



**Anyango v Attorney General & 2 others (Petition 034 of 2021) [2024] KEHC 254 (KLR)
(Constitutional and Human Rights) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 034 OF 2021
LN MUGAMBI, J
JANUARY 25, 2024**

BETWEEN

SELLA ROSE ANYANGO PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

NAIROBI CITY WATER AND SEWARAGE COMPANY 3RD RESPONDENT

The constitutional avoidance rule

The gravamen of the petition was that the petitioner’s arrest, detention and prosecution by the respondents was unjustified and thus violated her constitutional rights. The court highlighted the factors to be proved in order to establish malicious prosecution and false imprisonment. The court noted that the grievances raised in the petition were ordinary civil disputes (tortious claims) that the petitioner was masking as constitutional grievances. Applying the doctrine of constitutional avoidance, the court held that it could not consider the same as a constitutional petition.

Reported by Kakai Toili

Constitutional Law – constitutional petitions – matters to be litigated via constitutional petitions - whether tortious claims could be adequately litigated as constitutional disputes.

Criminal Law – malicious prosecution – claims of malicious prosecution - what were the factors to be proved in order to establish malicious prosecution.

Criminal Law - false imprisonment – claims of false imprisonment - what was required to be proved in order to establish false imprisonment.

Words and Phrases – constitutional avoidance rule – definition of constitutional avoidance - the doctrine that a case should not be resolved by deciding a constitutional question if it could be resolved in some other fashion.



Brief facts

The petitioner claimed that the 3rd respondent's officers accompanied by police officers disconnected their water and seized a water pump. That was in spite of an ongoing court matter over the issue. The petitioner was aggrieved that the police officer on the same day arrested and hurled her into their vehicle. The petitioner further claimed moreover that the officers sought a bribe of Ksh.10,000 from her before taking her to the police station which she refused to issue. It was her assertion that as a consequence, she was charged with willful obstruction.

It was the petitioner's case that the respondents' actions subjected her to psychological torture, trauma, depression and injury to her reputation due to the unwarranted accusations. It was further asserted that her detention was unjustified and that no credible investigations were conducted prior to her prosecution. On that premise it was argued that the prosecution instigated against her was malicious. The petitioner accordingly took the view that the respondents' actions violated her constitutional rights.

Issues

- i. Whether it was proper to litigate issues in tort as constitutional disputes?
- ii. What were the factors to be proved in order to establish malicious prosecution?
- iii. What was the threshold of establishing false imprisonment?

Held

1. The mandate of the respondents was provided for in the Constitution. The National Police Service was established under article 243 of the Constitution. The National Police Service Act, 2011, which operationalized article 243 provided in section 24(e) that one of the functions of the police was the investigation of crimes. The 2nd respondent derived his powers from article 157 of the Constitution and his mandate spelt out in the articles 157(4),(6), (10) and (11). The Office of the Director of Public Prosecutions Act, 2013 under section 6 provided for the manner of carrying out the functions.
2. The Office of the Director of Public Prosecution being an independent institution established under the Constitution, the court could only interfere with or interrogate its actions where there was contravention of the Constitution. For the petition to succeed, the petitioner must demonstrate that the officers of the respondent were in breach of their mandate in arresting, incarcerating and prosecuting the petitioner.
3. The facts as pleaded presented a dispute that was allegedly based on unlawful arrest, confinement and malicious prosecution. Though the allegations could be framed as constitutional violations, they could very well support a tortious claim of false imprisonment and malicious prosecution but the petitioner appeared to have deliberately avoided taking that route. For malicious prosecution, all what the petitioner would have been required to prove was the presence of four elements, namely;
 - a. the respondent instituted the prosecution against the petitioner;
 - b. the prosecution ended in her favour;
 - c. the prosecution was instituted without reasonable and probable cause; and
 - d. that the prosecution was actuated by malice.
4. In regard to false imprisonment, all what the petitioner would have been required to demonstrate was denial of personal liberty by acts willfully done by another person to restrain or confine her in a restricted place without her consent and without any lawful cause and the fact that she was aware of the confinement.
5. The allegations raised heavily lay in the tort of false imprisonment and malicious prosecution. The petitioner's cause of action could have adequately been remedied by conventional torts law not as a constitutional grievance.
6. Concerning the allegations of bribery made by the petitioner, that was the proper province of criminal law. The petitioner did not even demonstrate that she reported the complaint to the relevant investigative agency for investigation.



