



Odhiambo v Attorney General & 2 others; Nyanchoga (Interested Party) (Petition E400 of 2021) [2024] KEHC 354 (KLR) (Constitutional and Human Rights) (26 January 2024) (Judgment)

Neutral citation: [2024] KEHC 354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E400 OF 2021
M THANDE, J
JANUARY 26, 2024**

BETWEEN

CLIFFORD ONYANGO ODHIAMBO PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

THE HON. SPEAKER OF NATIONAL ASSEMBLY 2ND RESPONDENT

THE KENYA LAW REFORM COMMISSION 3RD RESPONDENT

AND

IAN NYANGAU NYANCHOGA INTERESTED PARTY

The definition of “victim” under the Victim Protection Act is unconstitutional for not providing for the protection, rights and welfare of all victims of criminal offences such as juristic persons

Reported by Kakai Toili

***Constitutional Law** – constitutionality of statutory provisions – constitutionality of section 2 of the Victim Protection Act - whether the limiting of the definition of victims to natural persons under section 2 amounted to unfair discrimination and therefore unconstitutional - whether the definition of victims under section 2 was unconstitutional for not providing for the protection, rights and welfare of all victims of criminal offences such as juristic persons – whether mere differentiation amounted to discrimination - Constitution of Kenya, 2010, articles 10, 27,47, 48, 49, 50(9) and 260; Victim Protection Act, Cap 79A, sections 2, 3 and 4.*

***Constitutional Law** – doctrine of separation of powers – Judiciary vis a vis Legislature - whether judicial intervention where there was a dispute on an alleged violation of the Constitution in statutory provisions amounted to a violation of the doctrine of separation of powers - Constitution of Kenya, 2010, article 94(1).*



Brief facts

The petitioner sought among other orders; a declaration that the definition of “victim” under section 2 of the Victim Protection Act No. 17 of 2014 was unconstitutional for not providing for the protection, rights and welfare of all victims of criminal offences such as companies, associations or other body of persons whether incorporated or unincorporated who were recognized as persons under article 260 of the Constitution of Kenya, 2010 (the Constitution) and contrary to article 50(9) of the Constitution; and a declaration that section 13 of the Victim Protection Act was unconstitutional to the extent that it limited the rights of juristic persons to challenge or add any evidence in criminal proceedings in which they were the complainants thus rendering such trials unfair and detrimental to the administration of justice.

The petitioner asserted that the Victim Protection Act was enacted to give effect to article 50(9) of the Constitution to *inter alia* provide the protection of victims of crime and abuse of power. It was the petitioner’s case that section 2 of the Victim Protection Act which restricted the definition of “victim” to natural persons discriminated against persons who were not natural persons. Further that the definition contravened the rights and fundamental freedoms of juristic persons recognized as such under article 260 of the Constitution as persons. The petitioner contended that the respondents had collectively failed or neglected to discharge their mandate thereby exposing non-natural persons to serious threats of violation of their rights and freedoms.

Issues

- i. Whether the definition of victim under section 2 of the Victim Protection Act was unconstitutional for not providing for the protection, rights and welfare of all victims of criminal offences such as juristic persons.
- ii. Whether limiting the definition of victims to natural persons under section 2 of the Victim Protection Act amounted to unfair discrimination and therefore unconstitutional.
- iii. Whether mere differentiation amounted to discrimination.
- iv. Whether judicial intervention where there was a dispute on an alleged violation of the Constitution in statutory provisions amounted to a violation of the doctrine of separation of powers.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 50 - Fair hearing

(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

Victim Protection Act, Cap 79A

Section 2 - Interpretation

"victim" means any natural person who suffers injury, loss or damage as a consequence of an offence;

Held

1. Pursuant to article 50(9) of the Constitution, Parliament enacted the Victim Protection Act. Section 2 of the Victim Protection Act defined “victim” as any natural person who suffered injury, loss or damage as a consequence of an offence. Section 4 of the Victim Protection Act listed the general guiding principles in the application of the Act. It further directed that the courts, administrative bodies and persons performing any function under the Act, shall respect and uphold the values and principles in the Constitution. In particular, they shall be guided by the provisions of article 10, 27(4), 47, 48 and 49 of the Constitution.
2. Article 10 of the Constitution provided for national values and principles of governance which bound every person and entity whenever any of them applied or interpreted the Constitution, enacted, applied or interpreted any law, or made or implemented public policy decisions. Relevant to the instant matter were the values of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, which must be upheld.



