



**SMN v Director of Public Prosecution & 3 others; PM & another (Interested Parties)
(Constitutional Petition E017 of 2022) [2024] KEHC 5305 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION E017 OF 2022**

MW MUIGAI, J

APRIL 26, 2024

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLE 22 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF UNDER ARTICLES 1, 2, 3, 10,
19, 20(1)& (2), 3 &4, 21(1), 23(1) & (3), 27 (1), 28,29, 31(C, 36 (1) 45, 47,48, 258(1) & 259(1) O**

AND

**IN THE MATTER OF DISCRETIONARY PROSECUTORIAL
POWERS UNDER ARTICLE 157(1), (6) (10) & (11) UNDER
THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION**

AND

**IN THE MATTER OF TERMINATION OF PROSECUTION
UNDER S.40 OF THE SEXUAL OFFENCES ACT**

AND

**IN THE MATTER OF LEGITIMATE EXPECTATION AND FAIR TRIAL
HIGH COURT CONSTITUTIONAL PETITION EO17 OF 2022 MHC1**

AND

**IN THE MATTER OF THE UNITED NATION
UNIVERSAL DECLARATION OF HUMAN RIGHTS**

AND

**IN THE MATTER OF THE INTERNATIONAL COVENANT
ON ECONOMIC, SOCIAL & CULTURAL RIGHTS**

AND

IN THE MATTER OF SECTION 7 & 8 OF THE FAIR ADMINISTRATIVE ACTION 2015

AND

**IN THE MATTER OF SECTION 8(1)(4) AS READ WITH S 8(1) (4) OF THE SEXUAL
OFFENCES ACT NO. 3 OF 2006- & SECTION 11(1) OF THE SEXUAL OFFENCES ACT**



AND

IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOMS) PRACTISE & PROCEDURE RULES 2013, RULE 3,4,5,9 & 10

BETWEEN

SMN PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

THE CM'S MACHAKOS CRIMINAL COURT 4TH RESPONDENT

AND

PM INTERESTED PARTY

TITUS JOHN NDUNDU INTERESTED PARTY

JUDGMENT

The Petition

1. Vide a petition dated 19th September, 2022 the Petitioner herein sought the following reliefs from the court:
 - a. A declaration that section 40 of the *Sexual Offences Act* No.3 of 2006 is inconsistent with Article 157(6) and (10) of *the Constitution* of Kenya 2010 and therefore null and void to the extent of the inconsistency.
 - b. A declaration that the fundamental rights and freedoms of the petitioner have been violated by the respondents.
 - c. An order of certiorari do issue quashing the decision of the director of public prosecution to prosecute taken under article 157 of *the constitution* so far as it regards the petitioner as a victim of sexual violence in criminal case No S.O 15/2018 Republic vs Titus John Ndundu.
 - d. An order of prohibition do issue prohibiting the Director of Public Prosecution to prosecute under Article 157 of *the constitution* so far as it regards the petitioner as a victim of sexual violence in criminal case No S.O 15/2018 Republic vs Titus John Ndundu.
 - e. An Order of prohibition do issue prohibiting the chief magistrate court Machakos from hearing and determining Criminal Case No. S.O 15/2018 in so far as regards to the petitioner as a victim of the alleged sexual violence.
 - f. An order do issue terminating the proceedings before the chief magistrate court Machakos in criminal case No. S.O 15/2018.



- g. An appropriate award of damages be granted to the petitioner for the violation of her rights and freedom in the criminal case No S.O 15/2018
- h. The cost of this petition be awarded
- i. Any other relief that this Court may deem just to grant.

