

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E325 OF 2023

BETWEEN

DAN ONYANGO

OTIENO.....PETITIONER

VERSUS

UNIVERSITY OF NAIROBI.....1ST
RESPONDENT

DATA PROTECTION COMMISSIONER.....
2ND RESPONDENT

DCIO, CENTRAL POLICE STATION.....3RD
RESPONDENT

SAMSON MURANGIRI MUKARIA.....4TH
RESPONDENT

CLIFFORD GULU NDERI.....5TH
RESPONDENT

JORAM NDUATI KINUTHIA.....6TH
RESPONDENT

STEPHEN NJUGUNA NDUATI.....7TH
RESPONDENT

PAUL KARIUKI NDUNGU.....8TH
RESPONDENT

MARTIN FINTAN KIMANI.....9TH
RESPONDENT

J U D G M E N T

Introduction

1. The Petition dated 4th September 2023 was amended on 25th March 2025 and is supported by the Petitioner's affidavit. The Petitioner alleges that the Respondents, through threats and intimidation by their investigation officers, unlawfully obtained Petitioner's information and used it in violation of the Petitioner's constitutional right to dignity and privacy.
2. Accordingly, the Petitioner seeks the following reliefs against the Respondents:

A Declaration that:

- i. The actions of the Respondents violate constitutional provisions under Articles 28, 31, 47 and 50(4).***
- ii. The evidence used by the Respondents to terminate the employment contract of the Petitioner was obtained illegally.***

An Order:

- iii. Compelling the 1st Respondent to pay the Petitioner and pay a total of Kshs 2 million as damages for infringement of privacy.***
- iv. Compelling the 4th, 5th, 6th, 7th, 8th and 9th Respondents to jointly pay the Petitioner a total of Kshs 800,000.00 for infringement of his right to privacy.***
- v. Prohibiting the Respondents from further publication publishing, broadcasting or using the information, data or documents against the Petitioner.***
- vi. The costs of this Petition.***

Petitioner's Case

3. The Petitioner states that he was employed by the 1st Respondent as a cleaner in 2004. Subsequently, he was re-designated as an *Audio-Visual* Officer.
4. He depones that on 14th January 2023, the 4th, 5th, 6th, 7th, 8th and 9th Respondents came to his office. He avers that the 4th Respondent drew his gun and pointed it at him while forcefully taking his phone and asking for the PIN number. At the same time, he proceeded to force the Petitioner to sign documents that were in his office to indicate that, they were found in his possession. He avers that the Respondents then went away with his phone and the documents.
5. He depones that he reported the matter to the Central Police Station vide *OB No.186* of 29th May 2023. He also recorded a statement on 5th June 2023 together with a witness.
6. He depones that due to the delay in processing the matter by the assigned police, citing that the 4th Respondent was his colleague, the Petitioner decided to escalate the matter to the 3rd Respondent. He alleges that despite the promise to follow up on the matter and have the 4th Respondent write his statement, the 3rd Respondent also went silent.
7. He claims that the 4th Respondent later told him that 5th and 6th Respondent being ICT officers accessed his phone and procured information that was shared with the 1st

Respondent. Equally, the 7th Respondent, the 1st Respondent's ICT officer, also accessed his email messages, WhatsApp, photos, messages, and Mpesa messages and made copies of the same.

8. He adds that the Respondents also deleted some of his private photos, videos and emails, which caused trouble for his family and spouse. He notes that this information was extracted by the Respondents without his consent and without a warrant.
9. Furthermore, he depones that the 1st Respondent suspended him on 1st March 2023 which was extended a further 30 days vide a letter dated 29th March 2023. He was subsequently summoned to the Staff Disciplinary meeting on 17th May 2023 and charged with various counts of gross misconduct committed during the course of his employment. He informs that the 1st Respondent only gave him the information that was in the Preliminary Report but did not share the final evidence relied upon by the Staff Disciplinary Committee.
10. He notifies that his request to be issued these documents was futile. He notes that he protested the decision of the Committee in his letter, dubbing it biased, procedurally flawed and full of illegalities.

