Atieno v Director General, Directorate of Criminal Investigations & 3 others; Change (Interested Party) (Constitutional Petition E014 of 2024) [2025] KEHC 9044 (KLR) (24 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9044 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CONSTITUTIONAL PETITION E014 OF 2024

DR KAVEDZA, J

JUNE 24, 2025

BETWEEN

NOVERCLAIRE ATIENO ..... PETITIONER

AND

THE DIRECTOR GENERAL, DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

BENSON KASYOKI ..... 3RD RESPONDENT

ISAAC KARIUKI ..... 4TH RESPONDENT

AND

JAPHETH CHANGE ..... INTERESTED PARTY

JUDGMENT

1. This is a petition filed under a certificate of urgency together with an application, now spent, filed in court on 6 November 2024. The petition challenges the Respondents' exercise of powers. The Petitioner craves an order stopping the intended institution of criminal charges against her. She argues that the respondents have violated *the Constitution* and should be stopped before further harm can be suffered. The Petitioner contends that the petition is yet another demonstration of how the criminal justice system is being misused to settle personal scores.

2. The Petitioner's case is that she is a financial expert and is normally engaged in the business of dealing with finances, and sometimes the filing of tax returns with the Kenya Revenue Authority. Sometimes in 2021, she was approached by one Ralph Edward Nguma, who requested assistance in filing tax returns. The Petitioner further states that Ralph had not filed his returns for 4 years and that he had

even forgotten the login details to his account. In her presence, they reset the password of the account and filed the NIL returns. Furthermore, Ralph had not filed his returns for some time, so he had to pay the penalties via MPESA using his phone. Upon the conclusion of the process, she advised Ralph to change his password and that he changed the password in his presence. As far as she was concerned, this marked the end of their interactions.

3. She was surprised in September 2024 when he received summons from the 1st Respondent through the 4th Respondent inviting him to the Nairobi Area police station. She was required to appear for statement recording on 30 October 2024 at 9.00 am. She averred that she honoured the summons but was surprised by the actions of the 4th Respondent, who frustrated her efforts to record the statement.

4. The 4th Respondent insisted on a version of facts that he required the petitioner to record. According to the petitioner, the 4th Respondent insisted on a fact pattern that would implicate a third party, herein the interested party. The 4th Respondent informed the petitioner that if he did not record the version of the fact pattern, she would be detained or charged in court.

5. The Petitioner further avers that she was harassed, harangued, vexed, and intimidated by the 4th Respondent in an attempt to force her to record the desired set of facts. The desired set of facts was for the petitioner to admit that she released Ralph's password to the Interested party, one Japheth Change. According to the Petitioner, this was false. According to the Petitioner, the 4th Respondent insisted that he was under strict instructions from the 3rd Respondent, his boss.

6. According to the petitioner, this pattern demonstrates that the 3rd and 4th Respondents were abusing their office as well as the criminal justice system by forcing the petitioner to give false testimony. As such, they were acting as agents of some private individuals, who appeared to have some scores to settle with Japheth. The petitioner also averred that upon her refusal to cooperate with that scheme, she was detained by the respondents for the entire day until night in a bid to physiologically torture, isolate, and mentally break her to submission. As such, she was detained in a secluded room, taunted and threatened. This included the officers taking her fingerprints and further being detained at Capitol Hill station. The Petitioner avers that this is an abuse of the criminal justice system. To this end, she sought the following prayers:

    i. A declaration that the 3rd and 4th Respondents' actions of intimidating, harassing, vilifying, and coercing the petitioner under the guise of conducting criminal investigations violated her fundamental rights and freedoms particularly the right to equality and freedom from discrimination [article 27]; the right to dignity [Article 28]; and the right to freedom and Security of the person [Article 29] and the right to fair administrative action [Article 47]

    ii. A declaration that the 3rd and 4th Respondents' actions of intimidating, harassing, vilifying, and coercing the petitioner under the guise of conducting criminal investigations violated Article 75 of *the Constitution* of Kenya, Sections 3,6,7,9,10,11,13,16 and 24 of the *leadership and Integrity Act* as well as section 3 and 66 of the *National Police Service Act*.

    iii. A declaration that the 3rd and 4th Respondent's actions of receiving instructions, being directed, and acting on behalf of private persons to settle private scores contravened the provisions of *the Constitution*, the *Leadership and Integrity Act* as well as the *National Police Service Act*.