7. The grievances raised in the petition were ordinary civil disputes (tortious claims) that the petitioner was masking as constitutional grievances. Applying the doctrine of constitutional avoidance, the court could not consider the same as a constitutional petition.

Petition dismissed with costs to the respondents.

Citations

Cases

1. Abkdiwahab Ibrahim Ali & another vs Inspector General of the National Police Service & 3 others (Petition 400 of 2016; [2017] eKLR) — Explained
2. Anarita Karimi Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR)) — Explained
3. Anthony Njenga Mbuti and 5 others v Attorney General and 3 others (Constitutional Petition 45 of 2014; (2015) eKLR) — Explained
4. Bethwel Omondi Okal v Attorney General , Kenya Power And Lighting Company & Director of Public Prosecution (Constitutional Petition 503 of 2016; [2018] KEHC 7437 (KLR))
5. Calvin Ouma Magare & 18 others v Director of Public Prosecutions, Attorney General, Inspector General of Police, Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & Ibrahim Wesonga Herese (Constitutional Petition E004 of 2021; [2022] KEHC 1460 (KLR)) — Followed
6. Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others (Constitutional Petition 204 of 2019; [2019] e KLR) — Explained
7. Daniel Waweru Njoroge & 17 Others v Attorney General (Civil Appeal 89 of 2010; [2015] KEHC 1154 (KLR)) — Explained
8. Denis Joseph Shijenje & another v Kenya Revenue Authority & 2 others (Petition 139 of 2019; [2021] eKLR) — Explained
9. Dickson Chebuye Ambeyi v National Police Service & Office of the Attorney General; Peter Sifuna Wesonga & Mary Kalakacha (Interested Parties) (Petition 10 of 2019; [2020] KEHC 870 (KLR))
10. Dr Lucas Ndungu Munyua v Royal Media Services Limited & another (Civil Case 52 of 2008; [2014] KEHC 2582 (KLR)) — Explained
11. Francis Anyango Juma v Director of Public Prosecutions & Commissioner of Police (Petition 160 of 2012; [2012] KEHC 2618 (KLR)) — Explained
12. Gitobu Imanyara, Njehu Gatabaki & Bedan Mbugua v Attorney General (Civil Appeal 98 of 2014; [2016] KECA 557 (KLR)) — Explained
13. James Kanyiita Nderitu v Attorney General & Director of Public Prosecution (Civil Appeal 96 of 2013; [2019] KECA 1006 (KLR)) — Explained
14. John Harun Mwau vs Peter Gastrow & 3 Others ([2014] eKLR) — Explained
15. Kenya Commercial Bank Ltd & 2 Others vs Commissioner Of Police And the Director Of Criminal investigations Department & Another Interested Party benjoh Amalgamated Ltd (Petition 218 of 2011; [2012] eKLR) — Explained
16. Keroche Industries LTD vs Kenya Revenue Authority and 5 others (Misc Civ Appli 743 of 2006; (2007) eKLR) — Explained
17. MMS vs Benjamin Mutua Matolo & another (Civil Appeal 21 of 2018; [2022] eKLR) — Explained
18. Sonia Kwamboka Rasugu vs Sandalwood Hotel and Resort Limited T/A Paradise Beach Resort and Leon Muriithi Ndubai (Petition 156 of 2011; [2013] KEHC 4134 (KLR)) — Explained
19. Tobias Moinde Kengere v Postal Corporation of Kenya, Inspector General of Police & Attorney General (Civil Suit 3B of 2019; [2019] KEHC 9950 (KLR)) — Explained
20. Uhuru Muigai Kenyatta vs. Nairobi Star Publication Limited (Petition 187 of 2012; (2013) eKLR) — Explained
21. Dendy vs Univeristy of Witwatersrand, Johannesburg and others ((2006) 1LRC 291) — Followed