3. Article 27(1) of the Constitution provided that every person was equal before the law and had the right to equal protection and equal benefit of the law. Article 27(4) prohibited direct or indirect discrimination against any person on any ground. Discrimination on any ground was prohibited. While article 27(4) enumerated various grounds, it had used the word “including”, meaning that the list was not exhaustive. Article 260 of the Constitution defined “person” as including a company, association or other body of persons whether incorporated or unincorporated.
4. A court, administrative body or a person performing any function under the Victim Protection Act was required to respect and uphold the right of every person to a fair trial under article 47 of the Constitution, the right to a fair trial under article 48 of the Constitution and the rights of arrested persons as well as the right not to be discriminated against under article 27 of the Constitution. It was instructive that the words used in those provisions were “every person is equal before the law”, “access to justice for all persons” “any person” and “every person has the right to fair administrative action”. No distinction was made in the provisions, between a natural person and a juristic person.
5. The long title of the Victim Protection Act indicated that the Act was intended to provide *inter alia* for protection of victims of crime and abuse of power. No distinction was made between natural and juristic persons. It was thus not clear why in spite of what was indicted in the cited provisions of the Constitution and the Victim Protection Act, Parliament went ahead to define “victim” in the manner that it did.
6. It had been submitted in opposition to the petition that the purpose of the Victim Protection Act was to ensure the protection and rights of natural persons and were the Act to be extended to juristic persons, the same would be unimplementable. A look at the objects and purposes of the Victim Protection Act however, seemed to suggest otherwise.
7. From a reading of section 3 of the Victim Protection Act, recognizing and giving effect to the rights of victims of crime could apply to both natural and juristic persons. Similarly, protection of the dignity of victims through provision of better information, support services, reparations and compensation from the offender, establishment of programs to assist vulnerable victims, supporting reconciliation by means of a restorative justice response, among others could also apply to juristic persons. That was because juristic persons were also often victims of offences such as theft by servant, stealing, arson, malicious injury to property, rioters injuring building or machinery, forcible entry among others. As such, they also needed protection of the law.
8. There was no justifiable reason why juristic persons should not also be protected under the provisions of the Victim Protection Act. Accordingly, the contention that extending the provisions of the Act to juristic persons would render the same unimplementable, was not merited.
9. In an apparent departure from the impugned definition, section 5 of the Victim Protection Act provided that the Act applied to any person in Kenya, irrespective of nationality, country of origin or immigration status, who was a victim of crime committed within Kenya or outside Kenya, where the victim was a citizen of Kenya. While section 2 of the Victim Protection Act limited the protection of victims to natural persons, section 5 expanded the scope to any person. That accorded with article 260 of the Constitution.
10. Juristic persons were always in court either as perpetrators or as victims of offences. A careful reading of article 50(9) of the Constitution would show that the people of Kenya did not distinguish between natural persons and juristic persons when they directed Parliament to enact legislation to provide for the protection, rights and welfare of victims of offences. As such, to limit the definition of “victim” in the Victim Protection Act to natural persons was not only limiting, but also restrictive. Even more critical, it was discriminatory. The said definition ignored the fact that juristic persons could be, and often were victims of offences and also required protection of their rights and welfare as well as information and support services, reparation and compensation as do victims who were natural persons.



11. Mere differentiation did not amount to discrimination. However, differentiation was only permissible if it was not arbitrary and did not constitute unfair discrimination. Further, any law that promoted differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose.
12. All victims of offences whether natural or juristic persons suffered as a result of offences committed against them. It could not be said that juristic persons were not in any need of protection under the law. Indeed, under article 27(1) of the Constitution, juristic persons, being persons within the meaning of article 260 of the Constitution, were equal before the law and were entitled to equal protection and equal benefit of the law. Thus, the impugned definition had the effect of treating juristic persons differently, without reasonable justification yet they, like natural persons suffered as victims of offences. That differential treatment amounted to unfair discrimination, which was prohibited by the Constitution.
13. As a result of the unfair discrimination, juristic persons which were victims of offences were denied the rights available under Part III and victim services under Part IV of the Victim Protection Act, which were available to their counterparts who were natural persons. The denial of rights of victims of offences just because they were juristic and not natural persons, amounted to unfair discrimination. The unjust or prejudicial distinction in the treatment of different categories of victims militated against the equality and non-discrimination values and principles espoused in the Constitution.
14. A proper interpretation of article 50(9) of the Constitution was that the envisaged legislation therein providing for the protection, rights and welfare of victims of offences applied to all victims of offences, without distinction. Given the unequivocal wording of article 50(9), there could not be a legitimate reason for the unequal treatment of non-natural persons. The definition had thus failed to uphold the aspiration of article 50(9) which required Parliament to enact legislation providing for the protection, rights and welfare of victims of offences.
15. Article 1 of the Constitution provided that all sovereign power belonged to the people of Kenya. Under article 1(3), sovereign power at the national level was delegated to the 3 arms of Government namely, the Legislature, the Executive and the Judiciary. The Constitution had further made clear provisions for separation of powers between those co-equal arms of Government, ensuring that each carried out the functions assigned to it and that none encroached on the authority or functions of the others unless there was breach.
16. Legislative authority was vested in Parliament under article 94(1) of the Constitution. Parliament must therefore be allowed to discharge its legislative mandate without interference by other arms of Government. However, where a dispute arose, as in the instant case, alleging violation of the Constitution, then judicial intervention would not be a violation of the doctrine of separation of powers as the court would merely be performing its solemn duty under the Constitution.
17. The purpose of the Victim Protection Act was to protect the rights and welfare of victims of offences. As such, Parliament ought to have taken a broader view of the impact of offences upon all victims thereof and extended the definition of “victim” to include non-natural persons.