    iv. That upon the declaration in 2 above, the Honorable Court be pleased to forthwith disqualify and hold that the 3rd and 4th Respondents are unfit to be in office and also ineligible from holding any public office by Article 75[2] and [3] of *the Constitution* and the *Leadership and Integrity Act*.

v. A permanent injunction barring the Respondents by themselves or through their agents, servants, employees, officers, proxies, or anybody acting under them from charging, prosecuting, harassing, intimidating, and vilifying the petitioner based on trumped-up charges particularly based on the facts herein.

vi. A mandatory injunction directed to the 2nd Respondent barring him either by himself or through his agents, servants, employees, or officers from approving, sanctioning, or directing any charges or prosecution from the facts laid herein.

vii. A mandatory injunction directed to the 1st Respondent directing them to immediately and unconditionally restrain the 3rd and 4th Respondents from utilizing the criminal justice system as a tool to settle private scores between private individuals.

viii. Compensation by way of damages for wanton and egregious violation of the Petitioner's fundamental rights and freedoms.

ix. Costs of the petition.

7. The Petition is opposed through Grounds of Opposition dated 28 April 2025 as well as a Replying Affidavit sworn on 9 May 2025. On the grounds of opposition, the Respondents state that:

a. The Petition is premature as a decision to charge is yet to be made.

b. The 3rd and 4th Respondents have been misjoined to the Petition and are protected under Section 66 of the *National Police Service Act*, No. 11 of 2011.

c. The consideration of the Petition by this Honourable Court would amount to an unjustified interference by this Court in the exercise of the 1st and 2nd Respondents' respective constitutional mandates.

d. That the petition is vexatious, frivolous, and an abuse of the legal process.

8. In his Replying Affidavit, Inspector Isaac Kirimi Kariki avers that:

a. The 3rd and 4th Respondent have been sued for actions that they carried out while in their official capacity as officers of the 1st Respondent authorized by law to undertake investigations and as such, their involvement in the investigations was not in their personal capacities.

b. They received a complaint from one Ralph Nguma who alleged that he worked with Arwa & Change Advocates from 2017 to 2021 where the interested party was a partner. The interested party informed Ralph to make all payments through the petitioner, who was the firm's accountant.

c. Subsequently, Ralph agreed with the firm where he disclosed his KRA identification details to the Petitioner, in her capacity as the firm's accountant. The petitioner was supposed to do 'withholding' on behalf of the firm.

d. In May 2022, Ralph received iTax email notifications indicating that on 22 April 2022 he had amended all his tax returns from nil returns for 2018,2019,2020 and 2021 which amendments he suspected were done by the Petitioner as she was the only person with the said credentials.

e. Due to these amendments, KRA demanded from him a total of Kshs 19,227,042. He queried this amount and even visited Remington Advocate LLP. Despite negotiations between the law firm and the KRA, he did not succeed and was advised to pay the demanded sum.

f. Ralph claimed that he transferred the sum to Remington Advocates LLP accounts for their onward transfer. He was however shocked when he received an email informing him of a tax amnesty. It was on this basis that he was advised by his advocates that the sum was never transferred to KRA.

g. The Respondents started to investigate a possible case of Obtaining money by false pretence contrary to section 313 and conspiracy to commit a felony contrary to section 393 of the penal code, Cap 63 of the Laws of Kenya.

h. From their investigations, they found that the complainant met the petitioner and Remington LLP at the firm of Arwa & Change Advocates, where the petitioner got access to the Complainant's KRA details.

i. The complainant's returns amendments for 2017-2021 were erroneously entered as per his tax status dated 30 November 2022.

j. The partners misdirected the complainant that KRA was demanding the said sum of Kshs. 19, 227, 042 and yet KRA was only demanding Kshs. 5, 427, 464.

k. The partners engaged KRA only once.