11. According to him, the 1st Respondent relied on the illegally obtained information to terminate his employment, 9 months before its expiry. As a result, he argues that the 1st Respondent should pay him Ksh.441,342 for the 9 months being a total of his monthly salary of Ksh.49,038.
12. He states that his family has received strange calls, emails, messages since the Respondents illegally accessed his phone. He stresses that his family has suffered anguish, ridicule and torment as a result of the Respondents actions and fears for their life. The Petitioner depones that despite his complaint to the 2nd Respondent, no action has been taken and neither has he received any communication from the 2nd Respondent.
13. On this basis, he argues that the Respondents actions of accessing his photos, messages, videos, emails, WhatsApp messages and Mpesa messages without his consent are in violation of his right to privacy and dignity as envisaged under Articles 28 and 31 of the Constitution.

1st and 8th Respondents' Case

14. The 8th Respondent, the 1st Respondent's Director ICT filed a Replying Affidavit sworn on 23rd May 2025.
15. He deponed that on 12th January 2023, the then Vice Chancellor, Prof. Stephen K. Gitahi convened a meeting and disclosed that he had received whistleblower information on

examination fraud and malpractices, committed by the Petitioner, who was their staff member. In attendance was Director Security, the 4th Respondent, Ag. Director Audit, Kenneth Gitau and himself.

16. He explains that the whistleblower stated that the Petitioner had colluded with students to get examination leakage, aid in examination impersonation, change examination marks in the system, among other examination malpractices. As a result, the Vice Chancellor directed that the matter be investigated.
17. He depones that the 3 commenced investigations the following day as soon as the Petitioner arrived in his office. They informed the Petitioner of the allegations against him and that they were required to investigate the matter using the internal administrative process. Following his consent, they proceeded to search his table, drawers, computer and related accessories. They further took an inventory of all the stationery related to examinations in the Petitioner's possession.
18. Further to this, they engaged the ICT staff and security experts, since among the allegations was the Petitioner was altering examination results on the management information system used for examinations referred to as **SMIS**. These officers were the 5th, 6th and 9th Respondents. He avers that the Petitioner *was directed to surrender his phone to the 7th*

Respondent of the Security Department, which he did voluntarily. The device was then handed over to the 5th, 6th and 9th Respondents when they arrived in the office, for the purposes of retrieving information deemed relevant in the matter. He informs that this was done in line with the procedure and guidelines adopted by ICT to gather and preserve evidence. He points out that throughout the Petitioner was cooperative and assisted where required, including giving out his PIN number to enable access to his phone.

19. He states that once the ICT analysis of the device was done, a report was issued and submitted to the 4th Respondent and the acting Director of Internal Audit, to compile an investigation report. Once all the forensic evidence was gathered and a report made, the same was submitted to the Vice Chancellor. He avers that the investigations revealed that the Petitioner had indeed been involved in examination malpractices as claimed by the whistleblower.
20. Considering this, a disciplinary committee was constituted to conduct the disciplinary proceedings against him. The Committee heard the matter and affirmed that he was guilty of the allegations made against him. He even claims that the Petitioner admitted to the allegations of examination related papers that were procured from his office.

21. He underscores that at no point during the process did the Petitioner challenge the manner in which the information was procured and utilized as highlighted in this Petition. The Petitioner only raised the same once the disciplinary proceedings were finalized against him on 26th May 2023. As such, he deems this Petition as an afterthought.
22. That said, he emphasizes that staff records on disciplinary issues are confidential and only handled by authorized and vetted staff members who maintain reasonable care as they handle the information. On this premise, he affirms that no information concerning the Petitioner's case was publicly shared or is available, to cause a breach of privacy as alleged.

2nd Respondent's Case

23. Opposing the Petition, the 2nd Respondent filed a Replying Affidavit through its Deputy Data Commissioner, Oscar Otieno sworn on 7th August 2024.
24. He depones that the Petitioner filed a complaint with the 2nd Respondent on 31st August 2023. He states that the 2nd Respondent is required to investigate complaints within 90 days as provided under Section 56(5) of the Data Protection Act.
25. He states that the 2nd Respondent conducted a Preliminary Investigation in accordance with Section 5(2) of the Data

Protection (Complaints Handling and Enforcement) Regulations. It established that the Petitioner filed the instant Petition 4 days after lodging his complaint. In light of this, the 2nd Respondent declined the complaint by dint of Regulation 6(2) (c) of the Regulations, in deference to the hierarchy of courts.

26. He underscores that the matter herein revolves around an employment dispute to which the 2nd Respondent is not a party. As such, he argues that the Petition does not disclose any reasonable cause of action against the 2nd Respondent.

