

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E212 OF 2022**

**BETWEEN**

**FRANCIS FABIAN MUTINDA.....**  
**.....PETITIONER**

**VERSUS**

**OFFICE OF THE DIRECTOR OF PUBLIC**  
**PROSECUTIONS.....1<sup>S</sup>**  
**T RESPONDENT**

**INSPECTOR GENERAL OF**  
**POLICE.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL**  
**INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup>**  
**RESPONDENT**

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

**Introduction**

1. The Petition dated 12<sup>th</sup> May 2022, is supported by the Petitioner’s affidavit in support of even date and a further affidavit dated 3<sup>rd</sup> June 2022.
2. The Petitioner challenges the investigation and prosecution that was conducted against him on grounds that it was merely a commercial dispute. He alleged that the Respondents employed the criminal justice system against

him at the behest of the complainants to intimidate the Petitioner to settle the commercial matter.

3. Accordingly, the Petitioner alleged that the Respondents' actions were in violation of his constitutional rights and thus seeks the following reliefs:

- a) ***A Declaration be made that the intended acts of the Respondents to arrest, arraign, charge and or prosecute the Petitioner herein FRANCIS FABIAN MUTINDA over commercial disputes in Milimani Magistrate's Court Criminal Cases Nos. E484 of 2022 and E485 of 2022, R v Mutinda Francis Fabian is unreasonable, an abuse of the prosecutorial powers and certainly inimical to Article 157(11) of the Constitution as read together with section 4 of the Office of the Director of Public Prosecutions Act.***
- b) ***A declaration do issue that the intended arrest, arraignment and/or prosecution of the Petitioner herein FRANCIS FABIAN MUTINDA over commercial disputes in Milimani Magistrate's Court Criminal Cases Nos. E484 of 2022 and E485 of 2022, R v Mutinda Francis Fabian is violative of Article 10 & 157(11) of the Constitution and the Petitioners rights under Article 27, 28, 29, 47 and 48 of the Constitution and thus illegal and unconstitutional.***
- c) ***A judicial review order of prohibition do issue permanently restraining/prohibiting the Respondents either by themselves, agents, officers or employees from arresting, arraigning, charging and/or prosecuting the Petitioner herein FRANCIS FABIAN MUTINDA over commercial disputes in Milimani Magistrate's Court Criminal Cases Nos. E484***

**of 2022 and E485 of 2022, R v Mutinda Francis Fabian.**

- d) A judicial review order of certiorari do issue for the purpose of bringing to this Court and quashing the Charge Sheets and the related criminal proceedings in Milimani Magistrate's Court Criminal Cases Nos. E484 of 2022 and E485 of 2022, R v Mutinda Francis Fabian.**
- e) An order for costs and interests at the Court rates.**
- f) Compensation for physical and psychological torture; being treated in a cruel, inhuman and degrading manner and violation of the Petitioners' right to inherent dignity and any other relief that the court will deem just and fair in the circumstances.**

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

4. The Petitioner avers that he is the Chief Executive Officer of D'COCE group, a traveling consultancy and agency company which has been in operation since 2015.
5. He depones that among his clients were the complainants in **Milimani Magistrates Criminal Cases No. E484 and E485 of 2022: R v Francis Fabian Mutinda**. He informs that the complainants in the cases allege that he obtained Ksh.945,000 and Ksh.200, 000 from them for a vacation trip he was organizing for them.
6. He states that he took a plea in both cases on 18<sup>th</sup> May 2022 and was released on bond of Ksh.500, 000 and Ksh.200, 000 respectively or a cash bail of Ksh.400,000. He contended that the bonds terms in *Criminal Suit No. E485 of 2022* are

unreasonable compared to those in *Criminal Suit No.E484 of 2022*.