9. The interested party similarly swore an affidavit on 17 April 2025 in support of the petition. The summarized gist of the response is as follows:

i. The criminal investigations and intended prosecution is an abuse of the criminal justice system and solely meant to settle personal scores. It is meant to intimidate him to withdraw criminal proceedings against a third party who is in an unholy alliance with the respondents.

ii. He is a partner at the law firm of Arwa and Change Advocates where the petitioner works as the firm manager.

iii. Ralph Nguma, the complainant, is not a stranger to him or the firm. Further, they have had a controversial and tumultuous relationship.

iv. The law firm of Arwa and Change Advocates noticed that Ralph Nguma was masquerading as a partner of the law firm and misleading the public. They issued a public notice to this effect.

v. The interested party lodged a complaint against Ralph Nguma. Mr Nguma had purported to take up and represent a client who was being represented by the firm. The LSK wrote to DCI asking for investigations and the said Nguma was charged in MCCR/E895/2023.

vi. Ever since he made the complaint to the LSK, Mr. Nguma has brought up frivolous and vexatious allegations and proceedings against the law firm and the interested party meant to tarnish and disdain his name and reputation including the dismissed claim before the Advocates Complaints Commission.

vii. The interested party has also annexed an investigation report by the employer of the 4th respondent. The report discloses how Ralph Nguma used the 4th Respondent to intimidate, harass, and coerce victims to withdraw any ongoing criminal matters against Nguma.

viii. That the petitioner is just a victim in a fight between himself and Nguma who wants to use the criminal justice system to arm-twist him to withdraw the Milimani Criminal Case No. E895 of 2023.

10. The petition was canvassed through written submissions. The Petitioner filed his submissions on 28 April 2025, the Respondents filed their submissions on 9 May 2025 and the interested party filed his submissions on 28 April 2025.

A. Issues for determination

11. Having looked at the petition and the submissions by parties, the following consequential issues call for determination:

    i. Whether the petition is premature and therefore offends the doctrine of ripeness?

    ii. Whether the 3rd and 4th Respondents have been properly joined to the Petition in their personal capacities?

    iii. Whether this Court has jurisdiction to interfere with the decision of the Director of Public Prosecution to approve and institute criminal proceedings or the investigations of the National Police Service?

    iv. Whether the Respondents in commencing the Investigations and approval of charges against the Petitioner violated their powers under Articles 157 and 245 of *the Constitution* and thereby abused their powers

    v. What reliefs should the Court issue

B. Analysis

I. Whether the petition is premature and therefore offends the doctrine of ripeness?

12. In their grounds of opposition, the Respondents aver that the petition is premature as the ODPP is yet to make a decision on whether or not to charge. As such, the petition should be struck out primarily. In sum, the petitioner is said to have jumped the gun as she should have waited until the decision to charge was made. I am not persuaded.

13. Although the doctrine of ripeness is a celebrated doctrine. It must be read in line with the 2010 Constitution and with the necessary modifications. It cannot be left on its own when the transformative dreams and aspirations of the 2010 Constitution are supposed to be flourishing. It is now 15 years since *the Constitution* was promulgated. Its dreams and aspirations must be given effect. The 2010 constitution's progressive nature cannot be tied down by old doctrines such as the ripeness doctrine. Indeed, articles 22 and 258 of *the Constitution* have remodified the ripeness doctrine in tremendous respects. One does not have to wait until harm has occurred for her to approach the High Court. *The Constitution* in appreciating the importance of protecting and safeguarding the Bill of Rights allowed Kenyans to seek protection even where there is a threat. As such, one does not have to wait for the actual violation before seeking protection.

14. I recently expressed myself on this change in Aperera v Officer Commanding Langata Police Station & 2 others; Maina [Interested Party] [Constitutional Petition E008 of 2024] [2025] KEHC 4472 [KLR] [8 April 2025] [Judgment]. In this decision, I summarized the travel that we have undertaken in our jurisprudence and I proceed to reproduce the relevant paragraphs as follows:

    13. To start with, the doctrine of ripeness asks courts to only address crystallised issues and not engage in an academic exercise of addressing mere fears. The meagre judicial resources should be spent only when it is necessary. Whereas this doctrine appears doctrinally sound, it must be read together with Articles 22 and 258 of *the Constitution*. Article 22[1] grants every person

the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 258 on the other hand, provides that every person has the right to institute court proceedings claiming that *the Constitution* has been contravened or is threatened with a contravention.

14. The inclusion of the term threatened in our Constitution has modified the justifiability question. Today, a party does not have to wait until a violation has crystallised before approaching this Court. A party is allowed to come to Court where a right or *the constitution* is threatened. In other words, unlike when a person needs to wait until flu symptoms kick in, running nose, sneezing, joint pains, and fever, before going to the hospital, the mere threat of a constitutional flu grants a party an audience before this court.

