

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CONSTITUTIONAL PETITION NO E004 OF 2024
IN THE MATTER OF ARTICLE 1, 2, 3, 10, 19, 20, 22, 23, 24, 165(3),
(5), 259 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF VIOLATION OF THE PETITIONER’S RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLE 27(1) (2), 28, 29, 31
AND 40(1) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

BILLY MUGAMI MASITSA.....PETITIONER

VERSUS

THE OCS, MUDETE POLICE STATION.....1ST
RESPONDENT

THE DIRECTORATE OF CRIMINAL
INVESTIGATIONS, MUDETE POLICE STATION.....2ND
RESPONDENT

THE ATTORNEY GENERAL.....3RD
RESPONDENT

GERTRUDE ALUSA.....4TH
RESPONDENT

SOITA KIDALI.....5TH
RESPONDENT

NOAH MUGARO.....6TH
RESPONDENT

VENA KAISHA.....7TH
RESPONDENT

GETRUDE CHAVERA LUMIRE.....8TH
RESPONDENT

KIULA FREDRICK PAUL.....9TH
RESPONDENT

JUDGMENT

INTRODUCTION

1. In his Petition dated 13th May 2024 and filed on 14th May 2024, the Petitioner herein sought for the following orders:-

- 1. A declaration that his right to human dignity, right to freedom and security of the person, right to privacy, right to deletion of untrue information and right to property have been violated by the acts of various Respondents as outlined in Article 28, 29(a), 31, 35(2) and 40 of the Constitution of Kenya.**
- 2. A mandatory injunction be issued against the 9th Respondent compelling him to immediately delete the impugned publication from Vihiga Lets Talk Facebook Page and or any other social media.**
- 3. An order prohibiting the 1st and 2nd Respondent from arresting and arraigning him on trumped up and false allegation of defilement or rape.**
- 4. An order of permanent injunction be issued against the 7th, 8th, and 9th Respondent restraining them jointly and or severally from continuing the publication of false information regarding him.**
- 5. An order for inquiry into damages be made by court and he be compensated for violation of his rights outlined herein.**
- 6. That he be paid costs of this Petition.**

2. On 11th June 2024, the 1st, 2nd and 3rd Respondent filed Grounds of Opposition dated 4th June 2024 in response to the Petitioner's Petition.
3. On 28th February 2026, the 7th and 8th Respondent filed Grounds of Opposition dated 17th February 2025 in response to the Petitioner's Petition.
4. The 4th, 5th, 6th and 9th Respondent neither entered appearance nor filed any response to the Petition herein.
5. The Petitioner filed three (3) sets of Written Submissions. The first one was dated and filed on 23rd October 2024. His Further Submissions were dated and filed on 3rd July 2025 while his Supplementary Submissions were dated 9th August 2025 and filed on 13th August 2025. The 1st, 2nd and 3rd Respondent's Written Submissions were dated and filed on 16th July 2025 while those of the 7th and 8th Respondents were dated 27th February 2025 and filed on 28th February 2025. The Judgement herein was, therefore, based on Petitioner's affidavit evidence, 1st, 2nd, 3rd, 7th and 8th Respondents' grounds of opposition and the said Written Submissions that the parties relied upon in their entirety.

THE PETITIONER'S CASE

6. The Petitioner averred that he was employed as a Protocol Officer in the Office of the Governor of Vihiga County which was a sensitive political post and that the 7th and 8th Respondent were legislators

while the 9th Respondent was a blogger and as such wield immense powers of influence over the public generally.

7. He invoked Articles 2, 3, 19(1), (3a) and (c), 20, 24(1) of the Constitution of Kenya, 2010. It was his case that the 5th Respondent beat him with a pipe and frog-marched him to Chamakanga Police Post in the presence of a crowd of members of the public on allegations that he had defiled the 4th Respondent. He added that the 5th and 6th Respondent had also broken in into his rental houses at Lotego and stole his tenant's property and that on 2nd May 2024, the 7th and 8th Respondents in collusion with the 9th Respondent published false information regarding him on Vihiga Let's Talk Facebook Page to the effect that he had defiled a young girl, after failing to extort him.
8. He asserted that as a result of the said publication, his family had faced ridicule and were being shunned by peers. He contended that he also risked being suspended from work and losing his job if the air was not cleared. He also blamed the 1st and 2nd Respondents for failing to take any action in investigating the likely commission of the offences by the 7th, 8th and 9th Respondent and was apprehensive that under the influence of the said Respondents, the police were likely to arrest him and arraign him in court for trumped charges.
9. He was emphatic that his Petition herein raised issues of a constitutional nature and he was likely to suffer further violation of his rights if arrested and charged.

