

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E126 OF 2024

BETWEEN

PROTAS SHIMENYA.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST

RESPONDENT

TRAFFIC BASE COMMANDER MUTHANGARI POLICE

STATION.....2ND

RESPONDENT

TRAFFIC COMMANDANT NAIROBI AREA.....3RD

RESPONDENT

INSPECTOR GENERAL OF POLICE.....4TH

RESPONDENT

J U D G M E N T

Introduction:

1. The Petition is dated 5/3/2024 is supported by the affidavit of the Petitioner sworn on 11/3/2024 and the further affidavit of 28/5/2024.
2. The foundation of this Petition is the fundamental right of access to information. The Petitioner contends he was found liable in Chief Magistrate's Court case at Nairobi (Milimani) Commercial Courts Civil Suit Number E007 of 2020 in respect of an accident that allegedly involved his motor vehicle KAK 332D on 1/6/2020 yet he had no knowledge of such an incident until he was served with the aforesaid judgment. He asserts that at the time of the alleged accident it was during Covid 19 lockdown and he was in Kakamega with his motor vehicle and thus could not understand how the vehicle got involved in an accident in Nairobi.
3. As a result, he sought disclosure of the documents outlined in the Petition so as to challenge the said judgment declared to support regarding the same
4. The Petitioner thus seeks the following reliefs:

1) A declaration that the Police Abstract, the OB extract, the Motor Vehicle Inspection Report and a Copy of the P3 Form are public

documents and contain information which should be issued upon request.

2) A declaration that the refusal and/or the blatant denial and failure by the Respondent to issue the Petitioner with a Police Abstract for the accident that occurred on 1st June 2020, the OB extract No. 54/1/6/2020, the Motor Vehicle Inspection Report for motor vehicle registration No. KAK 332D and a Copy of the P3 one Daniel Wafula Waswa Form is a violation of the Petitioner's constitutional rights and infringes articles 10, 35, 73 and 232 of the Constitution.

3) AN order of mandamus to issue compelling the Respondents to jointly and severally issue the Petitioner with a Police Abstract for the accident that occurred on 1st June 2020, the OB extract No. 54/1/6/2020, the Motor Vehicle Inspection Report for motor vehicle registration No. KAK 332D and a Copy of the P3 Form of one Daniel Wafula Waswa

**4) THAT the costs of, and incidental to this
Petition be awarded to the Petitioner against
the Respondents.**

**5) THAT this Honourable Court be pleased to grant
such further Order or Orders as may be just and
appropriate.**

Petitioner's Case

5. The Petitioner deponed until the day he had no prior knowledge of the accident involving his motor vehicle KAK 332D on 1/6/2020, until the formal service of the Judgment in **MCCC/E007/2021 Daniel Wafula Waswa Vs. Protas Shimenga & Rebecca Wanjiru (Milimani) = (annexure- "PS-2")**.
6. The Petitioner thus visited Muthangari Police station to obtain details of the accident but was not provided with any information. He instructed his Advocate to formally request for the information from the Traffic Commandant Muthangari Police Station (*through a letter annexure PS 3*). Despite his Advocate making a request, the information was not provided yet, according to the Petitioner, *Police*

Abstract, the OB extract, the Motor Vehicle Inspection Report and a Copy of the P3 Form is public information which ought to be furnished upon request.

7. The Petitioner stated that he proceeded to request for the same documents (*through letter annexure PS 4*) from the Traffic Commandant who again did not supply him with the requested documents.
8. He thus lodged a complaint (*annexure PS 5*) with the Commission of Administrative Justice pursuant to Section 4 of the Access to Information Act. The complaint was heard and an order was issued on 11th March, 2024 directing the Respondents to supply him with the information requested (*annexure "PS-1" of the Further Affidavit of 28/5/2024*). Despite the order being served upon the Respondents, they did not comply.
9. The Petitioner explained that he needs the documents to facilitate his right of access to justice but this has been frustrated by the respondents who have refused to supply them. He seeks- *The report of a Traffic Accident made vide OB extract No 54/1/6/2020 and a copy of the extract, A Police Abstract giving the particulars of the Accident of 1st June, 2020; A copy of the Motor Vehicle Inspection Report of*

*Motor Vehicle Regn. No. KAK 332D; A copy of the P3 Form;
Any other relevant document relating to the accident in
your records.*

10. The Petitioner asserted that the alleged accident happened during the Covid 19 lockdown. He averred that that time, he was in Kakamega with his Motor Vehicle Registration Number KAK 332D hence there was no way it could have been involved in an accident in Nairobi. He contended that the Police are withholding the information which would exonerate him from the alleged accident. He alleges that the refusal to supply the information violates his fundamental rights under Article 35 as read with Section 4 of the Access to Information Act hence the need for this Court's intervention so as to access those documents.