3rd Respondent's Case

27. The 3rd Respondent in opposition filed Grounds of Opposition dated 16th June 2025 on the basis that:

- i. This Petition offends the doctrine of Constitutional avoidance as enunciated by this Court in Apollo Mboya vs The Attorney General and National Employment Authority Nairobi Constitutional Petition Number E335 of 2023(unreported).*
- ii. The statutory duty upon the 3rd Respondent pursuant to Section 24(e) of the National Police Service Act; investigation of crimes, however, Article 245(4) of the Constitution provides that the Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector General with respect to— (a) the investigation of any particular offence or offences; (b) the enforcement of the law*

against any particular person or persons; or (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

- iii. The Constitution provides that only the Director of Public Prosecution pursuant to Article 157(4) of the Constitution to (4) shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.*
- iv. In response to paragraphs 29, 30, 31 and 32 this of the Amended Petition, the 3rd Respondent states that the Amended Petition violates the doctrine of exhaustion as the Petitioner ought to have filed a complaint with the Independent Police Oversight Authority who Pursuant to Section 5(a) as read with section 6(a) of the Independent Police Oversight Authority Act Cap 86 Laws of Kenya, have the power to investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations.*
- v. The 3rd Respondent though not privy to the contents of paragraphs 33 to 39 of the Amended Petition, the Petitioner has not shown that he has exhausted the elaborate complaints mechanisms provided for pursuant to Section 56 to 58 of the Data Protection Act Cap 411C.*

- vi. *In response to paragraph 51 of the Amended Petition, the Petitioner has not brought any evidence to support the claims thereat.*
- vii. *There also no orders sought as against the 3rd Respondent or sought to be enforced by the 3rd Respondent making him non-suited.*
- viii. *This Amended Petition therefore does not meet the test of a constitutional petition laid down in the case of **Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154** and emphasized in the case of **Mumo Matemu v Trusted Society of Human Rights alliance [2014] eKLR**, and on that ground alone, we urge that this Petition should fail. That apart from citing omnibus provisions of the Constitution, the Petition has provided neither particulars of the alleged complaints, nor the manner of alleged infringements, particularly in respect of the 1st and 2nd Respondents.*
- ix. *This Petition is an abuse of the Court Process and ought to be dismissed as against the Respondents.*

5th Respondent's Case

- 28. The 5th Respondent filed his Replying Affidavit sworn on 23rd May 2025 wherein he depones that they went to the Petitioner's office on 13th January 2023, alongside the 6th and 9th Respondents, where they were briefed by the 8th Respondent on the matter at hand.
- 29. He depones that the 8th Respondent instructed them to check the desktop computer and Petitioner's phone for any evidence on the allegations of engaging in examination malpractice. The 7th Respondent who was holding onto the

phone gave it to them to investigate. He notes that the Petitioner issued them the PIN number to access his phone and wrote down his PIN number on a paper for ease of access, without any reservations. He informs that the security officers left the office and left them investigating the devices until the close of the day.

30. He notes that the 8th Respondent on 15th January 2023 which was a Sunday, directed him to continue the investigations the following day. In like fashion, the 7th Respondent issued him the Petitioner's phone where he continued to retrieve evidence on 16th January 2023. Upon conclusion of the investigation, he submitted the phone to the 7th Respondent and prepared a Report. He sent the Report to the 8th Respondent and also the 6th and 9th Respondents via email on the same day.
31. He informs that they also investigated the Petitioner's colleague one, Peter Juma who he shared the office with, however did not find any evidence against him.

6th Respondent's Case

32. Similarly, the 6th Respondent filed his Replying Affidavit on 26th May 2025. He depones that the on 13th January 2023, he went to the Petitioner's office with the 5th and 9th Respondents, where they were briefed by the 8th Respondent on the matter at hand. They were instructed to check the

Petitioner's desktop computer and phone for any evidence on the allegations of engaging in examination malpractice.

33. He depones that the 7th Respondent gave them the Petitioner's phone. He notes that the Petitioner voluntarily issued them the PIN number to access his phone and wrote it down for them.
34. He depones that upon checking the desktop and phone, they documented the evidence they found. He underscores that a similar investigation of the Petitioner's colleague one, Peter Juma who he shared the office with, did not avail any evidence against him. He avers that the acting Director of Internal Audit, Kenneth Gitau also joined them and took an inventory of all the documents that were present in the Petitioner's office.
35. He states that he left the office at around 2pm where he left the 5th Respondent continuing the investigations. Subsequently, the 5th Respondent on 16th January 2023 shared with him the Preliminary Report of the investigations.