THE 1ST, 2ND AND 3RD RESPONDENTS' CASE

10. The 1st, 2nd and 3rd Respondents contended that the Petition contained allegations brought out of malice, in bad faith and without tangible and verifiable evidence against them, intended to injure or damage their reputation as there was no fundamental rights and freedoms under the Constitution or any statutory provision, treaty or convention and general rules of international law that had been contravened, breached or violated.
11. They asserted that they acted within their mandate under Article 244 and 245 of the Constitution of Kenya, 2010 and Sections 24 and 27 of the National Police Service Act Cap 84 and that in undertaking any arrest against the Petitioner, they would ensure that the same was in compliance with Article 49 and the Criminal Procedure Act Cap 75 (Laws of Kenya).
12. They argued that the Petitioner had failed to disclose how their actions might be influenced by false allegations. They further contended that the Petitioner had not met the threshold in the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance[2013]eKLR** and **Anarita Karimi Njeru(1979) KLR 154.** They added that not each and every violation of the law must be raised as a constitutional issue.
13. They further pointed out that the rights alleged to have been violated and/or contravened were not absolute rights and were subject to limitation as provided under Article 24 of the Constitution.

They asserted that the Petition in its entirety and claims therein were scandalous, frivolous or vexatious warranting a dismissal and that he had not demonstrated any irreparable harm or injury likely to be suffered if the orders sought were not granted.

THE 7TH AND 8TH RESPONDENT'S CASE

14. The 7th and 8th Respondents opposed the Petition on grounds that this court lacked jurisdiction to hear and determined the same and that the Petition was misconceived, bad in law and an abuse of the process of the court. They added that it was frivolous, vexatious and trivial in nature and should be dismissed with costs and that it did not meet the mandatory requirements for granting of the orders sought.
15. They were categorical that the Petition was incurably and fatally defective hence should be dismissed with costs.

LEGAL ANALYSIS

16. Having considered the Petition, the affidavit evidence and the Petitioner's Written Submissions and those of the 1st, 2nd, 3rd, 7th and 8th Respondents, it appeared to this court that the issues that had been placed before it for determination were: -

- a. Whether or not the Petitioner's constitutional rights had been infringed upon;**
- b. If so, what reliefs were they entitled to; and**

c. Who was to bear the costs of this Petition?

17. The court therefore deemed it prudent to address the aforesaid issues under the following distinct and separate heads.

I. CONSTITUTIONAL RIGHTS & FUNDAMENTAL FREEDOMS

18. The Petitioner invoked Article 28 of the Constitution and submitted that his rights to human dignity was violated by the 5th, 6th, 7th, 8th and 9th Respondents by frog-marching him to Chamakanga Police Station after subjecting him to beatings and insults in the presence of members of the public. He relied on the case of **MWK & Another vs Attorney General & 4 Others ; Independent Medical Legal Unit (IMLU)(Interested Party); The Redress Trust (Amicus Curiae) [2017] KEHC 1496 (KLR)** where it was held that the petitioner's right to dignity, privacy and right not to be subjected to degrading treatment were grossly violated.

19. He contended that his right to freedom and security of the person as provided for under Article 29 of the Constitution of Kenya was violated when the 5th and 6th Respondent deprived him freedom arbitrarily by whipping him out in public while dragging him to Chamakanga Police Post without a proper cause.

20. He invoked Article 31 of the Constitution and claimed that his right to privacy including the right not to have his property searched

was infringed when the 5th and 6th Respondents broke into his rental houses, broke the windows and forcefully took away four (4) gas cylinders belonging to his tenants. He added that his private property was not respected.

21. He further invoked Article 35(2) of the Constitution and noted that his right to the correction or deletion of untrue or misleading information affecting him was violated. He urged the court to order the deletion of the same information.

22. He argued that the published information which was accessible to all people all over the world had never been pulled down and that his reputation continued to be soiled. He added that the allegations against him were of a criminal nature yet up to date no criminal charges had been brought against the 5th , 6th , 7th and 8th Respondents yet the impression created in the public was that he was a criminal. He urged the court to issue a mandatory injunction against the 9th Respondent.

23. In that regard, he relied on the case of **Joseph Kaloki t/a Royal Family Assembly vs Nancy Atieno Ouma[2020]eKLR** where it was held that a mandatory injunction could be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case was clear and which the court thinks it ought to be decided at once, a mandatory injunction would be granted at an interlocutory application.