Statutes



1. Constitution of Kenya, 2010 (Const2010) — article 27(1); 27(4); 27(5); 28, 29(d); 29(f); 32, 33, 35, 39, 49, 157, 157(11), 243 — Cited
2. National Police Service Act, 2011 (Act No. 11A of 2011) — section 24(e) — Cited
3. Office of The Director of Public Prosecutions Act, 2013 (Act No. 2 of 2013) — section 6 — Cited
4. Water Act, 2016 (No. 43 of 2016) — section 59, 145(a); 147 — Cited

International Instruments

1. International Covenant on Civil and Political Rights (ICCPR), 1966

Advocates

None mentioned

JUDGMENT

The Petition

1. The petition dated May 18, 2020 was filed against the respondents for the alleged malicious and unlawful arrest, detention and prosecution of the petitioner. Accordingly, the petitioner seeks the following reliefs against the respondents:
 - a. A declaration that the way the petitioner was bungled into an already waiting car, demanding for bribe and making numerous trips without taking the petitioner to a police station was in the circumstances a violation of the petitioner’s fundamental right of the security of the person and freedom from being subjected to any form of violence including freedom from torture, cruel, inhuman and or degrading treatment contrary to articles 29(d) & (f), 32, 33 and 35 of [Constitution](#).
 - b. A declaration that the arrest and detention of the petitioner in police custody before being arraigned in a court of law was a violation of the petitioner’s fundamental right to personal freedom, liberty and rights of an arrested person contrary to articles 39 and 49 of the [Constitution](#).
 - c. A declaration that the detention of the petitioner in police custody incommunicado without access to any person from the outside world was a violation of the petitioner’s fundamental rights to human dignity and to the right to have the dignity protected, the security of person, and the protection of law, fundamental freedom from cruel, inhuman and degrading treatment contrary to articles 28 and 29(d) & (f) of the [Constitution](#).
 - d. A declaration that the prosecution of the petitioner on pretended, fabricated and unfounded criminal charges of willful obstruction in city court’s Criminal Case No 7932 of 2019 was a violation of the fundamental right of the petitioner to equal protection and equal benefit of the law and amounts to subjecting the petitioner to cruel ,inhuman and degrading treatment contrary to article 27(1), 29(d) & (f), 32, 33 and 35 of the [Constitution](#) and was in the whole circumstances an abuse of criminal law, the process of court and a malicious prosecution.
 - e. General damages as the court shall assess consequent to the declarations of violations of fundamental rights and freedoms in (a) to (d) above.
 - f. An award of exemplary, aggravated and or punitive damages for blatant, callous, oppressive and highhanded violation of constitutional rights by offices of the government.
 - g. Costs of the petition.



- h. Interest on prayers (e) to (g) above.

The Petitioner's Case:

2. The petitioner in her affidavit sworn on May 18, 2020 stated that on May 19, 2019, the 3rd respondent's officers accompanied by police officers disconnected their water and seized the water pump. This is in spite of an ongoing court matter over the issue. She is aggrieved that the police officer on the same day arrested and hurled her into their vehicle.
3. She claimed moreover that the officers sought a bribe of Ksh 10,000 from her before taking her to Kayole Police Station which she refused to issue. It was her assertion that as a consequence, she was charged with willful obstruction contrary to section 145(a) of the Water Act 2016 as read with section 147 of the Act.
4. She was released from Kayole Police Station at around 9 pm on the same day upon a cash bail of Ksh 10,000 being paid by her father. The cash bail receipt issued on June 1, 2019 indicated that the petitioner was scheduled to take a plea at Makadara Law Courts on June 10, 2019. This however did not materialize as the prosecutor informed her that her matter was supposed to be mentioned at City Court not Makadara Law Courts.
5. It is averred that upon explaining the circumstances to the Magistrate at the City Court, the warrant of her arrest was lifted. She as well was granted a cash bail of Ksh.80,000. The prosecution of the Case concluded on March 6, 2020 when the judgment was delivered in the matter acquitting her.
6. It is the petitioner's Case accordingly that the respondents' actions subjected her to psychological torture, trauma, depression and injury to her reputation due to the unwarranted accusations. It was further asserted that her detention was unjustified and that no credible investigations were conducted prior to her prosecution. On this premise it was argued that the prosecution instigated against her was malicious. The petitioner accordingly takes the view that the respondents' actions violated her constitutional rights under article 27(1), (4) & (5), 28,29(d) & (f), 32, 33,35 ,39 and 157(11) of the Constitution.