7. Further, he stated that the complainant in *Criminal Suit No. E484 of 2022* filed a civil claim in the Small Claims Court in **SCCCOM No.2912 of 2022: Daisy Mwenda Ben v Fabian Mutinda**, in which she claims the Ksh.945,000.
8. He claims that initially in *Criminal Case No. E484 of 2022*, the 1<sup>st</sup> Respondent had declined to approve the charges against him on the basis of lack of evidence, only to turn around and charge him. He alleges that the abrupt decision to charge him was done by a different 1<sup>st</sup> Respondent's officer. He avers that his advocate notified the Court of this discrepancy and adduced the 1<sup>st</sup> Respondent's original letter to the 2<sup>nd</sup> Respondent in that effect. In light of this, he avers that there may be a possibility of undue influence, irrationality and acting outside the 1<sup>st</sup> Respondent's Guidelines on the Decision to Charge.
9. According to the Petitioner, both disputes are commercial in nature. He points out that he was arrested before he could deliver his obligations to the complainants as per the Agreement. He avers that the complainants in *Criminal Suit No.E484 of 2022* were set to travel on 29<sup>th</sup> April 2022 yet lodged their complaint with the 2<sup>nd</sup> Respondent on 22<sup>nd</sup> April 2022.

10. He contends that both parties signed the Agreement on 23<sup>rd</sup> January 2022. He states that the cancellation policy dictates that all cancellations must be received in writing 28 days before date of departure otherwise a party will lose 100% of the money paid. He in addition had paid a deposit of Ksh.80,000 to the vacation location and informed them that he would travel ahead of them there before they arrived.
11. He alleges that when he enquired from his clients, the chairperson of group one, Daisy Mwendia disclosed that they had already engaged another service provider and thus needed their money back. Shockingly, he claims that the group actually travelled and stayed in the same place he had booked for them earlier on. He faults the complainants for failing to adhere to the terms of Agreement in view of cancellation and instead lodging the criminal suits.
12. Taking us back, he depones that he was arrested on 27<sup>th</sup> April 2022 and tortured in Karura forest before being booked at Capitol Hill police station, where he stayed for 7 days. He was thereafter released on a police cash bail of Ksh.20, 000. He argues that this action was contrary to his rights under Article 28, 29(a), 49 and 50 of the Constitution.
13. He reported the torture at Capitol Hill police station vide OB No. 15/06/05/2022 on 6<sup>th</sup> May 2022. He avers that he was denied a P3 form and claims that the OCS told him that they do not investigate the 3<sup>rd</sup> Respondent's officers. He as such

was to referred to the Nairobi DCI headquarters to report the matter.

14. He depones that he was examined at Mbagathi Hospital and Aga Khan Hospital on 9<sup>th</sup> May 2022 where his injuries were confirmed. He reported the matter to the 2<sup>nd</sup> Respondent against the officers who he states were Mr. Macharia, Mr. Chirchir and Mr. Mbithi and 2 others. He emphasizes that the officers' actions were illegal and unconstitutional. Further, he argues that they deceptively acted as debt collectors disguised as investigation of crime.
15. In view of these circumstances, the Petitioner contends that the charges preferred against him are a calculated move by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' officers in cahoots with the complainants to unconstitutionally, unlawfully and illegally coerce, him into admitting a non-existent debt which is a civil dispute, by misusing the criminal justice system.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondents' Case**

16. In opposition to the Petition, these Respondents filed Grounds of Opposition dated 1<sup>st</sup> March 2023 on the basis that:
  - i. *The Petitioner has not demonstrated to this Court the prejudice he will suffer in the ongoing prosecution. The Petitioner must demonstrate that substantial injustice would otherwise result if the purported criminal proceedings are not stayed.*

- ii. *Articles 47, 49 (f), (g) & (h) and Article 50 of the Constitution were complied with during the arrest and arraignment in Court of the Petitioner.*
- iii. *The Constitution and Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.*
- iv. *The law permits the DCI and any other Investigative Agency to investigate any body, including the applicants if there is probable cause to do so.*
- v. *It is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.*
- vi. *The investigation into this matter was occasioned through a complaint report made at DCI Headquarters-Complaint Desk by one Lucy Wanjuki Samuel Kivuti, on 12<sup>th</sup> January 2022 vide O.B No. 30/27/04/2022.*
- vii. *The facts and evidence presented to the Investigating Officer disclosed the evidence of Commission of offences referred to as; Obtaining Money by False Pretenses Contrary to Section 313 of the Penal Code.*
- viii. *In the course of investigations, it was established that the Petitioner obtained a total of Kshs. 200,000 from the said Lucy Wanjuki Samuel Kivuti, by falsely pretending that he would organize for her a family holiday in Masai Mara Game reserve.*
- ix. *Some of the money was deposited in Petitioner's Company's bank account domiciled at DTB bank and others in his company's M-Pesa Pay bill account.*