Background

2. The Petitioner averred that she was born in 12.01.2000 as evidenced in her birth certificate and corroborated by her national ID number 390XXXX and that she was an adult though was still a pupil at [Particulars primary school.
3. She averred that on 13th and 14th may 2018, she went to visit her grandmother RN without informing her mother who got unduly worried when she did not return- back home and as a result, her mother reported to Police at Wamunyu Police Station that her child had gone missing from home and the petitioner on coming back home the next day was taken to Wamunyu police Station by her mother where she was detained besides being aggressively interrogated and intimidated by the Police with threats of being jailed if she did not give a plausible account of where she had been.
4. She lamented that it was out of the said threats and intimidation, she was coerced to record a statement which was written by the police officer and was only told to sign it and was thereafter taken to Wamunyu Dispensary where on examination, no evidence of any sexual violation was established and was released and on 21/5/2018 she was again taken to Mwala Sub- County Hospital where she was again examined for sexual violation and that the examination was not only humiliating to her but was also done without her consent. The verdict came back that the petitioner had been defiled. The medical officer filled a P3 form two days after and on 28/5/2018 the 2nd interested party was arrested and arraigned in Court on charges of defilement contrary to Section 8(1)(4) of the *Sexual Offences Act* and indecent Act with a child contrary to section 11(1) of the Same act.
5. The Petitioner averred that on 26/7/2021 she was summoned to give evidence against the 1st interested party but she informed the prosecutor that she was discarding her evidence since the averments contained in the statement were only recorded by the police officers who forced her to sign the same and she was an adult afterall who was capable of making her own decisions.
6. She averred that she refused to testify and informed the court her displeasure in all that was going on since she was an adult capable of making her independent decisions but the pleas were ignored and the prosecutor applied for her to be detained for a period of 8 days and continued being held at G.K Machakos until 16/8/2021 when she was presented to court. 24days In custody and that her mother the 2nd interested party was also co ordered to be detained at Masii Police Station for failing to coerce her into giving evidence.
7. The Petitioner averred that out of realising that her life and that of her family were in grave danger due to detention, she out of fear and intimidation accepted to give evidence involuntarily and upon giving her evidence, she reached out to the prosecutor to have the proceedings terminated but was dismissed on account that the prosecutor does not take instructions from litigants.
8. The petitioner averred that having been denied a chance to highlight her plight instructed an advocate who addressed the court that the prosecution was premised on the wrong assumption that she was a minor when the alleged offence took place and that every time the matter came up before the court with her as the supposed victim, her rights and freedoms were being violated and continued to be



violated. The trial Court rendered its ruling dismissing the application for termination of the charges and directed that the matter proceed to full hearing.

9. The petitioner lamented that after the said ruling she again approached the prosecutor to intervene to have the charges terminated as they were infringing on her rights and freedoms but the prosecutor dismissed her that she had completed her role of being a witness and should allow the trial to go on.
10. The petitioner averred that having exhausted all avenues to get a reprieve in vain, on 23/8/2022 she approached the office of the Attorney general requesting that the said office considers terminating the charges since it is the only office mandated under the law to terminate any charges under the [sexual offences act](#) but the office to date has never responded or taken any action thereto.
11. It was her position that she was left with no other option but to turn to a constitutional court for protection as every time the criminal matter comes up for hearing, she is at the centre of the proceedings as a supposed victim and thus her rights continue to be violated

Supporting Affidavit in support of the petition

12. The Petitioner in her supporting affidavit dated 22nd September, 2022, sworn by Sarah Mutheu Ngumbau wherein she deposed inter alia that averred that she was born in 12.01.2000 as evidenced in her birth certificate and corroborated by her national ID number 390333419 and that she was an adult though was still a pupil at Wamunyu primary school.
13. She deposed that on 13th and 14th may 2018, she went to visit her grandmother Rita Ndua without informing her mother who got unduly worried when she did not return- back home and as a result, her mother reported to Police at Wamunyu Police Station that her child had gone missing from home and the petitioner on coming back home the next day was taken to Wamunyu police Station by her mother where she was detained besides being aggressively interrogated and intimidated by the Police with threats of being jailed if she did not give a plausible account of where she had been.
14. She lamented that it was out of the said threats and intimidation, she was coerced to record a statement which was written by the police officer and was only told to sign it and was thereafter taken to Wamunyu Dispensary where on examination, no evidence of any sexual violation was established and was released and on 21/5/2018 she was again taken to Mwala Sub- County Hospital where she was again examined for sexual violation and that the examination was not only humiliating to her but was also done without her consent. The verdict came back that the petitioner had been defiled. The medical officer filled a P3 form two days after and on 28/5/2018 the 2nd interested party was arrested and arraigned in Court on charges of defilement contrary to Section 8(1)(4) of the [Sexual Offences Act](#) and indecent Act with a child contrary to section 11(1) of the Same act.
15. The Petitioner averred that on 26/7/2021 she was summoned to give evidence against the 1st interested party but she informed the prosecutor that she was discarding her evidence since the averments contained in the statement were only recorded by the police officers who forced her to sign the same and she was an adult after all who was capable of making her own decisions.
16. She averred that she refused to testify and informed the court her displeasure in all that was going on since she was an adult capable of making her independent decisions but the pleas were ignored and the prosecutor applied for her to be detained for a period of 8 days and continued being held at G.K Machakos until 16/8/2021 when she was presented to court. 24 days In custody and that her mother the 2nd interested party was also co ordered to be detained at Masii Police Station for failing to coerce her into giving evidence.