9th Respondent's Case

36. In the Replying Affidavit sworn on 12th June 2025, the 9th Respondent depones that they went to the Petitioner's office on 13th January 2023, alongside the 5th and 6th Respondents, where they were briefed by the 8th Respondent on the matter at hand.

37. He depones that the 8th Respondent instructed them to check the desktop computer which is owned by the 1st Respondent, for any evidence on the allegations of engaging in examination malpractice, in accordance with the ICT Guidelines for electronic evidence gathering. In addition, the 7th Respondent gave them the Petitioner's phone to investigate. He notes that the Petitioner issued them the PIN number to access his phone without resisting. He avers that the Petitioner even went ahead and wrote his PIN number on a paper and handed it to them for ease of access into the phone.
38. He details that their investigation involved review of the access logs of the computers owned by the institution, the university email communications on the desktop computer. He avers that the acting Director of Internal Audit, Kenneth Gitau took an inventory of all the documents that were present in the Petitioner's office.
39. He informs that they also investigated the Petitioner's colleague one, Peter Juma who he shared the office with, however they did not find any evidence against him. He points out that when they arrived at the office, the 4th Respondent was not in the office and neither did he witness the alleged gun use to coerce the Petitioner.
40. Following the investigations, he states that he received the Report on 16th January 2023 from the 5th Respondent.

Petitioner's Submissions

41. The Petitioner through Orego and Odhiambo Advocates filed two sets of submissions dated 29th May 2025 and 17th July 2025. Counsel identified the issues for determination as: *whether this Court has jurisdiction to entertain the matter, whether the actions of the Respondents herein amounted to gross violation of the Petitioner's constitutional rights and whether the Petitioner is entitled to the relief sought.*

42. On jurisdiction, it was submitted on behalf of the Petitioner that this Court has jurisdiction to hear and determine the Petition by virtue of Article 165(3)(b) and (d) of the Constitution as the matter involves violation of the Petitioner's rights by the Respondents. Counsel contended that contrary to the Respondents assertion, the Petition is not about employment. Reliance was placed in **Independent Electoral and Boundaries Commission v Maina Kiai and 5 others [2017] KECA 477 (KLR)** where it was held that:

“In view of the foregoing, we conclude that the High Court had jurisdiction to determine the constitutionality of the impugned provisions of the Elections Act and the regulations made thereunder, and the fact that the 1st, 2nd and 3rd respondents could arguably have raised the issues before the Supreme Court under its rules, did not deprive the High Court of the jurisdiction vested by Article 165(3) (d). Accordingly, we are not persuaded that the High Court committed any error or assumed a jurisdiction that it did not have.”

43. On violation of Petitioner's constitutional right to dignity and privacy, Counsel for the Petitioner restated the Petitioner's averments and facts of the case and submitted that the Petitioner's rights had indeed been violated by the Respondents. Counsel pointed out that the Petitioner was threatened and feared for his life and actually reported the matter to the police- vide OB 186/29/5/2023 but no action was taken against the Respondents.
44. Counsel argued that the 5th and 6th Respondents accessed the information on his phone and produced the same without his consent. Counsel added that the Respondents had also retrieved information relating to his family as well as his private affairs, which was reported to the 1st Respondent.
45. The Petitioner thus argued that the Respondents' actions are contrary to Article 31(c) of the Constitution as read with Section 25 and 26 of the Data Protection Act. Reliance was placed on **JWI & Another vs Standard Group Limited & Another [2015] eKLR** where it was held that:

"The right to privacy consists essentially the right of one to live one's own life with minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disbursements of information given or received by the individual confidentiality."

46. Additional reliance was placed on **Wanjiru v Machakos University [2022] KEHC 10599 (KLR)**.

47. Counsel further contended that the decision that was made by the 1st Respondent's Committee was unfair, unlawful and unprocedural as it relied on the illegally obtained evidence. Counsel alleged that the Disciplinary Committee was also hostile to the Petitioner during the proceedings. Counsel submitted that no witness statements were issued to support the case and neither was he issued with the investigation report. Counsel stressed that these aspects violated Article 47 (1) & (2) and 50(4) of the Constitution. Further reliance was placed on **Gakanongo Sacco v National Transport and Safety Authority [2019] eKLR** where it was held that:

"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure for essential principles of justice. The decision must be declared as no decision."