- x. *The Petitioner was severally summoned by officers of the 3<sup>rd</sup> Respondent to avail himself at DCI Headquarters to give his version but he refused.*
- xi. *The Petitioner was arrested by officers from DCI Regional Office Nairobi Area, in connection to another case Criminal Case No. E484/2022 and was held at Capital-Hill Police Station.*
- xii. *The Petitioner was arrested on 27<sup>th</sup> April, 2022 at Nairobi CBD and he was booked in Capital-Hill Police Station.*
- xiii. *Before the Petitioner was taken to Capital-Hill, he was taken to DCI Nairobi Area and called the complainant as he was proposing to settle the matter out of Court.*
- xiv. *The Petitioner and the complainant failed to settle the matter at the DCI Nairobi Area and he was taken to Capital-Hill Police Station.*
- xv. *The Petitioner was released from Capital-Hill Police Station on a cash bail of Kshs. 20,000.00 on 4<sup>th</sup> May 2022.*
- xvi. *The decision to charge the Petitioner was strictly in observance to Article 157 (10) and 157 (11) of the Constitution. Therefore the 3<sup>rd</sup> Respondent was not under the influence of any person or authority.*
- xvii. *The 3<sup>rd</sup> Respondent did not in any way infringe the fundamental rights of the Petitioner in respect of Criminal Case No. E485/2022 as alleged in the supporting affidavit of the Petitioner dated 12<sup>th</sup> May 2022.*
- xviii. *The order of prohibition should be sparingly granted and this Petition is not merited for the orders prayed for.*

- xix. *The orders sought are therefore not tenable against the Respondent as the Petitioner has not shown how the 1<sup>st</sup> and 3<sup>rd</sup> Respondents will infringe on the Petitioner's constitutional rights if the orders sought are not granted.*
- xx. *The application and the Petition disclose no cause of action as against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents as the orders sought cannot be executed against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents since the 1<sup>st</sup> and 3<sup>rd</sup> Respondents exercised their constitutional mandate under Article 157 of the Constitution and other relevant provisions of law.*
- xxi. *It is an established legal principle that where a party alleges a breach violation and/or infringement of fundamental rights and freedoms he or she must state and identify the rights and freedoms with precision and how the same have been or will be infringed in respect to him/her.*
- xxii. *As per the Constitution, a right or fundamental freedoms in the Bill of Rights shall not be limited except by law to the extent that the law limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedoms, taking into account all relevant factors.*
- xxiii. *The Court should strike a balance between the claims by the Petitioner and the complainant who is seeking right for justice and fair action as provided for in the Constitution.*
- xxiv. *The Petitioner has not presented any written directive to the DCI or any other authority to justify his claim that the investigations and prosecution was commenced for a collateral purpose.*

- xxv. *In the absence of that evidence, it can be presumed that the ODPP and the DCI are purely operating within the confines of their lawful authority.*
- xxvi. *The Petitioner fails in toto to establish or substantiate his allegations that the DCI and ODPP are acting ultra vires to their powers hence the Court should not unnecessarily curtail their investigative and prosecutorial powers.*
- xxvii. *In the exercise of this power, the ODPP is not under the direction or control of any person, body or authority as per Article 157 (10) of the Constitution.*
- xxviii. *The primary test in making the decision to prosecute by the ODPP is premised on whether the material information obtained meets the evidential and public interest threshold as provided for in the National prosecution policy.*
- xxix. *The Petitioner has no reasonable ground to seek the orders sought in the application and the petition to bar his prosecution thus there is absolutely no reason for the Court to bar the investigation and prohibit prosecution since none of the foregoing grounds exists to justify such decision.*
- xxx. *The existence of a civil matter pending in a Court of law does not in any manner operate as stay to institution of criminal proceedings touching on the same parties battling their matters in a civil suit so long as it is probable so to do.*
- xxxi. *The Conservatory Orders sought in the application violates the provisions of Article 27, 47, 50, 79, 157, 159, 165, 160, 161, 169 and 259 of the Constitution as read with sections 1, 2, 3, 4, 5, 6, 23 and 26 of the ODPP Act since seeks to curtail the constitutional powers of the Respondents in*