Petition allowed.

Orders

- i. *A declaration was issued that that the definition of “victim” under section 2 of the Victim Protection Act, No. 17 of 2014 was unconstitutional for not providing for the protection, rights and welfare of all victims of criminal offences such as companies, associations or other body of persons whether incorporated or unincorporated who were recognized as persons under article 260 of the Constitution and was contrary to article 50(9) of the Constitution.*
- ii. *In the premises, the court called upon Parliament to amend the Victim Protection Act No. 17 of 2014 so that the definition of “victim” therein, accords with the Constitution and to section 5 of the Victim Protection Act.*



iii. *The Deputy Registrar of the court was directed to forward a copy of the judgment to the Attorney General.*

Citations

Cases

Kenya

1. *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* Petition 102 of 2011; [2011] KEHC 2099 (KLR) - (Explained)
2. *Havi, Nelson Andayi v Law Society of Kenya & 3 others* Civil Application 28 of 2018; [2018] KECA 731 (KLR) - (Explained)
3. *Joseph Lendrix Waswa v Republic* Petition 23 of 2019; [2020] KESC 23 (KLR) - (Explained)
4. *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* Petition 13A, 14 & 15; of 2014 (Consolidated); [2014] KESC 9 (KLR) - (Explained)
5. *Kaguru, Susan Wambui & 7 others v Attorney General & another* Petition 545 & 553 of 2012 (Consolidated); [2013] KEHC 4690 (KLR) - (Mentioned)
6. *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* Civil Appeal 145 of 2015; [2019] KECA 902 (KLR) - (Explained)
7. *Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board & 7 others* Civil Appeal 11 of 2018; [2018] eKLR - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 1, 10, 20(1)(3)(4); 22; 23(1); 27(1)(2); 25(a)(c); 40(1)(2); 46(1)(a)(3); 47; 48; 49; 48; 50(4)(9); 93(2); 94(1)(2); 260; 259(1)(c) - (Interpreted)
2. Criminal Procedure Code (cap 75) section 150 - (Interpreted)
3. Penal Code (cap 63) sections 268(1); 275 - (Interpreted)
4. Victim Protection Act (cap 79A) sections 2, 3, 5, 9(2)(3); 13; 23 - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. By his petition dated 28.9.21 and amended on 9.11.21, the petitioner seeks the following orders:
 1. A declaration that the definition of “victim” under section 2 of the *Victim Protection Act* No. 17 of 2014 is unconstitutional for not providing for the protection, rights and welfare of all victims of criminal offences such as companies, associations or other body of persons whether incorporated or unincorporated who are recognized as persons under article 260 of *the Constitution* and contrary to article 50(9) of *the Constitution*.
 2. A declaration that section 13 of the *Victim Protection Act* No. 17 of 2014 is unconstitutional to the extent that it limits the rights of juristic persons recognized as persons under article 260 of *the Constitution* to challenge or add any evidence in criminal proceedings in which they are the complainants thus rendering such trial unfair and detrimental to the administration of justice contrary to article 50(4) of *the Constitution of Kenya*.
 3. An order allowing all duly qualified advocates of the High Court of Kenya acting on behalf of companies, associations or any other body of persons whether incorporated or unincorporated who are complainants in ongoing criminal proceedings to make submissions, raise objections on points of law, pose questions to witnesses within strict controls of the court that may have been left out by the prosecutor and express their clients’ concerns at any stage in the criminal



proceedings without interfering with the victims' rights and prosecutorial powers of the Office of the Director of Public Prosecutions.