15. Indeed, a five-judge bench held in Coalition for Reform and Democracy [CORD] & 2 others v Republic of Kenya &10; others [2015] eKLR that

112. However, we are satisfied, after due consideration of the provisions of Article 22, 165[3] [d] and 258 of *the Constitution*, that the words of *the Constitution*, taken in their ordinary meaning, are clear and render the present controversy ripe and justiciable: a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of *the Constitution* to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of *the Constitution*.

113. take this view because it cannot have been in vain that the drafters of *the Constitution* added "threat" to a right or fundamental freedom and "threatened ..... contravention" as one of the conditions entitling a person to approach the High Court for relief under Article 165[3] [b] and [d] [i]. A "threat" has been defined in Black's Dictionary, 9th Edition as "an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm" [emphasis added]. The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another..."

114. The use of the words “indication”, “approaching”, “might” and “communicated intent” all go to show, in the context of Articles 22, 165[3] [d] and 258, that for relief to be granted, there must not be actual violation of either a fundamental right or of *the Constitution* but that indications of such violations are apparent.

16. I wish to reiterate and this time with finality that after 27 August 2010, one need not wait for a violation of rights or freedoms to be breached to pursue an action under a constitutional petition. Mere threatening is sufficient reason for one to pursue an action in a constitutional petition. In the case at hand, the petitioner avers in her affidavit that she was summoned by the Respondents and detained in the cells without a Court order. This alone is not merely a threat to the Bill of Rights. If proved, it amounts to a violation of rights, including the right to liberty. Second, in their affidavit, the Respondents aver that the file was forwarded to the ODPP to approve charges. Is this not a threat that her rights would be violated when the criminal justice system is used to settle personal scores? Is there not a possibility that the charges would be instituted? Indeed, in my considered view, there is a reasonable apprehension of fear that charges would be instituted against her. The petitioner avers that the entire criminal investigation and prosecution is an abuse of constitutional powers. This alone, in my view, meets the threatened angle in our Constitution.

II. Whether the 3rd and 4th Respondents have been properly joined to the Petition in their personal capacities?

17. The Respondents submit that the 3rd and 4th Respondents have not been properly joined to the Petition as they enjoy immunity under Section 66 of the *National Police Service Act*. The provision provides as follows:

> " 66. Protection from personal liability
>
> [1] No matter or thing done by a member, employee, or agent of the Service shall, if the matter or thing is done in good faith for the performance and execution of the functions, powers or duties of the Service, render the officer, employee or agent personally liable to any action, claim or demand whatsoever.
>
> [2] Subsection [1] shall not preclude a person from bringing legal proceedings against the Inspector-General in respect of an act or omission of the kind referred to in that subsection if the person can satisfy the court that the police officer or other person would, but for that subsection, have incurred liability for the act or omission."

18. First, it is trite law that constitutional petitions cannot be defeated by misjoinder. Rule 18, of *the Constitution* of Kenya, [Protection of Rights and Fundamental Rights] Practice and Procedure Rules, 2013 provides that [b] A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute. As such, if the parties were wrongly joined, this Court can proceed to strike their names out as long as the respondents are in place.

19. However, if I understood the Respondents correctly, they claim that the 3rd and 4th Respondents should not have been sued in the first place because they enjoy immunity. Section 66 [1] of the *National Police Service Act* however provides that an officer cannot be held personally liable for anything done in good faith. My understanding of the said provisions is that the immunity granted by the law is not absolute.

20. Indeed, my reading of *the Constitution* of Kenya is that public or state officers serving in the public service are bound by the celebrated national values and principles in the 2010 Constitution. The values of good governance, transparency, and accountability cannot entertain the idea of absolute immunity. In the era of accountability and a culture of justification, those in the public service must remain accountable. It is for this reason that section 66 of the Act only protects officers who act in good faith. If an officer goes on a frolic of his own, he can be dragged to court and there is nothing constitutionally wrong with that.

21. In this case, the Petitioner avers that the 3rd and 4th Respondents allowed themselves to be used as conduits to settle personal scores between one Ralph and the Interested party. The interested party's affidavit and the annexures support the petitioner's position. Further, the Interested party has annexed a report showing that Ralph has been using the 4th Respondent to settle personal scores. If this is proved, can it be said that the 4th Respondent was acting in good faith? I am persuaded to decline the objection.