*exercise of their lawful mandate which is detrimental to public interest, and rule of law and administration of Justice.*

- xxxii. *The equity Maxim "he who comes to equity must come with clean lands" is to the effect that anyone who comes to equity must come with clean hands sets the principle foundation upon which equitable powers of court rests and anyone, guilty of the improper conduct is barred from any relief.*
- xxxiii. *The application and the Petition dated 12<sup>th</sup> May, 2022 be dismissed with costs to the Petitioner as the same is frivolous and does not meet the precision threshold for grant of orders herein sought by the Petitioner.*
- xxxiv. *The Petitioner has not demonstrated that the DPP and the DCI has not acted independently or has acted capriciously, in bad faith or has abused the process in a manner to trigger the High Court's intervention.*
- xxxv. *The application and the Petition are without merit and should be dismissed with costs.*

### **2<sup>nd</sup> and 4<sup>th</sup> Respondents' Case**

17. These Respondents' response and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

### **Petitioner's Submissions**

18. JGS Law LLP Advocates for the Petitioner filed submissions dated 17<sup>th</sup> March 2025 where Counsel identified the issues for discussion as: *whether the decision to prosecute the Petitioner in Milimani Magistrate's Court Criminal Cases Nos. E484 of 2022 and E485 of 2022, R v Mutinda Francis Fabian*

*based on the facts disclosed in this Petition was unreasonable, an abuse of the prosecutorial powers, inimical to Article 157(11) of the Constitution as read together with Section 4 of the Office of the Director of Public Prosecutions Act and therefore violated Articles 10 and 157(11) of the Constitution and the Petitioners rights under Article 27, 28, 29, 47 and 48 of the Constitution and thus illegal and unconstitutional, whether the manner in which the Petitioner was mishandled by the police violated his inherent right to human dignity under Articles 28, his constitutional rights under Article 29 and amounted to psychological and physical torture and being treated in a cruel, inhuman and degrading manner and quantum of damages for physical and psychological torture, being treated in a cruel, inhuman and degrading manner and violation of the Petitioner's right to inherent dignity.*

19. On the first issue, Counsel submitted that the Petitioner's averments had not been controverted by the Respondents as no substantive affidavit was filed in response. Counsel reiterating the averments in the affidavit, pointed out that it is evident that there was an Agreement between the Petitioner and the complainants. Further that the criminal complaint was lodged even before the Petitioner had fulfilled his obligations to them.
20. Counsel emphasized that this is a purely civil matter wherein the police were being used by the complainants to prosecute

it. Counsel pointed out that the two criminal suits were eventually withdrawn which affirms this position. Counsel contended that the Respondents actions constitute an abuse of the criminal justice system and exercise of the 1<sup>st</sup> Respondent's prosecutorial power in violation of Article 157(11) of the Constitution as read together with Section 4 of the Office of the Director of Public Prosecutions Act.

21. To buttress this point reliance was placed in **Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank & 4 others [2013] eKLR** where it was held that:

*"It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes"*

*"[77]. ... It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil Court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book."*

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

22. Comparable reliance was placed in **Samuel Muigai Njoroge & another v Director of Public Prosecutions &**

**another; National Co-operative Housing Union Limited (Interested Party) [2022] eKLR, Wafukho v Republic [2014] KEHC 7538 (KLR), Cyrus Shakhalinga Khwa Jirongo v Soy Developers Ltd & 9 others [2021] eKLR, Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR and Republic v Attorney General & Another Ex Parte Ngeny (2001) KLR 612.**

23. On the second issue, Counsel submitted that the manner in which the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents officers mishandled the Petitioner violated his rights under Article 28 and 29 of the Constitution. Counsel stressed that these facts were not controverted by the Respondents.
24. Lastly, Counsel submitted that in the circumstances of this case the Petitioner is entitled to general damages. In this regard, he argued that Ksh.5000000 was sufficient. Reliance was placed in **Dennis Itumbi v Attorney General & 2 others [2018] KEHC 8921 (KLR), Akusala A. Boniface v OCS Langata Police Station & 4 others [2018] KEHC 9626 (KLR)** and **Javeria Siddique w/o Arshad Sharif & 2 others v Attorney General & 4 others [2024] KEHC 9667 (KLR)** where comparable damages were awarded.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondents' Submissions**