48. Counsel as well added that the Respondents actions had violated the Petitioner's right to dignity under Article 28 of the Constitution. Reliance was placed in **Maina Vs Talent Quest Africa [2024] KEHC6151 (KLR)** where it was held that:

"The right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights... put differently thereof, if a person enjoys the other rights in

the bill of rights, the right of human dignity will automatically be promoted and protected and it will never be violated if the others rights are respected."

49. More reliance was placed on **Ngugi vs County Government of Nakuru & Another [2023] KEHC 22624(KLR)**.
50. In light of the foregoing, Counsel relying in Article 23 of the Constitution submitted that the Petitioner was entitled to the reliefs sought. In regard to the award of damages, Counsel submitted that an award of Kshs. 2,000,000 for the unlawful use of information obtained illegally by the 1st Respondent. Further, an award of Ksh.800,000 to compensate the Petitioner for breach of his rights under Articles 28,31, 47 and 50(4) of the Constitution.
51. To buttress this point reliance was placed in **Mutuku Ndambuki Matingi vs Rafiki Microfinance Bank Limited [2021] eKLR** where the Court awarded the Petitioner general damages of Ksh.Kshs.2,000,000 for the violation of his rights to dignity and privacy.
52. Comparable reliance was placed in **Miguna Vs The Standard Group Limited & 4 others [2017] eKLR, Joel Mutuma Kirimi & Another vs National Hospital Insurance Fund (NHIF) [2020]eKLR** and **MWK vs AG & 3 others [2017]eKLR**.

1st, 4th, 5th, 6th, 7th, 8th and 9th Respondents' Submissions

53. These Respondents through their Counsel, Fredrick Collins Omondi filed submissions dated 15th July 2025 where Counsel outlined the issues for discussion as: *whether the Respondents violated the constitutional rights of the Petitioner and whether this Court has jurisdiction to determine whether the proceedings of the Staff Disciplinary Committee regarding the Petitioner are null and void.*
54. Counsel on the first issue submitted that the Respondents had not violated the Petitioner's rights as alleged. Counsel recapped that the Respondents in conducting the investigations did not break into the Petitioner's office neither obtained the documents, electronic gadgets and mobile phone at gun point as alleged. On the contrary, Counsel noted that no evidence of the gun threat was adduced. Further that no personal belongings of the Petitioners were carted away by the Respondents in the investigations.
55. In addition, reiterating the averments of the Respondents, Counsel noted that the Petitioner was co-operative throughout the investigation and even willingly gave out his mobile phone PIN number for them to access the information. The Petitioner had prior to this been informed

about the allegations against him and purpose of the investigations.

56. It is stressed that the information retrieved on the Petitioner's mobile phone was not confidential as related to examination malpractices. Counsel noted that this information was nonetheless not obtained through coercion, intimidation and threats. Counsel added that personal information relating to his family was not retrieved as alleged. Counsel underscored that while the Petitioner claimed that him and his family were receiving strange calls, this was not proved. Counsel stressed that the Petitioner's right to dignity was not violated by the Respondents.
57. Furthermore, in the second issue, Counsel submitted that this Court lacks jurisdiction to entertain this matter as the issue of an irregular disciplinary process before the 1st Respondent's staff disciplinary Committee, falls within the jurisdiction of the Employment and Labour Relations Court, as it is an employment matter. To buttress this point reliance was placed in **United States International University (USIU) -Vs- Attorney General [2012] eKLR** where it was held that:

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of

the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court.”

58. Comparable reliance was placed in **Daniel N. Mugendi -Vs- Kenyatta University & 3 Others CACA No. 6/2012 [2013] eKLR.**

2nd Respondent’s Submissions

59. Counsel for the 2nd Respondent, Dorine Wanjeru filed submissions dated 18th November 2024 where she outlined the issues for determination as: *whether the Court has proper jurisdiction to determine matters under Article 31 (c) and (d) of the Constitution and whether the Petition discloses any cause of action against the 2nd Respondent.*
60. On the first issue, Counsel submitted that the Petitioner violated the doctrine of exhaustion by prematurely filing this Petition, alleging a breach of privacy under Article 31(c) and (d) of the Constitution, despite the 2nd Respondent having original jurisdiction over such matters. Counsel pointed out that Section 56 of the Act confers original jurisdiction upon the 2nd Respondent while Section 64 of the Act provides for the right to appeal to the High Court against any administrative action taken by the 2nd Respondent. Accordingly, Counsel stressed that this Court only has appellate jurisdiction in such disputes.