22. I am fortified in my rejection of that position by the holding in Maina v Nyangweso & 5 others [Environment & Land Case E012 of 2024] [2024] KEELC 5648 [KLR] [12 July 2024] [Ruling] that:

> 30. Under this title the Court is taxed with examining if this suit offends the provisions of Section 66 of the *National Police Service Act*, No. 11A of 2011. Section 66[1] of the *National Police Service Act* protects Police officers from personal liability. It states that no matter or thing done by a member, employee or agent of the Service shall if the matter or thing is done in good faith

for the performance and execution of the functions, powers or duties of the Service, render the officer, employee or agent personally liable to any action, claim or demand whatsoever. As this Honourable Court has rightfully put it before in this ruling, the 2nd Defendant has been mentioned personally for the alleged forceful and violent entry and trespassed upon the suit property with the 3rd Defendant accompanied by goons. I believe this is a prime reason to decline to grant the objection on the basis that the suit offends the provision of Section 66 of the *National Police Service Act*. Likewise, the objection is overruled.

23. Similarly, the objection herein is declined.

III. Whether this Court has jurisdiction to interfere with the decision of the Director of Public Prosecution to approve and institute criminal proceedings or the investigations of the National Police Service?

24. As the Custodian of the Bill of Rights, can there be a moment when this court does not have to address a Constitutional wrong? Looking at the constitutional sweep granted by Article 165 of *the Constitution*, to determine the question 'whether anything said to be done under the authority of this Constitution or any law is inconsistent with or in contravention of this constitution', can courts go to slumber when approached by petitioners? I think not. Courts should not easily acquiesce to a scenario where they abdicate their constitutional obligation and cede their jurisdiction to enforce *the Constitution*.

25. This Court, as the custodian of the Bill of Rights, is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under *the Constitution*. The Court in Miscellaneous Application 40 of 2016 Republic v Director of Public Prosecutions& 2 others Ex parte Zablon Agwata Mabea [2017] eKLR while citing the case of Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, stated that:

> " ...The Court has the power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform..... "

26. The court further held that selective prosecution may be misused for unfair and unreasonable purposes. It stated;

> " .... It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves..."

27. The power to institute criminal proceedings is a constitutional power under Article 157 of *the Constitution*. The power is not absolute and is capped by Article 157[11]. Article 157[11] requires the DPP to exercise prosecutorial powers while taking into consideration the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process. When a petition is filed contending that the intended exercise of prosecutorial powers is an abuse of the legal process, this Court is effectively equipped under Article 165 to consider any question of whether anything said to be done under the authority of *the Constitution* is constitutional. The Supreme Court

has endorsed this view in Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 others [2021] eKLR that

> " [82] Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of Article 157[11] have not been met, then the High Court under Article 165[3][d][ii] can properly interrogate any question arising therefrom and make appropriate orders."

28. These views were also expressed by Justice Majanja who echoed this principle of law in Kenya Commercial Bank Limited & 2 Others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 [2013] eKLR, where he held that:

> " The office of the Director of Public Prosecution and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided by the law. But these offices are subject to *the Constitution* and the Bill of Rights contained therein and, in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under *the constitution*."

29. Further, the mere fact that a person will be charged before a court is not a bar and cannot stop the Court from exercising its supervisory and constitutional jurisdiction. A flawed criminal process can be stopped at any time without waiting for the trial to conclude. The Court in Republic v Attorney-General & 9 others Ex Parte Cyrus Shakhalaga Khwa Jirongo [2017] eKLR stated that:

> "Therefore the people placed in charge of investigation and prosecution must in deciding whether to prefer criminal charges ask themselves whether, in the circumstances, a fair trial is possible notwithstanding the material placed before them. In other words, the police and the DPP ought not to conduct themselves as if they are an appendage of the complainants. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles.....It is now clear that the mere fact that the applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful, and unfair trial to run its course."

30. The Supreme Court has also similarly endorsed the position that the Court can stop a constitutionally/ statutory process where the same is being used to violate the Bill of Rights. The apex Court held in Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 others [2014] eKLR where it was held that:

> " Article 3[1] of *the Constitution* imposes an obligation on everyone, without exception, to respect, uphold and defend *the Constitution*. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159[2] [e] which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of *the Constitution* being protected and promoted. However, all statutes flow from *the Constitution*, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process."