25. Senior Principal Prosecution Counsel, Kerongo Maatwa filed submissions dated 2<sup>nd</sup> October 2024.

26. Recapping the facts of the case, Counsel submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' had investigated a complaint that was lodged by the complainants where upon the 1<sup>st</sup> Respondent made a decision to charge the Petitioner. Counsel submitted that the 1<sup>st</sup> Respondent had reviewed the file and concluded that there was sufficient evidence to have the Petitioner charged and he was. On this premise, Counsel argued that the 1<sup>st</sup> Respondent in making the decision to charge and 3<sup>rd</sup> Respondent in investigating the matter exercised their respective constitutional and statutory mandates.
27. According to Counsel, the Petitioner had failed to demonstrate how the 1<sup>st</sup> and 3<sup>rd</sup> Respondents had violated his constitutional rights and freedoms and in particular, Article 49 and 50 of the Constitution. Counsel argued as such that the Petition has failed the specificity and precision test.
28. To buttress this point reliance was placed in **Anarita Karimi Versus-Republic (No.1) (1979) 1 KLR 154** where it was held that:

*“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) 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”.*

29. Further reliance was placed in **Mumo Matemu versus- Trusted Society of Human Rights Alliance, [2013]eKLR.**

**Analysis and Determination**

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

- i. Whether the Petition raises constitutional question.***
- ii. Whether the Respondents' upheld their constitutional and statutory mandate in this matter.***
- iii. Whether the Petitioner's constitutional rights were violated by the Respondents.***
- iv. Whether the Petitioner is entitled to the relief sought.***

***Whether the Petition raises constitutional question***

31. If a dispute can fully be resolved by the Court either through application of legislation or existing legal principles such as common law without resorting to the Constitution, then the matter does not genuinely raise a constitutional question and in such circumstances, the Court must invoke the doctrine of constitutional avoidance and refrain from entertaining the dispute.
32. The Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5**

others [2014] eKLR elaborated on the doctrine of constitutional avoidance as follows:

***“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:***

***“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”***

***[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”***

33. Equally, in Lugo v Director of Public Prosecutions [2022] KEHC 10574 (KLR) the Court observed as follows:

***“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights. Currie and de Waal***

**opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author states: - When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.”**

- 11. An important and critical issue arises from the above statements by Currie and de Waal. It is a fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy. One needs to be aware, however, of the singleness of the legal system. This is embodied in the fact that the supremacy of the Constitution does not detract from the usefulness of the rest of the body of law. In essence, all other laws give full expression to the ideals of the Constitution until found to be inconsistent with it.**

**....**

**The exceptions to the application of the doctrine of constitutional avoidance are: -**

- i. where the constitutional violation is so clear and of direct relevance to the matter,**
- ii. in the absence of an apparent alternative form of ordinary relief and**

**iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.”**

34. In like manner, in **C O D & another vs Nairobi City Water & Sewerage Co. Ltd [2015] KEHC 7762 (KLR)** the Court noted as follows:

**“11. Similarly, in Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:**

**“All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.” (Emphasis added)**

**12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in Re Application by Bahadur[1986] LRC (Const) the Court expressed itself as follows at page 307;**

**“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under**

***substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the un-wisdom of ignoring that advice.... The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, "a general substitute for the normal procedures for invoking judicial control of administrative action." (See Harrikissoon v A-G [1979] 3 WLR 62).***

**13. It was further observed in the case of *Minister of Home Affairs vs Bickle & Others (1985) LRC Const(per (Georges C.J);***

***"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."***

35. In the instant case, the Petitioner complains that he was unlawfully arrested and prosecuted in two criminal cases **Milimani Magistrates Criminal Cases No. E484 and E485 of 2022: R v Francis Fabian Mutinda.**

36. At paragraph 22 of the Petitioner's written submissions, dated 17/3/2023, Counsel for the Petitioner discloses thus:

*“...Our humble submission from the uncontroverted evidence is that Milimani Magistrate’s Court Criminal Cases Nos. E484 of 2022 and E485 of 2022, R v Mutinda Francis Fabian which did not take off in any event as they were withdrawn were instituted solely to aid the complainants in a civil dispute where the hand of the Petitioner was being forced by the sword of criminal proceedings to compromise the civil case yet to be filed and therefore constituted an abuse of the court/judicial/legal process, and abuse of the exercise of the 1st Respondent’s prosecutorial power in violation of Article 157(11) of the Constitution as read together with Section 4 of the Office of the Director of Public Prosecutions Act...”*