17. The Petitioner averred that out of realising that her life and that of her family were in grave danger due to detention, she out of fear and intimidation accepted to give evidence involuntarily and upon giving her evidence, she reached out to the prosecutor to have the proceedings terminated but was dismissed on account that the prosecutor does not take instructions from litigants.
18. The petitioner averred that having been denied a chance to highlight her plight instructed an advocate who addressed the court that the prosecution was premised on the wrong assumption that she was a minor when the alleged offence took place and that everytime the matter came up before the court with her as the supposed victim, her rights and freedoms were being violated and continued to be violated. The trial Court rendered its ruling dismissing the application for termination of the charges and directed that the matter proceed to full hearing.
19. The petitioner lamented that after the said ruling she again approached the prosecutor to intervene to have the charges terminated as they were infringing on her rights and freedoms but the prosecutor dismissed her that she had completed her role of being a witness and should allow the trial to go on.
20. The petitioner averred that having exhausted all avenues to get a reprieve in vain, on 23/8/2022 she approached the office of the Attorney general requesting that the said office considers terminating the charges since it is the only office mandated under the law to terminate any charges under the [sexual offences act](#) but the office to date has never responded or taken any action thereto.
21. It was her position that she was left with no other option but to turn to a constitutional court for protection as every time the criminal matter comes up for hearing, she is at the centre of the proceedings as a supposed victim and thus her rights continue to be violated

1st Respondent's Grounds of Opposition

22. By a Grounds of Opposition dated 2nd November ,2022 and filed in court on 8th November,2022, wherein the 1st Respondent raised grounds of opposition that:
 - a. The Application and Petition was misconceived, incompetent and amounts to abuse of the court process and should be dismissed
 - b. The Petitioner was trying to usurp the constitutional powers under Article 157 (6) © of [the Constitution](#) and S. 40 of the [Sexual offences Act](#) No. 3 of 2006 vested in the office of the Director of Public Prosecutions
 - c. That the Court dealt with a similar application which was dismissed
 - d. The Director of Public Prosecutions does not require the consent of any person or authority for the commencement or discontinuation of criminal proceedings and in exercise of his powers or functions shall not be under the direct control of any person or authority.
 - e. The petitioner has not demonstrated how she will suffer any substantial injustice if the trial court proceeds with the criminal case and is determined on merit.
 - f. That the application was misconceived, frivolous, vexatious and an abuse of the court process

2nd , 3rd & 4th Respondents Grounds of Opposition

23. The Respondents on their Replying Affidavit dated 4th May,2023
24. and filed in court on 9th May,2023 opposed the application, it was averred that the petition was incurably defective, incompetent, untenable, frivolous, scandalous, vexatious and devoid of substance



while the affidavits in support was full of falsehoods, misrepresentation of facts and law, inconsistent and unsupported conclusions and tailored and stage managed to unfairly and improperly hoodwink the court.