31. Therefore, and as it was held recently in Aperera [supra] when the criminal process is set in motion to serve adverse purposes and is an indictment of the objectives of a criminal proceeding, this court has jurisdiction to intervene. No court of law or constitutional judge should sit and fold its arms when constitutional powers are being abused. To do so would be a betrayal of the oath of office. I am not prepared to commit that constitutional wrong and I therefore decline the objection.

IV. Whether the Respondents in commencing the Investigations and approval of charges against the Petitioner violated their powers under Articles 157 and 245 of *the Constitution* and thereby abused their powers?

32. The Petitioner challenges the decision to charge by the ODPP as well as the investigative powers of the police. She avers that the exercise of the powers is neither legitimate nor proper and that it is solely meant to influence the outcome of other disputes. That the criminal justice system is being deployed against the Petitioner in order for her to implicate a third party, the interested party. The Interested Party in his affidavit summarized above, avers that the petitioner is merely a pawn in this whole debacle as she is the sole target, the reason being that, the Interested Party lodged a complaint against one Ralph who was charged under MCCR/E895/2023. The said Ralph is therefore using the criminal investigations to compel the interested party to withdraw the criminal case. The Respondents on the other hand aver that they were acting on a complaint and they followed the law.

33. Constitutional purity demands that public powers should be used to serve the public interest and objectives of the law. As such the criminal justice system cannot be used to achieve ulterior motives or be used as a tool of harassment to settle personal scores. Further, criminal proceedings ought not to be used to oppress or intimidate a party into settling a civil dispute, or to coerce a party to withdraw criminal proceedings.

34. The Supreme Court of India has recently in Arnab Ranjan Goswami v. Union of India [2020] 14 SCC 12 as cited with approval in Mohammed Zubair vs State of Nct Of Delhi Writ Petition [Criminal] No 279 of 2022 reiterated the role of courts in protecting personal liberty and ensuring that investigations are no used as a tool of harassment:

> " 60. [...] Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally, it is the duty of courts across the spectrum – the district judiciary, the High Courts and the Supreme Court – to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum – the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media, and in the dusty corridors of courts alive to the rule of [and not by] law. Yet, much too often, liberty is a casualty when one of these components is found wanting. 61. [...] The doors of this Court cannot be closed to a citizen who can establish prima facie that the instrumentality of the State is being weaponized for using the force of criminal law. Our courts must ensure that they continue to remain the first line of defense against the deprivation of the liberty of citizens."

35. In Kenya, the position was espoused in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001:

> " Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will

receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case."

36. In Commissioner of Police & Another vs. Kenya Commercial Bank Ltd & 4 Others [2013] eKLR, the Court of Appeal held that the High Court can stop investigations by the police when the same amounts to an abuse of the Court process. The Court held that:

> "Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of inquiry. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, to secure the ends of justice, and restrain the abuse of power that may lead to harassment or persecution. See Githunguri v Republic [1985] LLR 3090. 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. See Ndarua v. R.[2002]1EA 205"

37. In the case at hand, the burden was upon the Respondents to show that the decision to institute the criminal investigations was within the law, was not made in bad faith, was not intended to achieve ulterior motives or deployed as a tool for personal score-settling or vilification. I have looked at the material placed before me and will now consider whether the Respondents have discharged that burden.

38. The Petition and supporting affidavit were filed on 6 November 2025. The Interested party filed his replying affidavit on 25 April 2025 with the leave of the court. The Respondents filed their Replying Affidavit on 9 May 2025. However, looking at the Respondents' Replying Affidavit, it is silent on the allegations levelled by the Interested party. I say this because, both the Petitioner and the Interested party averred and provided evidence to demonstrate that they had a history with the complainant. The replying affidavit is quite telling:

    i. The Interested party is a partner at the law firm of Arwa and Change Advocates where the petitioner works as the firm manager.

    ii. Ralph Nguma, the complainant, is not a stranger to him or the firm. Further, they have had a controversial and tumultuous relationship.

    iii. The law firm of Arwa and Change Advocates noticed that Ralph Nguma was masquerading as a partner of the law firm and misleading the public. They issued a public notice to this effect.

iv. The interested party lodged a complaint against Ralph Nguma. Mr Nguma had purported to take up and represent a client who was being represented by the firm. The LSK wrote to DCI asking for investigations and the said Nguma was charged in MCCR/E895/2023.