37. As things stand therefore, although the Petition as initially instituted was a challenge to ongoing criminal prosecution arising from what the Petitioner described as maliciously instigated investigation and arrest, these criminal charges and prosecution were terminated during the pendency of this Petition yet the Petitioner did not bother to amend the Petition to reflect this fundamental change of circumstance or re-strategize on the appropriate cause of action of this fundamental factual shift. The failure to amend the Petition meant that the facts before the Court were misleading in substance as they no longer corresponded with what was eventually disclosed by Petitioner’s Counsel’s in the submissions since there was no more an ongoing prosecution that presented an impending threat of the Petitioner’s constitutional rights but a flashback of conduct and decisions that had already occurred prior to the termination of the two criminal cases.

38. Accordingly, the change in the factual matrix meant that the rights of the Petitioner were no longer under imminent threat from the conduct and decision complained of and therefore, could very well and sufficiently be addressed, not through constitutional litigation, but as ordinary tort claims of false imprisonment, assault and malicious prosecution.

39. In **Secretary, Board of Management Lugulu Mixed and Boarding Primary School & another v Mutanda [2024] KEHC 5319 (KLR)**, the Court observed as follows:

***“The tort of malicious prosecution is an intentional tort that provides redress to a party, for losses incurred following unsuccessful and malicious proceedings which are initiated without any lawful reasonable and/or probable cause by the Defendant. Although it is within any person’s rights to approach the Courts and/or other quasi-judicial bodies to seek redress for wrongs committed against them, this right must be exercised within the confines and parameters of the law, for genuine and lawful reasons. If the right is exercised with other ulterior motives, this constitutes abuse of process, which is in itself a wrong and/or violation attracting a claim for damages for malicious prosecution. The elements of the tort of malicious prosecution have been discussed in various authorities including Murunga vs The Attorney General (1976-1980) KLR 1251 where Cotran J listed them as follows: -***

- i. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.***
- ii. That the prosecution terminated in the Plaintiff’s favour.***

**iii. That the prosecution was instituted without reasonable and/or probable cause.**

**iv. That the prosecution was actuated by malice.**

**8. Instructively, all the elements apply conjunctively and must all be proven in order to successfully claim for damages for malicious prosecution.”**

40. The Court went on further to note as follows:

**“9. The last element on whether the prosecution was actuated by malice In Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399, the Court of Appeal held;**

**“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.”**

**10. In the case of Hicks v Faulkner [1878] 8 Q.B.D 167 at 171, Hawkins J held as follows with respect the meaning of reasonable and probable cause: -**

**“An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”**

**11. The test for whether a case was instituted with a reasonable and probable cause was also laid out by the Court of Appeal in Kagane & Other v The Attorney General & Another [1969] EA 643, where Rudd J held as follows: -**

**“...the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and so far as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.”**

**46. In Samson John Nderitu v The Attorney General [2010] eKLR, Nambuye J (as she then was) held as follows: -**

**“It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence**

***before arraigning such a person in a court of law.”***

41. Upon very careful analysis of the factual matrix that now constitutes the Petitioners case, it is my very humble and respectful view that it is capable of being resolved fully on non-constitutional grounds as it is essentially a tortious liability claim that touches on well established torts of assault, false imprisonment and malicious prosecution where were the Petitioner knows the individuals involved by their names including those of police officers, that allegedly assaulted him.
42. I must therefore exercise restraint and refuse to invoke the constitutional jurisdiction of this Court under Article 165 (3) (b) of the Constitution to determine what is essentially an ordinary tortious claim.
43. It is the finding of this Court that this Petition offends the doctrine of Constitutional avoidance. This being a jurisdictional issue, I must down my tools at this stage. The Petition is thus struck out.
44. I make no orders as to costs.

***Dated, signed and delivered virtually at Nairobi this 26<sup>th</sup> March, 2026.***

.....

**L N MUGAMBI**

**JUDGE**

ORIGINAL