25. Further it was averred that the petition was hopeless, misleading and devoid of any merit as the petitioner had failed to demonstrate the actions of the respondents that were laced with abuse of the court process and was an open attack at stopping and curbing the constitutional and statutory mandate of the respondents as the petitioner had merely raised issues alleging apprehension that her constitutional rights had been infringed albeit not demonstrating that the investigations and subsequent charge were marred with malice or that the prosecution acted in a manner to warrant the court's intervention.
26. That the petition neither meets the tenets for granting the orders sought nor has the petitioner satisfied the thresholds for constitutional petition as set out in Anarita Karimi Njeru versus Republic and that the petitioner had failed to demonstrate by evidence or at all which of her fundamental rights and freedoms were violated hence the petition is and remains unproven, hearsay and devoid of substance and specificity.
27. The respondents prayed that the petition be dismissed with costs.

1st Interested Party Replying Affidavit

28. The 1st interested party Philomena Mbithe in her replying Affidavit dated 7th November 2022, wherein she deponed that the petitioner was her daughter born on 12th January 2000 and had a birth certificate and national identity card confirming the same.
29. She deposed that her daughter left home on 13/5/2018 without her knowledge and never returned and since she was a pupil and a candidate at Wamunyu ABC Primary School, she was worried as she did not know what had happened to her and as a result went and booked an OB entry at Wamunyu Police Station that her daughter had gone missing and had last been seen on a bus stage standing alone the previous day.
30. She deposed that by the end of the day on 14/5/2018, rumours had started swirling around the village that Titus Ndundu was the one keeping her daughter in unknown place and engaging in sexual intercourse with her and as a mother she was grossly infuriated by the information and when her daughter resurfaced, she forced her to undergo a medical examination in order to verify whether what was being said about her sexual liason with the politician was true and whether she could be pregnant and the medical report at Wamunyu Health Centre Confirmed that there was no evidence of sexual intercourse and she had not conceived.
31. It was deposed that on 21/5/2018 the police summoned her and her daughter and instructed them to report to Wamunyu Police Station where they were taken by a Police Vehicle to Mwala Sub county hospital where her daughter was subjected to another medical examination and when she tried to inquire why she was being subjected to another medical examination, she was intimidated to silence by constable Mwangi who stated that it was not his duty to tell her what he was doing carrying out his mandate of investigating a crime and he told her that the Personnel at Wamunyu Health Centre were incompetent and that they now had good evidence against Titus Ndundu.
32. It was deponed that the said Police officer Constable Mwangi informed her that she will be required in court on 28/5/2018 when Titus Ndundu would be formally charged in court and on 27/5/2018, she was visited by Stephen Mboya in the company of another man who insisted that she should not fail



- to attend the court and informed that he shall ensure Titus Ndundu learns his lessons of not playing around with his seniors.
33. She deposed that on 28/5/2018 when she attended court she was surprised that cameras were all over them with pressmen insisting on interviewing them under the stewardship of Stephen Mboya Manywele directing imprudent words towards Titus Ndundu which really humiliated her and her daughter.
 34. It was consequently deposed that her daughter requested her to notify the prosecutor that she was not defiled and was not willing to give false testimony and the prosecutor insisted that her daughter must testify and on the said when her daughter declined to testify, the prosecutor applied for her to be detained for 24 days which really affected her and her family besides the humiliation they were already facing- in the village.
 35. It was deposed that she was on her part taken to Masii police station where the police insisted that she was the one misleading her daughter not to testify. An advocate intervened and she was released with stern warnings that should her daughter fail to testify she should be ready to go to prison.
 36. She deposed that her daughter's life had been turned upside down and so is her entire family, her daughter's self esteem has grossly been eroded, they are subject of ridicule and this has put a strain on their life.
 37. It was deposed the continued trial of the said Titus John Ndundu was only serving political interest at the expense of justice and gross violation of her family's right to privacy.
 38. She deposed that although the state's interest and indeed the constitutional and statutory powers to prosecute is recognized, the said powers must be exercised with caution and ensure the freedoms and rights of individuals are not put in jeopardy without recognized lawful parameters
 39. Finally, the Court was invited to make an informed decision and save her daughter's life and that of her family from the jaws of anarchy and oppression.
 40. The matter was canvassed by written submissions.