61. To buttress this point, reliance was placed in **Clifford Keya v Jackline Inguithia, Anna Konuche, Christine Kipsang, Attorney General, The Law Society of Kenya & Independent Electoral and Boundaries Commission; Atieno Aoko, Jane Nyaboke, Julie Soweto & LSK Elections Board (Interested Party) [2022] KEHC 1605 (KLR)** where it was held that:

“The doctrine of exhaustion is applicable to constitutional Petitions. If successfully raised, it is a complete bar and a Court will not move an inch ahead. There are, however, instances where the doctrine will be inapplicable. The doctrine of exhaustion traces its origin in Article 159(2)(c) of the Constitution which recognizes and entrenches the use of alternative mechanisms of dispute resolution. The doctrine is further entrenched in Section 9 of the Fair Administrative Action Act, 2015 which provision forbids the High Court from assuming jurisdiction in matters where a party does not exhaust internal remedies except where exceptional circumstances for exemption are proved to exist.”

62. Further reliance was placed on **Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others [2012] eKLR.**
63. Counsel emphasized that the Petitioner by filing this Petition prematurely undermined the 2nd Respondent’s original jurisdiction to adjudicate the alleged breach of privacy and denied it an opportunity to exercise its jurisdiction within the stipulated 90 days. This in turn prompted the 2nd Respondent to invoke Regulation 6(2)(c) of the Data Protection

(Complaints Handling and Enforcement) Regulations, 2021, in declining to entertain the complaint.

64. Turning to the second issue, Counsel contended that the 2nd Respondent is not a party to the substantive issues raised in this Petition, being an employment dispute and hence the Petition fails to disclose any reasonable cause of action against the 2nd Respondent.

3rd Respondents' Submissions

65. Deputy Chief State Counsel, Stephen Terell filed submissions dated 29th July 2025 and set out the issues for determination as: *whether the Petition meets the threshold of a constitutional petition and whether the 3rd Respondent is a necessary party.*
66. Counsel relying in the threshold outlined in **Anarita Karimi Njeru**(supra) submitted that the Petition does not meet the test of a constitutional petition. In Counsel's view, apart from citing omnibus provisions of the Constitution, the Petition provides neither particulars of the alleged complaints, nor the manner of alleged infringements, particularly in respect of the 3rd Respondent.
67. Further to this, the Petitioner submitted that the Petition offends the doctrine of constitutional avoidance as held in **Kiriro Wa Ngugi & 19 Others vs Attorney General & 2 Others [2020] eKLR**. Equally, the doctrine of exhaustion as

the Petitioner ought to have filed a complaint with the Independent Police Oversight Authority who pursuant to Section 5(a) as read with section 6(a) of the Independent Police Oversight Authority have the power to investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief. Similarly, Counsel submitted that the Petitioner had not shown that he exhausted the elaborate complaints mechanisms provided for pursuant to Section 56 to 58 of the Data Protection Act.

68. On the second issue, Counsel submitted that the statutory duty upon the 3rd Respondent pursuant to Section 24(e) of the National Police Service Act is investigation of crimes. Counsel noted that Article 245(4) of the Constitution provides that no person can give direction to the Inspector General save for the Director of Public Prosecution pursuant to Article 157(4) of the Constitution.
69. In addition to this, Counsel pointed out that no relief had been sought against the 3rd Respondent in the Petition hence not a necessary party and that the Court can reach a reason decision in his absence. Counsel adjudged the Petition as an abuse of the Court process hence should be dismissed.

70. Reliance was placed in **Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others [1998] eKLR** where the Court held that:

"For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party."

71. Additional reliance was placed on **Kizito M. Lubano v KEMRI Board of Management & 8 Others [2015] eKLR, Boniface Omondi v Mathare Youth Sports Association & another [2021] KEELRC 671 (KLR)** and **Pravin Bowry v John Ward & Another [2015] eKLR**.

Analysis and Determination

72. It is my considered view that the issues that arise for determination are:

- i. Whether this Court has jurisdiction to entertain the Petition in the light of the issues raised.***
- ii. Whether the Petition raises a cause of action against the 2nd and 3rd Respondents.***
- iii. Whether the Petition satisfies the threshold required of a constitutional Petition.***
- iv. Whether the Petitioner's rights under Articles 28, 31, 47 and 50(4) of the Constitution were violated by the Respondents.***

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

Whether this Court has jurisdiction to entertain the Petition in the light of the issues raised.