4. A declaration that section 13 of the [Victim Protection Act](#) No 17 of 2014 unjustifiably discriminates against complainants who are defined as persons under article 260 of [the Constitution of Kenya](#) by not allowing their advocates to adduce evidence that has been left, give oral evidence and written submissions just as it allows advocates representing complainants who are natural persons.
 5. A declaration that section 23 of the [Victim Protection Act](#) No 17 of 2014 is unconstitutional for only limiting the right to compensation and restitution to natural persons to the unjustifiable exclusion of companies, associations or any other body of persons whether incorporated or unincorporated who are recognized as persons under article 260 contrary to article 27(1) & (2) of [the Constitution](#) which provides that every person is equal before the law and has the right to equal protection and benefit of the law.
 6. An order compelling the Parliament of the Republic of Kenya to amend the definition of "victim" under section 2 of the [Victim Protection Act](#) No.17 of 2014 to provide for the protection, rights and welfare of all victims of criminal offences such as companies, associations or other body of persons whether incorporated or unincorporated who are recognized as persons under article 260 of [the Constitution](#).
 7. Any other orders and/ or reliefs as the court may deem fit.
 8. Costs of the petition.
2. The petitioner asserts that the [Victim Protection Act](#) (VPA) was enacted to give effect to article 50(9) of [the Constitution](#) to *inter alia* provide the protection of victims of crime and abuse of power. It is the petitioner's case that section 2 of the VPA which restricts the definition of "victim" to natural persons is discriminative against persons who are not natural persons. Further that the definition contravenes the rights and fundamental freedoms of juristic persons recognized as such under article 260 of [the Constitution](#) as persons. The petitioner contends that the respondents have collectively failed or neglected to discharge their mandate thereby exposing non-natural persons to serious threats of violation of their rights and freedoms as guaranteed and protected by [the Constitution](#).
 3. It is the petitioner's contention that the exclusion of juristic persons in the definition of "victim" has resulted in the violation of article 25(c) that provides that the right to a fair trial cannot be limited. It has also limited the rights and fundamental freedoms under articles 40(1),(2), 46(1)(a),(3) and 50(1) enjoyed by juristic persons. It is the petitioner's further contention that the VPA contravenes article 27 by conferring privilege to natural persons while denying the same to juristic persons and further denying them an equal opportunity to access courts of law and seek justice.
 4. The petitioner thus accuses Parliament of failing to exercise its legislative authority within the bounds set by [the Constitution](#) under article 93(2) in passing the VPA. Further that Parliament acted ultra vires by seeking to unjustifiably limit the rights and fundamental freedoms of persons recognized under article 260 of [the Constitution of Kenya](#) by limiting the rights set out under articles 22, 25(a), 27(1) & (2), 40(1)(2), 48, and 50 (9) of [the Constitution](#).
 5. The petitioner further contends that advocates representing juristic persons unlike those of natural persons are not allowed to address the court in criminal proceedings under section 150 of the [Criminal Procedure Code](#) on behalf of their clients. As such, they are not treated equally and are denied equal opportunity to defend their clients' interests. Attempts of advocates watching brief on behalf of juristic persons to participate in proceedings are met with constitutional objections by trial courts relying on