24. He further asserted that he had adduced text messages from the 7th and 8th Respondent that clearly showed that they tried extorting money from him in exchange of doing away with the defilement case and that he had also attached screenshots of the publication posted on Vihiga Lets Talk Facebook page. Therefore, he was categorical that the evidence on record supported the Petitioner's claim and that the 7th, 8th and 9th Respondents should be permanently restrained from continuing to publish false information regarding him.

25. To buttress his point, he relied on the case of **Bandari Investments & Co Ltd vs Martin Chiponda & 139 Others[2022]eKLR** where it was held that a permanent injunction fully determines the right of the parties before the court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected.

26. He prayed for an award of Kshs 8,000,000/= as compensatory damages against the Respondents jointly and severally. He relied on the case of MWK case (**sic**) where the court awarded Kshs 4,000,000/= for violation of the Petitioner's right to dignity and privacy. He urged the court to allow his Petition together with costs in his favour.

27. On their part, the 1st, 2nd and 3rd Respondents placed reliance on the case of **Anarita Karimi Njeru vs Republic (1976-1980) KLR 1272** where it was held that if a person is seeking redress from the High Court on a matter which involves a reference to the

Constitution, it was important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed. They also cited the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others** (Supra).

28. They argued that although the Petitioner had averred that they had caused his arrest, it was not in dispute that he was never arrested or detained by them but by civilian arrest. They invoked Articles 238 (2), 239, 243, 244 of the Constitution of Kenya, 2010 and Sections 24, 27 and 35 of the National Police Act.

29. They placed reliance on several cases among them, the cases of **Thuita Mwangi & 2 Others vs The Ethics and Anti-Corruption Commission[2014]eKLR** and **Republic vs Commissioner of Police & Another[2012]eKLR** where the common thread was that the police had a duty to investigate on any complaint once a complaint was made and that they only needed to establish reasonable suspicion before preferring charges and the rest was left to the trial court.

30. They contended that no evidence had been tendered by the Petitioner to the effect that there had been abuse of power on their part. They asserted that a grant of an order prohibiting them from arresting and arraigning the Petitioner was against public interest in preventing investigations and prosecution of defilement or rape charges if any. They also added that if this court were to give such

orders, it would be interfering with the mandate of the Director of Public Prosecutions who was not a party to these proceedings.

31. They further cited the case of **Agnes Ngenesi Kinyua aka Agnes Kinywa vs Director of Public Prosecution [2019]eKLR**

where it was held that a constitutional petition challenging prosecution does not deal with the merits of the case but only with the process.

32. They further submitted that in any event, the Petitioner still had constitutional safeguards in respect of his rights even when undergoing criminal trial. They added that the Petitioner would, at the trial also be accorded an opportunity to challenge the veracity of the evidence if any. They were emphatic that it was well-established principle of law that on the basis of public interest and upholding the rule of law, courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. They urged the court to dismiss the Petition herein with costs.

33. On the other hand, the 7th and 8th Respondents submitted that the Petitioner was facing a possible criminal charge of defilement of a minor and that the investigations and ultimate arrest and prosecution had been stopped by this court by way of an injunction.

34. They asserted that they were honourable members of the County Assembly of Vihiga County who were duly elected to represent the interest of girls and women in the County Assembly of

Vihiga and that the alleged defilement took place within Vihiga County which was within their political jurisdiction.

35. They argued that the Petitioner had not established with sufficient evidence how they published articles relating to his alleged defilement. They were categorical that no document or publication had been attached in the supporting affidavit purportedly done by them. They added that no evidence had been attached in supporting affidavit to clearly demonstrate how they had tried to extort money from the Petitioner.

36. They were emphatic that the assertions in paragraph 15, 16, 17, 18 and 25 of the Petitioner's Supporting Affidavit dated 13th May 2024 were not substantiated by the Petitioner. They added that despite having been made on oath, no evidence of the meeting either by way of photos, call logs, text messages emanating from them had been attached. They asserted that the allegations herein were very serious and bordered their integrity, thus, should be fully substantiated by clear evidence.

37. They were emphatic that the Petitioner had failed to provide a nexus between them and the allegations hence the Petition was misplaced, frivolous and an abuse of this court's process. They asserted that as members of the County Assembly, they had the right to exercise their oversight and representation roles on issues affecting women and girls in the County of Vihiga and in performing such roles, the Petitioner should be discouraged by this court from

hindering the performance of their duties which was a legitimate expectation by the tax payers.