Respondents' Case

11. In opposition to the Petition, the Respondents grounds of opposition dated 25/3/2024. They opposed the Petition on the following grounds:
1. *THAT the Petition is, misconceived, unwarranted, devoid of merit and therefore an abuse of the process of this Honourable Court as its substratum is a mere afterthought upon judgment being entered against*

the Petitioner as the defendant in Milimani Civil Suit Number E007 of 2020.

- 2. THAT the Petitioner has failed to plead in clear, precise and concise manner, his constitutional rights and their manifest violation by the Respondents as the same have to be so real and ramifications dire in the circumstances of the case.*
- 3. THAT the information alleged to be sought by the Petitioner from the Respondents ought to be within the possession of the Petitioner as the same must have been adduced as evidence during trial in Milimani Civil Suit Number E007 of 2020 and copies thereof served upon the Petitioner.*
- 4. THAT this instant Petition offends the principle of Constitutional Avoidance since instead of proffering an appeal, review and setting aside of the judgment of the court, the Petitioner filed a Petition on a matter that could have been decided on another basis. The court in the case of Communications Commission of Kenya & 5 others v Royal Media Services & 5 others, stated as follows:*

“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 be properly decided on another basis.”

5. *THAT the instant petition does not raise any triable issues for determination. There is no present justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use.*
6. *THAT the reliefs sought by the Petitioner are unenforceable. This is contrary to the judicial principle that no court of law will knowingly act in vain. The court in Daniel Kaminja & 3 others v County Government of Nairobi [2019] eKLR stated that;*

'No court will knowingly act in vain... a suit is academic where it is merely theoretical, makes empty sound and no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is

academic if it does not relate to practical human nature and humanity.'

7. THAT the Petition and application and the orders sought therein are unwarranted and untenable in the present circumstances and subsequently, the petition ought to be dismissed with costs to the Respondents.

SUBMISSIONS

Petitioner's Submissions

12. The Petitioner through the Firm of **Wahome Mwangi & Company Advocates** filed written submissions dated 15/10/2024.
13. Counsel for the Petitioner outlined a concise recapitulation of the Petitioner's case against the Respondents. He contended that, the Respondents, by failing to file a replying affidavit, were in law, effectively deemed to have admitted the facts as stated in the Petitioner's supporting and his further affidavit leaving the Petitioner's factual account unchallenged.
14. Counsel submitted Article 22 (1) of the Constitution gives every person the right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied and relied on the Supreme Court

decision of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** on the need to particularize and link the violations to the Articles of the Constitution alleged to have been violated. On the same breath, the Petitioner further cited the High Court decision of **Anarita Karimi Njeru vs Republic [1979] KLR 154.**

15. He submitted that the Petition had been brought for violation of Article 35 of the Constitution which provides that every citizen has the right of access to information held by the State, or information held by another person and required for the exercise or protection of any right or fundamental freedom.
16. The Petitioner submitted that the failure to furnish him with the information is unjustified, unconstitutional and in violation of his right under Article 35 of the Constitution including Section 4 of the Access to Information Act which allows every citizen the right of access to information held by the state and if the information is required for the exercise or protection of any right or fundamental freedom. To buttress this point the Petitioner relied on the case of **Nairobi Law Monthly Company Limited V Kenya**

Electricity Generating Company & 2 Others (Petition 278 of 2011).[2013] KEHC 6054 (KLR) (13 May 2013)

(Judgment) where the Court held that the State bore a proactive duty to publish and publicize information of national importance affecting the State and to provide access to specific information to the people who seek it from the State. Further, the Court underscored the following:

'... in order to facilitate the right of access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests'

17. Counsel contended that the Petitioner is seeking the information to enable him exercise his right to access justice and defend himself in the civil suit against him yet the Respondents have declined to accede to the request thereby necessitating the filing of the Petition herein.
18. He contended the Respondents have failed to uphold the tenets of Article 232 of the Constitution on the values and principles of public service which requires —high standards

of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making; accountability for administrative acts; transparency and provision to the public of timely, accurate information.