v. Ever since he made the complaint to the LSK, Mr. Nguma has brought up frivolous and vexatious allegations and proceedings against the law firm and the interested party meant to tarnish and disdain his name and reputation including the dismissed claim before the Advocates Complaints Commission.

vi. The interested party has also annexed an investigative report by the employer of the 4th respondent. The report discloses how Ralph Nguma used the 4th Respondent to intimidate, harass, and coerce victims to withdraw any ongoing criminal matters against Nguma.

vii. That the petitioner is just a victim in a fight between himself and Ralph Nguma who wants to use the criminal justice system to arm twist him to withdraw the Milimani Criminal Case No. E895 of 2023.

39. From the above rendition, there is therefore a history, a history that this court cannot ignore. Further, the Respondents did not respond to the annexed investigative report from the National Police Service detailing an unholy alliance between the 4th Respondent, Isaac Kariuki, and the complainant Ralph Nguma. The report annexed as JC 7 exposes the unholy alliance, where the said officer is used by Ralph Nguma to coerce complainants to withdraw or settle claims. The damning report recommended that the said officer be transferred.

40. But let us come back to the gist of the facts provided by the Respondents. One, the Respondents claim that the complainant entered into an agreement with the firm of Arwa and Change Advocates where the petitioner is a financial manager and further that, as the financial manager, she wrongly amended the complainant's tax returns. The said KRA tax returns is a self-service feature. Be it as it may, if indeed the complainant entered into an agreement and has suffered harm due to negligence of an employee of the firm, why then go against the employee? Doesn't the remedy of a civil suit against the firm exist? At what point does the harm suffered from an agreement metamorphosize into a criminal dispute?

41. Second, the Interested Party averred that the complainant approached the firm of Remington Advocates LLP when the Complainant's relationship with the firm of Arwa and Change Advocates had irretrievably broken down. Further, he alleges that it is at the Remington firm that the complainant was misled on the amount of tax payable to KRA. According to the Interested Party, the complainant ought to have paid only Kshs 5,427,464 and not Kshs. 19, 227,042. If this is true, where and how does the petitioner get entangled in this maze? It should not be forgotten that the petitioner works at Arwa and Change Advocates and not at Remington Advocates LLP. The question that still baffles me therefore is how the petitioner participated in misleading the complainant into paying that amount.

42. To this end, I am persuaded by the petitioner and the interested party's affidavits that there was something sinister, other than the realization of the rule of law, or the fight against crime that motivated the investigations. Had the investigators exercised their independence during investigations, they would have reached a different conclusion. The question that begs is, how did the investigators miss such glaring and screaming gaps? The answer in my view lies in the annexed report marked JS 7 which has exposed the 4th Respondent as a mere conduit of the complainant, Ralph Nguma. I do not therefore hesitate to find that the criminal investigations and intended prosecution was solely meant to serve an ulterior motive.

43. I am constrained to agree with the Petitioner's argument that the Respondents abused their powers as was held in Jacob Juma & another v Commissioner of Police & another [2013] eKLR where the Court stated as follows:

> " ..... However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. Law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon, that failure may constitute a lack of reasonable and probable cause for the purposes of malicious prosecution."

44. I will reiterate that criminal justice powers are not toys to be played around with, and this Court, as the bulwark and sentinel of fundamental rights and freedoms, must enforce the Bill of Rights in our Constitution where the violation is proved and quash criminal investigations which violate *the Constitution*. Put differently, this Court should not be seen to abet abuse of power camouflaged as criminal investigations.

45. I find that the machinery of the criminal justice is being deployed as a pawn in the settlement of a civil dispute. As such the Respondents are in violation of Articles 10, 19, 20, 21, 22, 23, 245, and 258 of *the Constitution*. In addition, their actions also violated the rights of the petitioner as provided for in Articles 28 and 29 of *the Constitution*.

V. Despite this finding, I do not find it necessary to consider the question of whether there has been a violation of Article 73 and the remedy being sought against the 3rd and 4th Respondents that they are unfit to hold public office. I say so because the interested party has informed this court that he has lodged a complaint against the aforesaid officers to the relevant body. As such, and to avoid embarrassing the relevant body, this court shall refrain from saying anything on that ground.