- the impugned section 2 of the VPA. In light of this and without proof of how such participation would prejudice accused person, trial courts have not interpreted *the Constitution* in a manner that develops the law, as required by article 259(1)(c). The petitioner has thus invoked the provisions of article 23(1) and 258(1) to institute the proceedings herein, in the public interest.
6. The 1st and 3rd respondents filed grounds of opposition dated 9.11.21. The grounds are on both the application and the petition. The grounds relating to the amended Petition are that the VPA enjoys a general presumption of Constitutional validity, which presumption has not been rebutted by the petitioner; the actions of the 2nd respondent National Assembly to enact the VPA also enjoy the presumption of legality and or constitutionality; that the petitioner has misconstrued and misapplied the definition of the term “victim” in the VPA and has confused the same to mean “a person” under article 260 of *the Constitution*; that the petition and orders therein are meant to unlawfully defeat and/or curtail the objects and purposes of the VPA as captured under section 3; that no law bars qualified advocates of the High Court of Kenya from representing parties in ongoing criminal proceedings provided they comply with directions of that particular court; that the petitioner has misconstrued the meaning and purport of the term “discrimination” and misapplied it to the current matter.
 7. The 2nd respondent also filed grounds of opposition dated 7.12.21. The grounds touching on the amended petition are that the 2nd respondent exercised its legislative power bestowed upon it under article 94(1) and (2) of *the Constitution* to enact the VPA in accordance with article 50(9) to ensure the upholding and fulfilment of articles 27(4), 47, 48 and 49 of *the Constitution*; that the petitioner has not rebutted the presumption of constitutionality of statutes which is enjoyed by every statute, until the contrary is proved (See *Susan Wambui Kaguru & 7 Others v Attorney General & Another* [2013] eKLR); that the mere exclusion of unnatural persons in the definition of a “victim” in the VPA does not amount to discrimination, since *the Constitution* has in no way expressly limited the use of the term “person” to always include both natural and unnatural persons at the same time and in the same measure in its application; that there will always arise circumstances where the use of the term will only be suitable for one group and not the other; that the petitioner has failed to give the impugned provision a purposive interpretation in order to understand the context within which it was enacted and the purpose intended to be served by the legislation; that it is not the duty of the court to alter the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous (see the Supreme Court of Kenya case of *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & Il others* [2014] eKLR).
 8. The 2nd respondent further stated that there is no legal provision both in the *Constitution* and in statute that limits the 2nd respondent from expressly and specifically providing for the protection of natural persons; that no evidence has been provided of the alleged unfair discrimination; that article 27(1) which provides for equality does not prohibit differentiation or classification based on different requirements of the law; that what the *Constitution* requires is that any classification or differentiation must bear a rational connection to a legitimate government purpose; that the VPA clearly provides that its intended to protect vulnerable individuals in the trial process. This has been achieved by the provision of the impugned sections; that the petitioner has drawn a misleading comparison of natural and unnatural persons in the case of this Act and has thereby failed to appreciate the import of the Act.
 9. The 2nd respondent urged the court to take into consideration the public interest being served through the implementation of the VPA by dint of the provisions of the impugned section. Grant of the orders sought will lead to scores of litigants currently seeking justice before the courts and many other potential litigants to be adversely affected as this shall impede their access to justice and protection by the law.



10. In an application for joinder dated 22.10.21, the interested party, an advocate of the High Court of Kenya stated that in the course of practice, he has received instructions from corporate clients to watch brief and represent their views and concerns in Kiambu CMCR Case No 1739 of 2017, *Republic v Charles Waweru Mutuga; Kibera*; CMCR Case No 1489 of 2017, *Republic -v- Phillip Weru Macharia & 2 others*; Kiambu CMCR Case No 1237 of 2018, *Republic v Michael Martin Namai & 5 Others*; Nairobi CMCR Case No E 2309 of 2020, *Republic v Julius Gicheru & 3 others*; Nairobi CMCR Case No 2009 of 2020, *Republic v Allan Kimathi Murungi*; Nairobi HC CRIM Misc App No E136 of 2021 *Charles Waweru v DCI, ODPP, CIC Insurance Group & The Co-Operative Bank of Kenya Limited* and Kiambu HC CRREV No E30 of 2021, *Craft Silicon Limited and Anor v Michael Martin Namai & 5 others*. The Interested Party contends that in all these cases, he was denied participatory audience in the proceedings, on several occasions, and therefore resigned to a passive and mere observer throughout the entire criminal trial proceedings.
11. In Kiambu CMCR Case No 1237 of 2018 for instance, as a result of cybercrime that took place on 21.6.18, the complainant Craft Silicon Limited incurred economic loss of Kshs 91,176,192.00 at the hands of the 6 accused persons; They were all charged with various criminal offences, including the stealing by servant from the complainant, contrary to section 268(1) and 275 of the [Penal Code](#). The Interested Party, watching brief for the complainant liaised with the State prosecutor for several months to establish a prosecution strategy as well as carrying out trial preparations before the prosecution hearing; that satisfied that the matter was ready to proceed, the complainant did on 11.1.21 avail 2 prosecution witnesses to testify before the trial court; that the assigned State prosecutor failed to appear in Court and another prosecutor with no prior knowledge of the case was sent to court to conduct the hearing; that the said prosecutor intimated to the trial court that he not interacted with the file but was simply holding brief for the assigned prosecutor; that in order to safeguard the integrity of the proceedings and the complainant's constitutional right to a fair hearing under article 50(1), the interested party sought an adjournment of the first hearing; that despite representing the complainant's views and concerns, the trial court declined the application for adjournment and insisted that the hearing proceed; that due to the prosecutor's lack of interaction with the matter, the nature of questions posed to PW-1 lacked structure and the first prosecution hearing proceeded in a disorderly manner.
12. Aggrieved by the *laissez-faire* conduct by the prosecution, the Interested Party did at the second hearing on 8.3.21 make an oral application for controlled participation in the proceedings on behalf of the complainant; that the nature of the controlled participation was grounded in law and based on articles 20(1),(3) and (4), 20(3), 27, 50(1),(7)(9) and 260 of [the Constitution](#), Sections 5, 9(2) and (3) of the [VPA](#) and the guiding principles laid out by the Supreme Court in [Joseph Lendrix Waswa v- Republic](#) [2020] eKLR; that despite submitting on guiding provisions of law, by a ruling delivered on 26.4.21, the trial court dismissed the complainant's application, indiscriminately placing the rights of the accused persons over and above the complainant's constitutional right to a fair trial; that the trial court denied the Intended Interested Party the right of audience for reasons that the complainant does not fall within the definition of a "victim" under the VPA and that the complainant's counsel cannot share in the prosecutorial duties of the Director of the Public Prosecution (DPP); that on 10.6.21 under instructions of the complainant, the Interested Party filed Kiambu High Court Criminal Revision No. E30 of 2021 against the trial court's ruling; that on 14.6.21, the Kiambu High Court on 14.6.21 stayed the trial proceedings before the trial court pending the final determination of the criminal revision; that based on the forgoing, the outcome of this Petition shall have a direct consequence on the trial court's ruling and nature of his involvement as an appointed legal representative on behalf of the complainant; that it is therefore imperative that the Court allows the same.