38. They pointed out that this Petition did not meet the threshold for grant of the orders sought as the Petitioner was full of narrations and inaccurate factual verbosity but did not point out clearly or disclose the specific rights that he alleged to have been violated by the 6th Respondent as was held in the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2014]eKLR**. They urged the court to dismiss the same with costs.

39. The National Police Service (NPS) was charged with the duty to carry out investigations into suspected criminal activities and to apprehend those culpable. However, in carrying out their respective mandates, the institution was subject to the Constitution of Kenya and statute.

40. The Petition herein had challenged the manner in which the 1st, 2nd and 3rd Respondent had failed in discharging their duties in relation to investigating on the alleged offences of the 5th, 6th, 7th and 8th Respondents.

41. Notably, the legal basis of the exercise of prosecutorial powers in Kenya was anchored in the Constitution of Kenya and statute. The Office of the Director Prosecutions was established by Article 157(6) of the Constitution of Kenya which provides that: -

“The director of public prosecutions shall exercise state powers of prosecution and may: -

- i. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;**
- ii. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and**
- iii.discontinue at any stage before judgment is delivered any criminal proceedings instituted by the director of public prosecutions or taken over by the director of public prosecutions under paragraph (b).”**

42. Article 157(8) -(12) further provides that: -

“8. The director of public prosecutions may not discontinue a prosecution without the permission of the court.

9. The powers of the director of public prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

10. The director of public prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

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

12. Parliament may enact legislation conferring powers of prosecution on authorities other than the director of public prosecutions.”

43. Going further, the Office of Director of Public Prosecutions Act No 2 of 2013 (hereinafter referred to as ‘the ODPP Act’) was enacted to give effect to Articles 157 and 158 of the Constitution and other relevant Articles of the Constitution of Kenya and for connected purposes.

44. Section 4 of the ODPP Act gives the guiding principles in prosecution of cases as follows: -

“In fulfilling its mandate, the office shall be guided by the Constitution and the following fundamental principles—

- i. the diversity of the people of Kenya;**
- ii. impartiality and gender equity;**
- iii. the rules of natural justice;**
- iv. promotion of public confidence in the integrity of the office**
- v. the need to discharge the functions of the office on behalf of the people of Kenya;**

- vi. **the need to serve the cause of justice, prevent abuse of the legal process and public interest;**
- vii. **protection of the sovereignty of the people;**
- viii. **secure the observance of democratic values and principles; and**
- ix. **promotion of constitutionalism.”**

45. Although the ODPP was not bound by any directions, control or recommendations made by any institution or body under Article 165(3) (d)(ii) of the Constitution of Kenya properly interrogate any question arising therefrom and make appropriate orders where it was shown that the expectations of Article 157(11) of the Constitution of Kenya had not been met.

46. This court had due regard to the case of **Commissioner of Police & Another vs Kenya Commercial Bank Ltd & 4 others [2013] eKLR** where it was held that whereas there could be no doubt that the field of investigation of criminal offences was exclusively within the domain of the police, it was well settled that the aforesaid powers were designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law.

47. In the premises foregoing, courts were called to wait for investigations to be completed and the suspect charged. The ODPP was enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process.

48. The court's role was to ensure that the ODPP and the NPS undertook all their functions in accordance and compliance with the law. If the court was satisfied that there had been abuse of power, then it would intervene in order to secure the ends of justice and restrain abuse of power that could lead to harassment or persecution.

49. The NPS and the ODPP were, therefore, called upon to always act judiciously and not act in perpetuation of an unfair and malicious criminal complaint when prosecuting matters. It was to be guided by the principle that the right to a fair trial cannot be limited thus raising the bar in the determination of the question whether to prosecute or not.

50. In the case of **Diamond Hasham Lalji & Another vs Attorney General & 4 Others [2018] eKLR**, it was held that the exercise of prosecutorial discretion enjoyed some measure of judicial deference and as numerous authorities established, the courts could only interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases.

51. The burden of proof rested with the person alleging unconstitutional exercise of prosecutorial power and/or the power to arrest and charge. However, if sufficient evidence was adduced to establish a breach, the evidential burden shifted to the ODPP/NPS to justify their decisions.

52. Based on the above analysis, the Petitioner was required to show the manner in which the rights he alleged had been infringed.

He was also required to set out in a clear manner the basis of each of their grievances.