1st Respondent's Case

7. The 1st respondent in response, filed a replying affidavit by Samuel Menganyi, a police officer sworn on August 2, 2022. He deposed that on the material day, APC Joseph Wambugu Wairimu and Beatrice W Mwangi accompanied the 3rd respondent's officers to conduct a routine check at Greenfield Estate. During the check at the petitioner's house, it was noted that there was an illegal water connection. He deposed that the petitioner was uncooperative and in fact ended up locking out the officers curtailing the exercise.
8. Following this, the police officers arrested the petitioner and booked her in at Kayole Police Station under OB 38/19/05/2019. The offence as stated was obstructing the 3rd respondent's officers whilst they carried out their duties under section 145(a) as read with section 147 of the Water Act.
9. He deposed that the petitioner was released on a cash bail of Ksh.10,000 and scheduled to appear before the Chief Magistrate Court at city court on May 21, 2019. He admitted that the petitioner's appearance before the Makadara Law Courts was an inadvertent error on their part.
10. He refuted that petitioner's claim that a bribe had been sought from her adding that even so the same was never reported. He as well argued that the petitioner's arrest, detention and prosecution was premised on a probable cause after establishing commission of a crime on the petitioner's part. He



concluded by stating that the petition was defective as failed to meet the threshold set for constitutional petitions.

3rd Respondent's Case

11. According to the 3rd respondent's officer, Kilonzo Musyoka in his replying affidavit sworn on February 23, 2021, accompanied by police officers they visited the petitioner's premise at Greenfield Estate on May 19, 2019. This was following a complaint by their officer who informed that the petitioner had repetitively refused to grant access to the premise for the purposes of disconnecting the water supply due to accrued unpaid water bill of Ksh 127,853 as at December 31, 2019.
12. He deposed that during their official visit, the petitioner attempted to frustrate their efforts and even locked the gate. He further deposed that the petitioner's water pump was illegally connected. This is since it was directly connected from the main line instead of the reservoir. As a result, this interfered with the other tenants' water supply.
13. Owing to these circumstances the petitioner was arrested by the police officer and taken to Kayole Police Station. He additionally informed that the officers issued the petitioner's brother who was at the premise with summons to be issued to the father who was not present. In view of this account, he opposed the petitioner's averments and disparaged the claims as being falsehoods.

Parties' Submissions

Petitioners' submissions

14. The Firm of Agutu and Company Advocates on behalf of the petitioner filed written submissions dated May 6, 2022. Counsel on whether the petitioner's rights had been violated under articles 27(1), (4) & (5), 28, 29 (a), (d) & (f), 32, 33, 35, 36 and 39 of the Constitution answered in the affirmative. This is because of the manner in which the respondents handled the petitioner and their actions during the arrest, detention and prosecution. Counsel relying on the account in the petitioner's affidavit contended that there was no rational reason to arrest, detain and prosecute the petitioner once the water had been disconnected.
15. Furthermore, it was submitted that the petitioner was not informed of the reason for her arrest and the rights of an arrested person. Counsel argued that the arrest of a suspect ought to only occur once there is sufficient evidence. Reliance was placed in article 9(1) of the International Covenant on Civil and Political Rights which prohibits arbitrary arrest and detention. Equally, the case of Anthony Njenga Mbuti and 5 others v Attorney General and 3 others (2015) eKLR where it was held that:

“That the conduct by law enforcement officers profiling suspects on mere suspicion, arresting and detaining them with no evidence of crime committed is arbitrary and discriminatory against the rights guaranteed in our Constitution.”
16. Like dependence was placed in Sonia Kwamboka Rasugu v Sandalwood Hotel and Resort Limited T/ A Paradise Beach Resort and Leon Muriithi Ndubai (2013) eKLR, Daniel Waweru Njoroge and 17 others v Attorney General (2015) eKLR, Keroche Industries LTD v Kenya Revenue Authority & 5 others (2007) eKLR and Hicks v Faulkner (1878) 8 QBD 167 and Kagame v Attorney General & another (1969) EA 643.
17. Consequently, counsel submitted that the petitioner's arrest violated her right not to be deprived of her freedom and freedom of movement under article 29(1) and 39(1) of the Constitution. Moreover, that the police officers' actions were discriminatory contrary to article 27(4) of the Constitution. The act of



hurling the petitioner into the vehicle being taken around for 5 hours and being detained violated her right under article 25, 28 and 29 of the *Constitution*. Reliance was placed in *Moses Tengeya Omweno vs Commissioner of Police and another* (2018) eKLR where it was held that:

“As regards violation of the right to human dignity.... when it is illegal, it is not only an infringement of the freedom of movement, but also an act that undermines one’s dignity.”

18. Accordingly, owing to the violation the petitioner’s constitutional rights, counsel submitted that the petitioner is entitled to general, exemplary and punitive damages including compensation of Ksh 5,000,000. In support counsel cited the case of *Gitobu Imanyara & 2 others vs Attorney General* (2016) eKLR where the Court of Appeal held that:

“...the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements.”

19. Equal reliance was placed in *Dendy v Univeristy of Witwatersrand, Johannesburg and others* (2006) 1LRC 291.

1st Respondent’s Submissions

20. State counsel, Betty Mwasao on behalf of the 1st respondent filed written submissions dated August 24, 2022 where she sought to discuss whether the petitioner’s constitutional rights had been infringed hence deserving of the damages sought.
21. Relying on the threshold set out in the *Anarita Karimi Njeru v Republic* (1979) eKLR submitted that the petition fails the constitutional threshold. Counsel further stressed that an acquittal is not an automatic demonstration of the existence of malice resulting in malicious prosecution. Counsel asserted that the petitioner had failed to prove the ingredients of malicious prosecution as discussed by the Court of Appeal in *MMS v Benjamin Mutua Matolo & another* (2022) eKLR. It was argued that there was nothing malicious about the petitioner’s arrest, detention and prosecution as the same was done in view of a supposed commission of a criminal offense.
22. It is counsel’s submission that the petitioner’s allegations were refuted in the 3rd respondent’s replying affidavit where it was made known that the petitioner had water bill arrears. Additionally, it was stressed that the claim for the alleged ongoing court case was not proved. In view of this it was argued that the 3rd respondent was well within its mandate as empowered under section 59 of the *Water Act* in the actions its officer took. Furthermore, it was pointed out that section 145(a) of the *Water Act* provides that any person who obstructs the 3rd respondent’s officer while carrying out its duties commits a criminal offence.
23. In the same way, counsel attacked the petitioner’s assertion of being coerced to produce a bribe as the same was not evidenced. In total it was asserted that the instant suit does not disclose any constitutional issue.
24. Consequently, it is counsel’s submission that the petitioner having failed to demonstrate the alleged constitutional violations and proving her allegations, is not entitled to an award of damages as sought. Reliance was placed in *Abkdiwahab Ibrahim Ali & another vs Inspector General of the National Police Service & 3 others* (2017) eKLR where it was held that:

“It is only if infringement has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice developed in constitutional matters is to



award damages for violation of constitutional rights but it cannot be overemphasized that this is after there is evidence of the infringement.”

3rd Respondent’s Submissions

25. The 3rd respondent through Kabue Thumi and Company Advocates filed written submissions dated May 22, 2023 where counsel submitted that he who alleges must prove. According to counsel, the petitioner failed to prove her case by way of oral evidence which then would have been tested through cross examination. As such, it was argued that her claim remained unsubstantiated and unproved to the required standard. Reliance was placed in *Dickson Chebuye Ambeyi v National Police Service and others* (2020) eKLR where it was held that:

“...In any claim for general damages, the party claiming must formally prove their claim. It was foolhardy for the petitioner to have assumed that he could establish his claim by way of written submissions, instead of giving testimony to prove his claim. He should have sought to have the matter heard orally. This is a simple claim for unlawful arrest, false imprisonment and malicious prosecution, all of which are torts. At common law, the usual way of prosecuting them is by way of plaint, and formal proof. The mere fact that there are constitutional provisions which cover the same subject, and that there is provision for litigation under the *Constitution* for redress, besides the usual civil process, does not obviate the need for formal proof. The principles governing what ought to be proved, or the standards of proof, are the same.”