13. In a further affidavit sworn on 26.5.22, the petitioner countered the objections by the respondents by reiterating his earlier averments. He further asserted that there are many cases that demonstrate how magistrate courts are interpreting the provisions of VPA contrary to the Constitution, to the disadvantage victims of crimes that are juristic persons together with their appointed advocates. One such case is MCCR/1291/2019 *Republic vs James Basil Wasike* in which the accused being a servant of Highlight Travel Limited (a juristic person) had stolen Kshs. 1,148,654.27 worth of airline tickets from his employer. The petitioner averred that the proceedings show that a request by counsel watching brief for the juristic person to cross examine the witnesses was dismissed by the trial court as being what the trial court terms as "strange and mind boggling" and that the court does not need the help of watching brief to understand or appreciate the evidence. The court further stated that counsel should consult the prosecutor and assist him in pretrial preparation.
14. The petitioner further asserts that contrary to the averments of the 2nd respondent, non-natural persons have always been victims of offences under the Penal Code such as theft, stealing, arson, malicious injury to property, forcible entry among many other offences. The petitioner noted that the 2nd Respondent admitted that Parliament tailored the VPA specifically to protect individual victims. As such, impugned legislation has failed to live up to the expectations of giving effect to the provisions of article 50(9) of the Constitution. Further that none of the Respondents has explained the reasonable and justifiable reason for excluding juristic persons from enjoying the benefit of the VPA.
15. I have given due consideration to the submissions filed by the parties herein and having done so, I find that the only issue for consideration is whether the definition of "victim" to mean natural persons to the exclusion of excludes juristic persons who are recognized under article 260 as persons, is discriminative and therefore unconstitutional.
16. article 50 of the Constitution guarantees the right to a fair trial to all. At the heart of the matter herein is Clause (9) thereof, which provides as follows:

Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.
17. Pursuant to the above requirement, Parliament did enact the VPA to give effect to Clause (9). The long title of the VPA reads as follows:

AN Act of Parliament to give effect to article 50(9) of the Constitution; to provide for protection of victims of crime and abuse of power, and to provide them with better information and support services to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes
18. Section 2 defines "victim" as follows:

"victim" means any natural person who suffers injury, loss or damage as a consequence of an offence;
19. Section 4 lists the general guiding principles in the application of the VPA. It further directs that courts, administrative bodies and persons performing any function under the Act, shall respect and uphold the values and principles in the Constitution. In particular, they shall be guided by the provisions of article 10, 27(4), 47, 48 and 49 of the Constitution. article 10 provides for national values and principles of governance which bind every person and entity whenever any of them apply or interpret the Constitution, enacts, applies or interprets any law, or makes or implements public policy decisions.



Relevant to the matter herein are the values of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, which must be upheld.

20. article 27(1) provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Clause (4) goes on to prohibit direct or indirect discrimination against any person on any ground as follows:

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

21. Discrimination on any ground is prohibited. While article 27(4) enumerates various grounds, it has used the word “including”, meaning that the list is not exhaustive. In the case of *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* [2019] eKLR, Makhandia, JA addressed his mind to the term “including” and stated:

I am also in agreement that the word ‘including’ in article 27(4) is not exhaustive of the grounds listed there. article 259(4)(b) defines the word ‘including’ as meaning ‘includes, but is not limited to’. In the circumstances, I do not find any merit in the submission that the High Court was guided by the South African constitution that includes ‘sexual orientation’ as a prohibited ground. A purposive interpretation of the grounds listed in article 27(4) is to the effect that they are not exhaustive. The court will therefore have to determine on a case to case basis other grounds that may form part of article 27(4) whenever called upon to.