SUBMISSIONS

The Petitioner's Submissions

41. Respondents in their submissions dated 8th February ,2023, where it was submitted that that the petitioner was never defiled as she was of a majority age and the only sexual offence she could fall victim of was rape
42. On Power to prosecute, it was submitted that Article 157 (6) of *the Constitution* vests power to Prosecute with the Director of Public prosecution and that according to the above article the office of the Director of Public Prosecution is an independent office and normally the court will reluctantly interfere with the exercise of its powers except where the court process is being misused as an avenue to settle personal scores, case of Rosemary Wanja Mwangi & 2 Others vs Attorney General & 2 others, where the exercise of its mandate is outside the law and not in accordance with *the constitution*, where the DPP has exercised arbitrary, oppressively or contrary public policy as where there is abuse of the court process.
43. Reliance was made to the case of Thuita Mwangi & Others vs Ethics & Anti-Corruption Commission & 3 others Petition No 369 Of 2013 on the discretionary powers of the DPP and how it should be exercised within the corners of *the Constitution*.



44. On whether Section 40 of the *Sexual Offences Act* is unconstitutional, it was submitted that only the Attorney General has power to discontinue sexual offences which goes contrary to the provisions of Article 157 of *the constitution*. This was buttressed by the case of Investments & Mortgages Bank Ltd (I&M) vs Commissioner of Police & 3 others, Nairobi HC petition No 104 Of 2012 and submitted that section 40 of the sexual offence act was inconsistent with Article 157(10) of *the Constitution*
45. On whether the DPP exercised discretionary powers to prosecute, it was submitted that the commencement of any criminal case is rooted on proper and objective investigations and fair trial. Reliance was made to the case of Benard Mwikya Mulinge vs DPP and 3 others (2019) and that the prosecution is required to exercise caution and ensure that the prosecution process does not put freedom and rights of an individual in jeopardy. Reliance was made to the case of R vs AG Kipngeno Arap Ngeny vs High Court Civil Application no 406 of 2001.
46. It was submitted that the prosecution in this case was not only oppressive and vexatious but also carried out for ulterior motive for instance the nature of the charge and that the foundation of the charge is on the assumption that the petitioner was a minor despite having produced a birth certificate and an identity card that she was 18 years and 4 months old at the alleged time of the commission of the offence.
47. On the medical evidence, it was submitted that the petitioner averred that she was not defiled and her testimony corroborated by the medical evidence in the first medical report from Wamunyu Health Centre. However 5 days later, the petitioner alleged to have been compelled to undergo another medical examination at Mwala sub- county Hospital with a verdict of defilement and that only one inference could be drawn that someone was looking for results that would help support a case against the 2nd interested party and this was against the discretionary powers of the DPP as donated by *the Constitution* and the law
48. On Non - Rebuttal of the 2nd interested Party evidence that she received money to facilitate her court attendance which neither the prosecution nor the investigating officer controverted it which only meant that there were other forces that were pushing for institution of criminal charges
49. On the imprisonment of the petitioner for 24 days it was submitted that this was done out of malice because the petitioner had informed the prosecutor on her age and unwillingness to lie under oath and the prosecutor then proceeded to imprison her as a refractory witness.
50. On deliberate failure to authenticate birth certificate and ID card, it was submitted that the petitioner gave out her copy of her Identity Card and Birth certificate to the prosecutor to confirm her age before declining to testify and it was exactly 18 months and the prosecutor was still alleging to have lodged investigations and that by insisting on proceeding with the case without ascertaining the issue of age, the prosecution was grossly abusing their powers.
51. On the violation of the petitioner's right to human dignity and privacy reliance was placed in the case of MWK vs Attorney General & 3 others (2017) it was submitted that this was a case of the violation of the said rights and not to mention the limitation that the said right has been subjected to contrary the law. The petitioner has maintained that she is an adult capable of making decisions for herself however the respondents took no steps to verify this assertion and continue to treat her as a minor.
52. It was submitted it is the petitioner's position by deliberately refusing to treat her as an adult. She has been subjected to medical examination without her consent and or explanation. It was submitted the cardinal rule and the law as well that any person being subjected to any medical examination must give an informed consent. Reliance was made to the case of Rao vs MGH & 2 others (2020) eKLR. The petitioner was herein subject to PITC test, HVS test, VDRC test and HCG test which she had no



idea about. These tests were carried out during a repeat medical examination after the 1st examination confirmed there was no available evidence of defilement.