26. In the same breath, counsel emphasized that the petitioner had failed to prove the elements of malicious prosecution to the effect that the prosecution commenced the suit; the suit was terminated in her favour; that the suit was instituted without reasonable and probable case and lastly actuated with malice. In this regard counsel cited the case of *Tobias Moinde Kengere vs Postal Corporation of Kenya and 2 others* (2019) eKLR where the court citing the case of *Dr Lucas Ndungu Munyua v Royal Media Services Limited and another* (2014) eKLR held that:

“With respect to malice, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. As was held in *James Karuga Kiiru v Joseph Mwamburi and others* Nrb CA No 171 of 2000 [2001] eKLR, to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted.”

27. Analogous reliance was also placed in *Calvin Ouma Magare & 18 others v Director of Public Prosecutions and 4 others* (2022) eKLR. It is the 3rd respondent’s case in a nutshell that the petitioner failed to prove her allegations against the respondents.

Analysis and Determination

28. The issue before the court is whether the petitioner’s constitutional rights under articles 25(1), (4) & (5), 28, 29(a)(d) and (f), 32, 33, 35, 36 and 39 were violated by the respondents.

29. The gravamen of this petition is that her arrest, detention and prosecution by the respondents was unjustified and thus violated the petitioner’s constitutional rights. The petitioner claims that the police officers failed to carry out proper investigations of the complaint hence her prosecution by the 2nd respondent was as a consequence malicious.



30. The mandate of the respondents is well provided for in the Constitution. The National Police Service is established under article 243 of the Constitution. The National Police Service Act, 2011 which operationalizes the above article provides in section 24(e) that one of the functions of the police is the investigation of crimes. In Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others (2019) eKLR, the court in discussing the role of the police in investigation of crimes held:

“...The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power...Odunga J in Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR, said with regard to the power of the police to investigate:

42. “... It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers *inter alia* to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene...”

31. On the other hand, the 2nd respondent derives his powers from article 157 of the Constitution and his mandate spelt out in the following sub-articles:

- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - i. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - ii. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - iii. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.



- (11) In exercising the powers conferred by this article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
32. The *Office of the Director of Public Prosecutions Act*, 2013 under section 6 on the manner of carrying out the function provides as follows:
- a. not require the consent of any person or authority for the commencement of criminal proceedings;
 - b. not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the *Constitution*, this Act or any other written law; and
 - c. be subject only to the *Constitution* and the law.
33. The court in *Denis Joseph Shijenje & another v Kenya Revenue Authority & 2 others* (2021) eKLR discussing the mandate of the 2nd respondent noted as follows:
- “37. I find that the office of the Director of Public Prosecution being an independent institution established under the *Constitution*, the court can only interfere with or interrogate its actions where there is contravention of the *Constitution*. In the case of *Paul Ng’ang’a Nyaga v Attorney General & 3 others* (2013) eKLR, it was held that “this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the *Constitution*.”
34. Further in *Francis Anyango Juma vs The Director of Public Prosecutions and another* (2012) eKLR the court observed that:
- “Clearly, the intention under the *Constitution* was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the *Constitution* or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under the *Constitution*, or violation of the *Constitution* itself.”
35. In like manner, in *Kenya Commercial Bank Ltd & 2 others v Commissioner Of Police And the Director of Criminal investigations Department & another interested party benjob Amalgamated Ltd* [2012] eKLR the court held that:
- “25. The Office of the Director of Public Prosecutions 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 for 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*.”