19. The Petitioner argued that the information sought is within the possession of the Respondents as they are by virtue of the provisions of the Traffic Act charged with the responsibility of gathering, investigation, recording and storing all information related to Road Traffic accidents in the Republic of Kenya. On the interpretation of the phrase contained in **Article 35 (1) (b) 'information held by another person and required for exercise or protection of any right or fundamental freedom'**; Counsel submitted that Kenyan Courts have not yet had occasion to interpret this particular phrase. However, the Constitutional Court of South Africa, in interpreting a similar provision of the Constitution of South Africa, ruled that the information sought in an application for disclosure of information must be such as is required for the protection or exercise of another fundamental right. That principle was

applied in the case of **Shabalala and 5 Others v Attorney General of the Transvaal and the Commissioner of South African Police CCT/23/94**

[1995]. The applicants, who had been charged with murder, sought information in the possession of the Police on the basis that it was required for the exercise of their right to a fair trial. The court made an order that denial of information contained in a police docket

"is inconsistent with the Constitution to the extent to which it protects from disclosure all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure is justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial..."

20. The Petitioner thus submitted he is seeking the said information, as stated in his Petition and Supporting affidavit, in order to exercise his right to access justice and defend himself from a civil claim lodged against him. He avers that he has no recollection or knowledge of the accident that gave rise to the civil litigation and unless furnished with the information, it would not be possible for him to adequately defend himself.

Respondents' Submission

21. The Respondents filed their written submissions dated 24/2/2025.
22. The Respondents contended that the main concern of the Petitioner lies in the failure to furnish him with the documents upon request.
23. The Respondents contended that on **4th August, 2023**, a judgment was delivered against the Petitioner; who was the 1st Defendant in the civil matter holding him vicariously liable for the acts of the 2nd Defendant in the matter.
24. As a result, the Petitioner requested the 2nd Respondent to furnish him with the Police Abstract, the OB extract, the Motor Vehicle Report and a Copy of the P3 with the intention of using the said documents to defend himself in Court. In response to the Petition, the Respondent's filed grounds of opposition dated 25th day of March 2024 opposing the petition on three major grounds namely:
 - a.** The Petition offends the doctrine of constitutional avoidance
 - b.** The Petition does not raise triable issues for determination

c. The reliefs sought by the Petitioner are unenforceable.

25. On the issue of the Petition contravening the doctrine of Constitutional Avoidance, the Respondents submitted that instead of the Petitioner seeking to utilize avenues such as an appeal, review and setting aside of the judgment, he has filed a Petition on a matter that could have been decided under the relevant statutory provided avenues. On the doctrine of constitutional avoidance, the Respondents relied on the case of **KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling)** where it was held thus: ***"The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies, the preferred route is to apply such remedies before resorting to the Constitution. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted***

by the doctrines of ripeness and constitutional avoidance. It is borne out of a realization that all legislative or common-law remedies are part of the legal system."

26. Also relied on was the case of **Mkaya v County Government of Taita Taveta & another [2025] KEELRC 594 (KLR); South African case of SV Mhulungu, 1995 SA 867(CC); Communications Commission of Kenya & 5 others v Royal Media Services & 5 others.**
27. The Respondents thus submitted that given the guidance of the cited authorities; and given that it was possible for the petitioner to have the matter dealt with without approaching the constitutional court on grounds of violation of constitutional rights, the Court should find that the Petition violates the doctrine of constitutional avoidance.
28. The Respondents further argued that the Petitioner failed to disclose in a clear, precise and concise manner, the violation alleged and therefore the Petition is incompetent. Citing the case **Anarita Njeru v Republic (1979) eKLR** which underscored that a Petition must be pleaded with reasonable degree of precision identifying the provision

said to be infringed and the manner in which they were alleged to be infringed and also the case of **Mumo Watemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** which emphasized the same principle; the Respondents argued that despite the Petitioner alleging that his right to access to information was violated, he failed to demonstrate the manner in which the same was infringed.

29. The Respondents submitted that the Petitioner was a party in the case he now complains of and seeks to challenge and therefore had access to the said documents that he is now requesting to be furnished with.
30. In any case, he could check for them in the CTS system or simply walk into the registry and obtain the documents. That he was entitled to the documents as and when the proceedings in the running down matter was live where he ought to have been given the documents the plaintiff was relying on in the hearing.
31. As to whether the petitioner is entitled to the orders sought, the Respondents answered in the negative maintaining that the Petitioner has neither demonstrated how his rights and

fundamental freedoms have been violated nor adduced any evidence to back up the allegations in the Petition.

Analysis and Determination

32. Having reviewed the pleadings and the submissions of the Parties, this Court considers the following to be the issues for determination in this Petition;

1. Whether the instant Petition meets the precision threshold required in pleading a Constitutional

Petition

2. Whether the Court is barred from hearing and determining the Petition on the basis that it offends the doctrine of constitutional avoidance

3. Whether the failure by the Respondents to provide information to the Petitioner in the circumstances of this case constitutes violation of Article 35 of the

Constitution

4. Whether the Petitioner has established factual and legal basis for grant of the specific reliefs

sought, and whether they are appropriate remedies to redress the alleged Constitutional violations.