22. article 260 of *the Constitution*. which defines “person” as:

“person” includes a company, association or other body of persons whether incorporated or unincorporated;

23. A court, administrative body or a person performing any function under the VPA is required to respect and uphold the right of every person to a fair trial under article 47, the right to a fair trial under article 48 and the rights of arrested persons as well as the right not to be discriminated against under article 27. It is instructive that the words used in these provisions are “every person is equal before the law”, “access to justice for all persons” “any person” and “every person has the right to fair administrative action”. No distinction is made in the said provisions, between a natural person and a juristic person.

24. Notably, the long title indicates that the Act is intended to provide *inter alia* for protection of victims of crime and abuse of power. Again, no distinction is made between natural and juristic persons. It is thus not clear why in spite of what is indicted in the cited provisions of the *Constitution* and the VPA, Parliament went ahead to define “victim” in the manner that it did.

25. It has been submitted in opposition to the Petition that the purpose of the VPA was to ensure the protection and rights of natural persons and were the Act to be extended to juristic persons, the same would be unimplementable. A look at the objects and purposes of the VPA however, seems to suggest otherwise. Section 3 provides that the objects and purposes of this Act are to-

- (a) recognize and give effect to the rights of victims of crime;
 - a. protect the dignity of victims through —
 - i. provision of better information, support services, reparations and compensation from the offender, in accordance with this Act.



- ii. establishment of programs to assist vulnerable victims;
 - iii. supporting reconciliation in appropriate cases by means of a restorative justice response;
 - iv. establishment of programmes to prevent victimization at all levels of government;
 - v. preventing re-victimization in the justice process; and
- b. promote co-operation between all government departments and other organizations and agencies involved in working with victims of crime.

26. Reading the above provision, it is clear to my mind that recognizing and giving effect to the rights of victims of crime can apply to both natural and juristic persons. Similarly, protection of the dignity of victims through provision of better information, support services, reparations and compensation from the offender, establishment of programs to assist vulnerable victims, supporting reconciliation by means of a restorative justice response, etc can also apply to juristic persons. This is because juristic persons are also often victims of offences such as theft by servant, stealing, arson, malicious injury to property, rioters injuring building or machinery, forcible entry, etc. As such, they also need protection of the law. There is no justifiable reason why juristic persons should not also be protected under the provisions of the VPA. Accordingly, the contention that extending the provisions of the Act to juristic persons would render the same unimplementable, is not merited.
27. The courtnotes that in an apparent departure from the impugned definition, Section 5 of the VPA provides that the Act applies to any person in Kenya, irrespective of nationality, country of origin or immigration status, who is a victim of crime committed within Kenya or outside Kenya, where the victim is a citizen of Kenya. While Section 2 limits the protection of victims to natural persons, section 5 expands the scope to any person. This accords with article 260 of *the Constitution*.
28. It is common knowledge that juristic persons are always in court either as perpetrators or as victims of offences. A careful reading of article 50(9) of *the Constitution* will show that the people of Kenya did not distinguish between natural persons and juristic persons when they directed Parliament to enact legislation to provide for the protection, rights and welfare of victims of offences. As such, to limit the definition of “victim” in the VPA to natural persons is not only limiting, but also restrictive. Even more critical, it is discriminatory. The said definition ignores the fact that juristic persons can be, and often are victims of offences and also require protection of their rights and welfare as well as information and support services, reparation and compensation as do victims who are natural persons.
29. It is well settled that mere differentiation does not amount to discrimination and our courts have held as much. In *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR a 3 judge bench of this Court stated:

In our view mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary that it does not rest on any basis having regard to the object which the legislature has in view or which *the Constitution* had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of *the Constitution*. In addressing that issue, it is important to know whether there are other provisions or special provisions that have reserved special seats and benefits for the vulnerable members of our



society. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.