36. It follows therefore that for the petition to succeed, the petitioner must demonstrate that the officers of the respondent were in breach of their mandate in arresting, incarcerating and prosecuting the petitioner.
37. However, a fundamental question that must be asked is whether this dispute as presented is in reality a constitutional dispute. The facts as pleaded in my view present a dispute that is allegedly based on unlawful arrest, confinement and malicious prosecution. Though these allegations can be framed as constitutional violations, they may very well support a tortious claim of false imprisonment and malicious prosecution but the petitioner appears to have deliberately avoided taking that route.
38. For malicious prosecution which the petitioner heavily complains about, all what the petitioner would have been required to prove is the presence of four elements, namely the respondent instituted the prosecution against the petitioner, the prosecution ended in her favour, the prosecution was instituted without reasonable and probable cause and that the prosecution was actuated by malice. The court in *Bethwel Omondi Okal v Attorney General & another* [2018] eKLR reiterated these principles as follows:
- “... For one to succeed, he/she must prove four elements. First that the criminal proceedings were instituted by the defendant who was instrumental in setting the law in motion against the plaintiff, second, that the defendant acted without reasonable or probable cause. Otherwise there must exist facts which show that the defendant genuinely believed that the criminal proceedings were justified; third, that the defendant must have acted maliciously. That the defendant in instituting the criminal proceedings acted with improper or wrongful motive. and fourth, the criminal proceedings must have terminated in the plaintiff’s favour having been acquitted of the charge laid against him. (See *Egbema v West Nile District Administration* [1972] EA 60) ...”
39. In regard to false imprisonment, all what the petitioner would have been required to demonstrate is denial of personal liberty by acts willfully done by another person to restrain or confine her in a restricted place without her consent and without any lawful cause and the fact that she was aware of the said confinement.
40. If therefore the claims can be adequately litigated in tort, was it proper for the petitioner to fashion the matter as a constitutional dispute?
41. This brings into focus the doctrine constitutional avoidance. *Black’s Law Dictionary*, 10th Edition, defines Constitutional avoidance rule as follows: The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.
42. Courts have consistently weeded out disputes that are disguisedly instituted as constitutional disputes when in reality they are not. In *Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited* (2013) eKLR Justice Lenaola stated:
- “...Where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of decision of Haco Industries where the converse may have been expressed as the position. My mind is clear however that not every ill in the society should attract a constitutional sanction as stated in *AG v Dutambala* Criminal Appeal No 37 of 1991 (Tanzania Court of Appeal) such sanctions should be reserved for appropriate and really serious occasions...”



43. Further in *John Harun Mwau v Peter Gastrow & 3 others* (2014) eKLR the court said:

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if the remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether in addition to breach of the other declaration of rights...It is established practice where a matter can be disposed without recourse to the Constitution, constitution should not be invoked at all...”

44. In the instant petition, this court considers the allegations raised heavily lie in the tort of false imprisonment and malicious prosecution. The petitioner’s cause of action could have adequately been remedied by conventional torts law not as a constitutional grievance. I find the words of the Court of Appeal in *James Kanyiita Nderitu v Attorney General and the Director of Public Prosecution* (2019) eKLR relevant in this matter. The court in dismissing a similar matter stated:

“... As we have stated above, the remedy for the appellant was to institute a suit for malicious prosecution. He has failed to do so and a constitutional petition cannot be used to circumvent primary legislation for enforcement of a given right or violation. It is not open to the appellant to urge that there can be no wrong without a remedy. Indeed, this legal principle is correct; the appellant had a remedy in the tort of malicious prosecution or an action for defamation, he has chosen not to pursue the causes of action within the legal time frame...”

45. Concerning the allegations of bribery made by the petitioner, that is the proper province of criminal law. The petitioner did not even demonstrate that she reported the complaint to the relevant investigative agency for investigation.

46. Guided by the above principles, this court is satisfied that the grievances raised in this petition are ordinary civil disputes (tortious claims) that the petitioner is masking as constitutional grievances. Applying the doctrine of constitutional avoidance, this court finds that it cannot consider the same as a constitutional petition. It is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 25TH DAY OF JANUARY, 2024.

L N MUGAMBI

JUDGE