VI. What Remedies should this court issue?

46. Article 23 of *the Constitution* authorizes this court to grant appropriate reliefs. It must be appreciated that the reliefs are meant to vindicate *the Constitution* and deter further harm. The Supreme Court has endorsed this opinion in several decisions. In Wamwere & 2 others v Attorney General SC Petition No. 34 & 35 of 2019 [2024] KECA 487 [KLR], the court held that the crafting of remedies in human rights adjudication goes beyond the realm of compensation for loss as it is principally for vindicating rights. In that case, the Court further held that although the appellants did not provide any evidence to demonstrate the loss they may have suffered due to the violation of their rights and freedoms from inhuman treatment, it was important for the court to vindicate and affirm the importance of the violated rights.

47. In CMM [Suing as the next friend and on behalf of CWM] & 6 Others v The Standard Media Group & 4 Others, [2023] KESC 68 [KLR] the apex Court equally addressed itself to what a trial Court should do in its assessment of an award for compensation in constitutional rights violation claims when it held;

> "...All the trial court was expected to do in considering this prayer was to assess what, in the circumstances of the case would be the appropriate compensation, or what other relief would vindicate the appellants' contravened rights. Examples of factors the court would have taken account of include the fact that the violations related to children; that some of the children had to transfer from the school; some were ridiculed, and being minors they were bound to suffer distress, trauma, anguish, fear and lowered self-confidence. On the other hand, exculpatory factors to consider would be the fact that some of the respondents, upon learning of the complaints about their publications immediately pulled down the offending story.[100]In the result, it was erroneous for the two courts below to ignore settled principles for the award of compensation in constitutional rights violation claims; namely, that once the burden of proving a violation was discharged, it was not necessary for the appellants to prove any damage or loss so as to be entitled to any of the reliefs contemplated in Article 23[3]..."

48. In Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others SC Petition No. 2 of 2018 [2021] KESC 50 [KLR], the apex Court in overturning the decision of the Court of Appeal held that the questions and issues that a court has to consider in order to make an award of damages with regards to a constitutional violation is manifestly different to what the Court would consider in say, tortious or civil liability claim. The Court distinguished the same as follows;

> "...In the latter, the issues are clear cut, and quantification of the appropriate award is in most instances, straight forward. The same, however, is not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters does not present an explicit consideration of the issues; other issues such as public policy considerations also come into play. A Court obligated and mandated to evaluate the appropriate awards for compensation in constitutional violations does not have an easy task; there is no adequate damage standard that has been developed in our jurisprudence that recognizes that an award for damages in constitutional violations is quite separate and distinct from other injuries. In this regard, the Court of Appeal was unclear of what other material the Petitioners needed to present before the trial Court to establish that there was a violation of their constitutional rights by the Respondents and that the Court therefore abused its discretionary powers in issuing the award of damages. In the event and following our reasoning in Martin Wanderi & 106 Others v Engineers Registration Board & 10 others, SC Petition No.19 of 2015 [2018] eKLR we must overturn the appellate Court's decision on this issue....."

49. In this case, although the Petitioner did not provide evidence of the loss suffered, damages can still be issued to remedy the harm and vindicate *the Constitution*. This is so because the violation of rights and *the constitution* warrants the grant of damages. In this case, based on the facts above an award of Kshs. 300,000 is sufficient to vindicate the violated rights.

C. Reliefs

50. Accordingly, for the reasons set out above, the court makes the following orders:

    i. A declaration be and is hereby issued that the Respondents have violated Articles 10, 19, 20, 21, 22, 23, 245, and 258 of *the Constitution*.

ii. A declaration be and is hereby issued that the Respondents have violated Articles 28 and 29 of *the Constitution*.

iii. An order of permanent injunction is issued prohibiting the respondents from harassing, arresting, commencing a prosecution, or preferring any criminal charges against the petitioner before any competent court in the Republic of Kenya based on a complaint made by Ralph Nguma on the facts considered in this Judgment.

iv. An award of Kshs. 300,000 to the Petitioner to be borne jointly and/or severally by the Respondents.

v. Costs of the suit awarded to the Petitioner are to be borne jointly and/or severally by the Respondents.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JUNE 2025

D. KAVEDZA

JUDGE

In the presence of:

Mr. Ongoro for the Petitioner

Mr. Odhaimbo Isaac for the Interested Party

Mr. Mutuma for the 2nd Respondent

Tonny Court Assistant