30. The learned Judges found that it is necessary for a party alleging discrimination to demonstrate unreasonableness and arbitrariness in the differentiation.
31. And in the case of *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR, Mativo, J (as he then was) considered allegations of discrimination and stated:
 92. From the above definition, it is safe to state that *the Constitution* prohibits unfair discrimination. In my view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.
 94. The clear message emerging from the authorities, both local and foreign, is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. But where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.
 95. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.
 96. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but prohibits unfair discrimination.
32. I concur with the learned Judge that not every differentiation that amounts to discrimination. However, differentiation is only permissible if it is not arbitrary and does not constitute unfair discrimination. Further, that any law that promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose.
33. All victims of offences whether natural or juristic persons suffer as a result of offences committed against them. It cannot be said that juristic persons are not in any need of protection under the law. Indeed, under article 27(1), juristic persons, being persons within the meaning of article 260, are equal before the law and are entitled to equal protection and equal benefit of the law. Thus, the impugned definition has the effect of treating juristic persons differently, without reasonable justification yet they, like natural persons suffer as victims of offences. This differential treatment amounts to unfair discrimination, which is prohibited by *the Constitution*.
34. As a result of this unfair discrimination, juristic persons which are victims of offences are denied the rights available under Part III and victim services under Part IV of the VPA, which are available to their counterparts who are natural persons. These rights and services include *inter alia* being permitted by the court under section 9, to have their views and concerns presented and considered at stages of the proceedings as deemed appropriate by the court; adducing, either in person or through an advocate, evidence that has been left out and to give oral evidence or written submission, as provided under section 13 of the *VPA*. They are also denied the right to access and participate in the criminal



justice process and in restorative justice to obtain reparations under section 14 as well as submitting information to the court for consideration, during plea bargaining, bail hearing and sentencing.

35. This discrimination can be seen in the documents exhibited by the petitioner and the interested party. In MCCR/1291/2019 *Republic v James Basil Wasike*, the trial court declined an application by counsel watching brief for the complainant, a non-natural person, to cross examine witnesses. The interested party as counsel watching brief for a juristic victim in Kiambu CM Criminal Case No 1237 of 2018, *Republic v Micabel Martin Namai & 5 Others* was denied controlled participation, on account that his client was not a natural person. This denial of rights of victims of offences just because they are juristic and not natural persons, amounts to unfair discrimination. This unjust or prejudicial distinction in the treatment of different categories of victims militates against the equality and non-discrimination values and principles espoused in the Constitution.
36. A proper interpretation of article 50(9) of the Constitution is that the envisaged legislation therein providing for the protection, rights and welfare of victims of offences applies to all victims of offences, without distinction. Given the unequivocal wording of Clause (9), there cannot be a legitimate reason for the unequal treatment of non-natural persons. The definition has thus failed to uphold the aspiration of article 50(9) which required Parliament to enact legislation providing for the protection, rights and welfare of victims of offences.
37. article 1 of the Constitution provides that all sovereign power belongs to the people of Kenya. Under article 1(3), sovereign power at the national level is delegated to the 3 arms of government namely, the Legislature, the Executive and the Judiciary. The Constitution has further made clear provisions for separation of powers between these co-equal arms of government, ensuring that each carries out those functions assigned to it and that none encroaches on the authority or functions of the others unless there is breach.
38. The court recognizes that legislative authority vested in Parliament under article 94(1) of the Constitution which provides:

The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.
39. Parliament must therefore be allowed to discharge its legislative mandate without interference by other arms of government. However, where a dispute arises, as in the present case, alleging violation of the Constitution, then judicial intervention would not be a violation of the doctrine of separation of powers as the court would merely be performing its solemn duty under the Constitution.
40. This intervention was articulated by the Court of Appeal in the case of *Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board and 7 others* [2013] eKLR as follows:

Where the Constitution had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the courts do not normally have.



41. It bears repeating that the purpose of the VPA was to protect the rights and welfare of victims of offences. As such, Parliament ought to have taken a broader view of the impact of offences upon all victims thereof and extended the definition of “victim” to include non-natural persons.
42. In the end and for the reasons stated, I find the impugned definition to be discriminative against juristic persons and prevents them from enjoying the rights and support available under the provisions of the VPA. Accordingly, I make the following orders:
 - i. A declaration is hereby issued that that the definition of “victim” under section 2 of the *Victim Protection Act* No. 17 of 2014 is unconstitutional for not providing for the protection, rights and welfare of all victims of criminal offences such as companies, associations or other body of persons whether incorporated or unincorporated who are recognized as persons under article 260 of *the Constitution* and is contrary to article 50(9) of *the Constitution*.
 - ii. In the premises, I call upon Parliament to amend the *Victim Protection Act* No 17 of 2014 so that the definition of “victim” therein, accords with *the Constitution* and to section 5 of the VPA.
 - iii. Pursuant to the foregoing, I direct the Deputy Registrar of this Court to forward a copy of this judgment to the Hon. Attorney General.

DATED AND DELIVERED VIA MS TEAMS THIS 26TH DAY OF JANUARY 2024

M. THANDE

JUDGE