33. Issue number 1 and 2 above raise fundamental preliminary questions on the competence of the instant Petition. They may lead the Court to either of the following paths:

a) Should the Court uphold any of them, it will be dispositive, meaning that the Petition would conclude without examining the substance or its merits.

b) If these two issues are dismissed, the Court must proceed and determine the Petition on its merits. I thus proceed to determine the two issues one at time.

Whether the instant Petition meets the precision threshold required in pleading a Constitutional Petition

34. A cardinal requirement in pleading a constitutional petition is that must clearly identify the specific provisions of the Constitution that were violated and also plead distinctly a factual description of the manner the violations occurred.

This requirement was articulated in the High Court

cerebrated case of **Anarita Karimi Njeru v R 1979**

eKLR, where the Court held thus:

“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.”

35. Affirming the principle in Anarita case (supra) , the Court of Appeal in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** held as follows:

“...The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...

was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements...”

36. In the instant case, the Respondents argued that despite the Petitioner alleging that his right to access to information under Article 35 was violated, he failed to demonstrate the manner in which it was infringed.
37. It is necessary to point out from the outset that that the consideration of whether a Petition meets the threshold required in pleading a Constitutional Petition only focuses on whether the pleadings identify the specific provisions of

the Constitution infringed, and if it explains the manner and the a logical link between the pleaded facts and the Constitutional right infringed, basically, whether the facts sufficiently found a cause of action based on the violation of the Constitution. At that point, the Court will not normally be concerned with whether or not evidence exists to proof the allegations.

38. In the instant matter, I carefully examined the Petition herein. On its face, the Petitioner unmistakably reveals the foundation of the Petition which is the violation of the Petitioners right of access to information under Article 35 of the Constitution. The Petitioner further goes ahead to give a factual account as to the nature of violation where he has given details of the attempts made to get the information from the Respondents including through writing letters but it has been all futile.

39. In my considered view, the manner this Petition is pleaded is not what one would describe as imprecise or lacking a factual nexus. I find that the Petition as pleaded adequately satisfies the necessary ingredients of a properly pleaded constitutional petition. I now turn to the next issue.

Whether the Court is barred from hearing and determining the Petition on the basis that it offends the doctrine of constitutional avoidance

40. The doctrine of Constitutional avoidance requires that if an issue can be adequately be resolved by application of the statute or regulatory regime or any other lawful instruments, then the Constitution should not be invoked in resolution of such disputes. Instead, it is the ordinary legal remedies that should be applied in resolving the dispute.
41. The Court underscored significance of the doctrine in **Ibrahim Wakhanyanga & 2 others v Chief Magistrate's Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party) [2022] eKLR** as follows:

“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.

18. Similarly, the same court stated in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR thus:

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation....

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”

42. Further in **C O D & another vs Nairobi City Water & Sewerage Co. Ltd (2015) eKLR** 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 marshall. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof."

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.”

43. And in **Council of County Governors v Attorney General & 12 others (2018) eKLR** the Court stated:

“59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (supra) (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

60. In the South African case of S v Mhlungu, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay 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. And in Ashwander v Tennessee Valley Authority, 297 U.S. 288, 347 (1936)), the U.S. Supreme Court 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.”

44. In the present case, the Respondents contended the Petitioner was a Party in the in Civil suit No. MCCC E007 Of 2021 whose judgment he now says he wants the documents to challenge and instead of filing a separate constitutional Petition, the Petitioner ought to have utilized the statutorily provided avenues such as an appeal, review or setting aside of the judgment.
45. The Petitioner countered that the Petition was founded on refusal by the Respondents to supply him with the information he needs to enable him challenge the judgment in question and thus were in breach of Article 35 of the Constitution. He even stated that he had gone all the way to the Commission on Administrative Justice and despite getting the order, the Respondents have not yielded. He thus contended that he was entitled to bring this Petition under Article 22 (1) of the Constitution.
46. I have examined the pleadings and I noted that one of the annexures that was provided by the Petitioner was the Judgment in MCCC/E007/2021 where the parties are