73. The jurisdiction of this Court in determining Constitutional questions alleging breach of fundamental rights is provided for in Article 165 (3) (b) and is also further buttressed by Article 23 (1) of the Constitution.

Article 23 (1) of the Constitution states:

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom on the Bill of Rights.”

74. On its part, Article 165 (3) (b) of the Constitution provides thus:

“165 (3)- Subject to clause 5, the High Court shall have:

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b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”

75. The Constitution has also laid down the principles to govern exercise of judicial authority in Article 159 (2), of which Article 159 (2) (c) recognizes and mandates to promote the use alternative forms of dispute resolution including

reconciliation, mediation, arbitration and traditional dispute resolution mechanisms in settlement of disputes.

76. Courts have stated in various judicial precedents that the Constitution does not operate in isolation and where an effective remedy exists other than by instituting Court action, that is the course that ought first to be followed and exhausted before any Court action. Accordingly, where initial process is skipped, the Court although clothed with jurisdiction, will ordinarily decline to hear the matter in deference to the primary mechanism.
77. This doctrine was elaborated by the Supreme Court in **Waity vs Independent Electoral & Boundaries Commission and Three Others [2019] KESC 54 (KLR)** as follows:

“[63] Where the Constitution or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

78. Further, the Supreme Court in **Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] KESC 83 (KLR)** stated as follows:

“ [118] In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial

authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

79. I shall thus consider the twin-jurisdictional question relating to the doctrine of exhaustion as well as the related doctrine of Constitutional avoidance which was also raised by the Respondents. Constitutional avoidance requires the Court do not to entertain disputes disguised as raising a Constitutional question where it is clear that such questions can be resolved fully on non-constitutional grounds such as application of the provisions of a legislation, or regulation or some other legal instrument.
80. The Court in **Ibrahim Wakhanyanga & 2 others v Chief Magistrate’s Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party) [2022] KEELC 1072 (KLR)** expressing itself on the doctrine of constitutional avoidance held:

“17. One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through

an ordinary suit as opposed to a constitutional petition. In that regard, the Court of Appeal stated in Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR as follows:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

[17] In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition..."

81. The 2nd Respondent faulted the Petitioner's decision to institute this Petition which the 2nd Respondent termed premature since it alleges a breach of privacy under Article 31(c) and (d) of the Constitution yet it is the 2nd Respondent which should assume initial jurisdiction over such matters. The 2nd Respondent pointed out that Section 56 of the Data Protection Act confers primary jurisdiction on the 2nd Respondent while Section 64 of the Act provides for the right to appeal to the High Court against any administrative action taken by the 2nd Respondent. It was therefore the 2nd

Respondent's position that this Court should only exercise appellate jurisdiction over the matter.

82. According to the Replying affidavit of the 2nd Respondent which was sworn by Oscar Otieno, a Deputy Data Protection Commissioner on 7/8/2024; the Petitioner had indeed approached the Data Commissioner and filed a complaint on 31/8/2024. According to the 2nd Respondent, pursuant to Section 56 (5) of the Act, the 2nd Respondent had 90 days within which to investigate the complaint and it in fact assumed jurisdiction and carried out the preliminary inquiry but 4 days later, the Petitioner filed this Petition hence, the 2nd Respondent, in deference to hierarchy of Courts, declined to take further action.
83. The Petitioner did not specifically rebut this particular averment in the 2nd Respondent's replying affidavit.
84. Parliament has enacted the Data Protection Act, Cap 411 which gives effect to **Article 31(c)** and **(d)** of the Constitution. The preamble to the Act states as follows:

'AN ACT of Parliament to give effect to Article 31(c) and (d) of the Constitution; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data

controllers and processors; and for connected purposes.'

85. **Section 2** of the Act defines

"Personal data" as *'any information relating to an identified or identifiable natural person'*

"Personal data breach" means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed;

"Identifiable natural person" means a person who can be identified directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or social identity;

"data subject" means an identified or identifiable natural person who is the subject of personal data;

86. Under **Section 3 (c), (d) & (e)**; the objects and purpose of the Act include:

(c) to protect the privacy of individuals;

(d) to establish the legal and institutional mechanism to protect personal data; and

(e) to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act.