53. Indeed, Sections 107(1), (2) and 109 of the Evidence Act Cap 80 (Laws of Kenya) required that whoever desired any court to give judgment as to any legal right or liability and depended on the existence of facts, he or she had to prove that those facts existed.

54. A reading of the evidence on record showed that the Petitioner had not yet been arrested and/or charged of the alleged offence of defilement. Thus, to the mind of this court, it was premature to lodge a claim against the 1st, 2nd and 3rd Respondent when there was no claim against them at the moment. Therefore, there was no evidence placed before this court to warrant its determination on whether the 1st, 2nd and 3rd Respondent acted in abuse of power.

55. Going further, the Petitioner contended that his right under Article 28 of the Constitution of Kenya which stipulates that every person has inherent dignity and the right to have that dignity respected and protected had been infringed upon. This court noted that apart from the P3 form that he annexed as evidence, there was nothing to prove that the injuries were caused by the beatings of the 5th Respondent.

56. He did not demonstrate how the alleged contravention of the right to dignity ensued in the circumstances of the case. He did not prove his assertions with specificity. No photograph was adduced to

show that he was actually frog-marched to the Police Post and nothing was adduced to show that he was insulted.

57. Indeed, their being charged in the criminal case or being apprehensive that he would be finally charged was not in contravention of Article 28 of the Constitution of Kenya *per se*. As such, this assertion was also unsuccessful.

58. He further argued that his right under Article 29 of the Constitution of Kenya had been infringed upon. Article 29 provided that every person had the right to freedom and security of the person which included the right not to be deprived of freedom arbitrarily or without a just cause, detained without trial, except during a state of emergency among others.

59. The 7th and 8th Respondents argued that they were members of the County Assembly of Vihiga County and who were representatives of the interests of women and children in the County. They were emphatic that the defilement and the civil arrest happened in the area of their jurisdiction. He was neither arrested and/or detained by the 1st and 2nd Respondent as they were emphatic that it was only a civil arrest that took place. His assertion that his right to freedom and/or security was curtailed was not, therefore, established. His contention thus fell by the wayside.

60. He also asserted that his right under Article 35(2) of the Constitution had been infringed. Article 35(2) provides that every person had the right to the correction or deletion of untrue or misleading information that affects the person. Notably, this court

could not delve into whether or not the allegations about the Petitioner defiling a child were true as that would be delving into the jurisdiction of the criminal court in the event that the Petitioner is charged. In the premises, as the truthfulness of the published information had not been established, the Petitioner could not claim that his right under the aforesaid Article had been infringed. As held above, that was a matter to be decided by a criminal court.

61. The Petitioner had, therefore, failed to demonstrate to the court how the 1st, 2nd, 3rd, 7th and 8th Respondents acted contrary to public interest, the interests of the administration of justice or failed to prevent and avoid abuse of the legal process.

62. The aforesaid Respondents were under a public duty to ensure that offences were prosecuted and those culpable attended to as the law required. That was the balance created by the law and which the court was called upon to take. In fact, that was the essence of the rule of law.

63. The termination of their roles and duties in the circumstances of the instant case would frustrate, instead of advance, the rule of law. This court agreed with the submission by the 1st, 2nd and 3rd Respondents that there were constitutional safeguards to protect the Petitioner's rights even when undergoing trial if any as he would be accorded an opportunity to challenge the veracity of the evidence including whether the evidence was properly obtained during trial. Indeed, not all violation of law amounted to

infringement of rights and freedoms and some rights were limited and not absolute.

64. In the mind of this court, the Petitioner's claim appeared to have been a civil case and not a constitutional matter. He failed to demonstrate with specificity how his constitutional rights had been violated, infringed upon and/or contravened as was held in the **Anarita Karimi Njeru vs Republic** (Supra).

65. In the circumstances foregoing, this court found that the Petitioner had failed to show how the Respondents actions were an abuse of the criminal justice system. He failed to prove that they had infringed his rights under Articles 28, 29, 31 and 35(2) of the Constitution and was thus not entitled to any reliefs.

II. COSTS

66. Having analysed the evidence as above and as some of the Respondents herein were government entities this court deviated from the general rule that costs follow events.

DISPOSITION

67. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition dated 13th May 2024 and filed on 14th May 2024 was not merited and the same be and is hereby dismissed. As it would be punitive to award costs to the government against its citizens, it is hereby directed that there will be no orders as to costs.

68. Orders Accordingly.

DATED and **DELIVERED** at **VIHIGA** this **19th** day of **March** 2026

J. KAMAU
JUDGE

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