**Wafula Waswa v Protas Shimenga & Rebecca
Wanjiru (annexure PS 2).**

47. Reading the Judgment, Protas Shimenga (the Petitioner) was the 1st defendant in that matter, and this is what the Court said about him:
48. **“The 1st defendant entered appearance and filed a statement of defence dated 12th January, 2022 asking that the suit be dismissed with costs. The defendant admitted he was the registered owner of the suit motor vehicle but averred that the 2nd defendant was a stranger to him.”**
49. From that judgment, the testimony of a officer from Muthangari Police Station **PW 2, CPL George Ratemo** is recorded and is indicated he produced a police abstract dated 18/2/2020 as exhibit and confirmed the occurrence of the accident on 1/6/2020 at about 1700hrs along Gitanga Muthangari Junction involving motor cycle KMEC 595 and motor vehicle KAK 332D.
50. In respect to the defendant (now Petitioner herein), the Court reviewed his testimony and recorded it as follows:
51. **“...DWI was Protas Shimenga. He adopted his witness statement dated 17/3/2022 as his evidence**

in chief and produced documents contained in his list of documents dated 28/10/2022 as exhibits. On cross-examination he admitted that motor vehicle KAK 332D was his vehicle. He further stated he was sued and that is how he got to know of the accident...He insisted his vehicle was at home and has never come back to Nairobi.”

52. The reason I have reviewed the above testimonies is not because this Court wants to assume the role of an appellate Court. I fully understand that what is before me is a Constitutional Petition.
53. The main reason for the review is to demonstrate that the judgment establishes that there was the full participation of the Petitioner in the process leading to the judgment in Milimani MCCC/007/2021 and not as asserted in his affidavit in support of the Petition that he only got to know about the accident on the date he was served with the judgment in Milimani MCCC/007/2021. He actually entered appearance and filed a defence and defended himself by giving evidence and calling a witness, hence was aware of the suit from the beginning to the end.

54. The question that lingers in the mind of this Court thus becomes, having been fully aware of the case, and having participated in the that trial fully, in which one of the witnesses who testified was one CPL George Ratemo, from Muthangari Police Station in which the Petitioner claims documents relevant to the case which he believes could exonerate him are being withheld hence this Petition, why did the Petitioner not use the process of discovery provided for under the Civil Procedure Act and the rules to summon the witnesses and compel their attendance before the trial Court to produce those documents he believed were in their possession? Section 22 of the Civil Procedure Act, Cap 21 provides:

Section 22. Power to order discovery and the like

*Subject to such conditions and limitations as may be prescribed, the court may, at any time, **either of its own motion or on the application of any party—***

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production,

impounding and return of documents or other material objects producible as evidence;

- (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;***
- (c) order any fact to be proved by affidavit.***

55. Order 16- Rules 1, 5, 6, 7 & 10 further reinforces the power of the Court to compel discovery and production of relevant documents in the hands of any person and specifies the consequences for non-compliance. These rules provide as follows:

56. **ORDER 16 - SUMMONING AND ATTENDANCE OF WITNESSES**

1. Summons to attend to give evidence or produce documents [Order 16, rule 1]

At any time before the trial conference under Order 11 the parties may obtain, on application to the court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

5. Time, place, and purpose of attendance to be specified in summons [Order 16, rule 5]

Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

6. Summons to produce documents [Order 16, rule 6]

Any person may be summoned to produce a document without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

7. Power to require persons present in court to give evidence or produce document [Order 16, rule 7]

Any person present in court may be required by the court to give evidence or to produce any document there and then in his possession or power.

10. Procedure where witness fails to comply with summons [Order 16, rule 10]

(1) Where a person to whom a summons has been issued, either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the court shall, if the certificate of the serving officer has not been verified by affidavit, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another court, touching the service or non-service of the summons.

(2) Where the court has reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with the summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and

place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12.

57. The Petitioner had the opportunity to move the Court in the civil suit under the above provisions of the Civil Procedure Act and the Rules to not only compel the attendance of any witness believed would give testimony relevant to the suit but also to produce documents in their custody that was relevant to the case.

58. He disregarded express statutory provisions that were directly applicable to the case during the trial and now wants to use the Constitution to achieve what he failed to do in the initial trial despite it being provided for in the Civil

Procedure Act and the rules thereunder. A Constitutional remedy is extraordinary one and cannot be used to substitute for ordinary remedies available under the Civil Procedure Act and the Rules.

59. It is therefore the finding of this Court that the instant Petition offends the doctrine of constitutional avoidance.
60. Having so found, I need not determine any other issue as this is a jurisdictional bar. I must down my judicial tools at this juncture.
61. The upshot therefore is that the Petition is dismissed with costs to the Respondents.

Dated, signed and delivered virtually at Nairobi this 23rd April, 2026.

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L N MUGAMBI
JUDGE