87. In dealing with personal data the Act under Section 25 provides the following principles:

Principles of Data Protection

Every data controller or data processor shall ensure that personal data is—

- a) *processed in accordance with the right to privacy of the data subject;*
- b) *processed lawfully, fairly and in a transparent manner in relation to any data subject;*
- c) *collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes;*
- d) *adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed;*
- e) *collected only where a valid explanation is provided whenever information relating to family or private affairs is required;*
- f) *accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay;*
- g) ***kept in a form which identifies the data subjects for no longer than is necessary for the purposes which it was collected; and***
- h) *not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject.*

88. Correspondingly the Act outlines the rights of a person referred to as a data subject as follows under Section 26:

A data subject has a right—

- a) **to be informed of the use to which their personal data is to be put;**
- b) *to access their personal data in custody of data controller or data processor;*
- c) *to object to the processing of all or part of their personal data;*
- d) *to correction of false or misleading data; and*
- e) *to deletion of false or misleading data about them*

89. Section 56 (1) allows a 'A data subject who is aggrieved by a decision of any person under the Act to lodge a complaint with the Data Commissioner in accordance with this Act'.

90. The core of this Petition is the claim by the Petitioner that the Respondents, without the consent of the Petitioner, by intimidation and threats illegally accessed and processed his personal data and used it for purposes not authorized or consented to by the data subject (i.e. the Petitioner).

91. In my view, the first port of call, in the light of the provisions of the Data Protection Act, Cap 411 was to lodge a complaint with the Data Protection Commissioner. Once lodged, the Act

gives a timeframe within which a resolution has to be made. Section 56 (5) states:

'A complaint made to the Data Commissioner shall be investigated and concluded within ninety days.'

92. The Petitioner properly lodged the complaint with the Data Protection Commissioner. Nevertheless, instead of waiting for the Data Protection Commissioner to investigate the complaint within the statutory timeframe, he abandoned that process prematurely and instituted parallel proceedings by way of instant Petition before this Court while his complaint was still pending at the Data Protection Commissioner. That in my view amounts to forum shopping. The filing of this Petition was thus premature and unwarranted, particularly because the Data Protection Commissioner, 2nd Respondent confirms that it had already assumed jurisdiction and conducted its preliminary inquiry as it prepared for further action in the matter.

93. There were claims that the Petitioner was intimidated by the 4th Respondent, a police officer who allegedly threatened him with a gun to force him to hand over his phone, and that even after he filed a complaint with the 3rd Respondent, the 3rd Respondent failed to take any action. These are not matters to be taken merely on the face value without the

benefit of thorough factual inquiry especially because there is a special statutory body that has been created by law to investigate such case-specific complaints and to recommend appropriate action, including compensation to the wronged party yet the Petitioner completely avoided this well laid out statutory avenue and rushed to file this Petition. The Independent Police Oversight Authority Act, Cap 486 states inter alia that the functions of the authority at Section 6 (a) include-

'6. The functions of the Authority shall be to—

- (a) *investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, **including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations***

94. This Court must exercise judicial restraint by showing deference to the coordinate bodies of government by abstaining from interfering with the core functions that are within the constitutional or statutory mandate of these bodies. This was well articulated by the Court in **William Kabogo Gitau v Ferdinand Ndung'u Waititu [2016] eKLR** as follows:

“In my view, while this Court enjoys unlimited original jurisdiction in criminal and civil matters by dint of Article 165 (3) (a) of the Constitution, that is not a substitute for other first ports of call in determining such civil and criminal matters. In the present case, the Petitioner alleges the commission of various criminal offences and thus concludes that the Respondent is guilty of the same and hence in violation of Articles 10 (2) and 73 of the Constitution.

49. I hold the view that the Petitioner’s contentions in regard to the commission of the alleged offences must be raised with the relevant authorities and this Court cannot at this juncture usurp the powers of such authorities...”

95. The upshot is that the Court finds the instant Petition offends the twin-doctrines of constitutional avoidance and doctrine of exhaustion of remedies hence declines jurisdiction to entertain the matter. Having so found, I find it unnecessary to consider any other issue as being a jurisdictional question, I have to down my tools at this juncture.

96. The Petition is hereby dismissed with costs to the Respondents.

Dated, signed and delivered virtually at Nairobi this 16th day of April, 2026.

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**L N MUGAMBI
JUDGE**