53. Further, the Petitioner's submission was that she was not sexually assaulted by the 2nd interested party and this should have taken sway on the part of the prosecution to reconcile the two medical reports before adducing them as evidence in court
54. On whether the petitioner is entitled to the prayers sought it was submitted that the petitioner had clearly demonstrated how her rights and freedoms had violated.
55. It was submitted that the award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental rights under *the constitution*. Reliance was made to the case of *MWK & ANO vs Attorney General & 3 others* (2017) eKLR and urged the court to adopt a similar approach in the case where the petitioner was awarded kshs 4,000,000 as compensation for breach of her rights and freedom and urged the court to find that the said award suitable in the circumstances of this case.

Petitioner's Supplementary Submissions

56. The petitioner's filed their supplementary submissions dated 11th May 2023 and submitted that the by requiring the authority of the Attorney General to withdraw a sexual offence section 40 is essentially placing the DPP under the control and authority of the attorney general contrary to the clear provision of article 157.
57. Reliance was placed to the Anarita Karimi- and Mumo Matemu cases which the courts have since migrated from. In the case of Peter Mwau *Muinde & Anor versus Insurance Pesulatory Authority Petition No 20 of 2018*.
58. It was submitted that the petition was clear and in her petition she has enumerated several of her rights and freedom that have been violated and continue to be violated.

2nd, 3rd & 4th Respondent's Submissions

59. It was opined that the issues for determination were whether the respondents acted beyond their mandates resulting to violation of the petitioner's constitutional rights & freedoms and whether orders sought should be granted
60. On whether the respondents acted beyond their mandates, it was submitted the petition is an aftermath of the 1st interested party's complaint at Wamunyu Police Station. The 3rd Respondent carried out its mandate by investigating the alleged crime and arrested the 2nd interested party who was the accused person. The 3rd respondent's duties are provided for under section 24 of the *National police Service Act*.
61. It was submitted that the *sexual offences Act* is clear on the prohibitive nature of withdrawal of cases which can only be conducted by the office of the Attorney General now the office of DPP.
62. Reliance was placed in the case of Michael Monari and Anor v the Commissioner of Police and 3 others Misc. application 68 of 2011 that it is not the duty of the court to go into the merits and demerits of any charge to be preferred against any party
63. Reliance was also made to the case of Paul Ng'ang'a and 2 others vs AG and 3 others Pet 518 Of 2012, Republic v Inspector General of the National Police Service & another Exparte Beatrice Hilda Omunia; Peter Nganga Chege & 2 others [2019] the court held that prosecution should be instituted or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused.



64. On whether the petitioner's constitutional rights were violated, it was submitted that the respondents have disputed that they have violated the petitioner's rights and fundamental freedoms and maintained that the petition is an abuse of the court process as they were seeking for this court to determine their innocence rather than allow the trial court that is vested with all the particulars surrounding the complaint to render a determination the validity of the charges.
65. Reliance was placed in the case of Hussein Khalid and 16 others v Attorney General & 2 others [2019 eKLR, Anarita Karimi Njeru vs The Republic (1976-1980) and Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013).
66. It was submitted that the petitioner was not entitled to the orders sought for reasons that she has not proved to this honourable court how her rights were violated having failed to mention that she was an adult when she was taken to the police station by the 1st interested party for the report to be made
67. It was finally submitted the petition lacks merit and this court cannot grant reliefs sought and prayed that the petition be dismissed with costs

ANALYSIS AND DETERMINATION

68. This Court perused the Petition and the Supporting Affidavit. The substratum of the Petitioner's case is the manner in which she was handled and detained by the Police during the hearing of the case.
69. The Petitioner asserted that her right to human dignity and right to privacy was violated as she was not allowed to make independent decisions for herself and was detained and subjected to cruel and degrading treatment by being subjected to a medical procedure whose objective was to support the narrative that she had been defiled yet she was an adult at the time. She set out the details of violations in paragraph 80- 99 of the Petition. In paragraph 80 -99, the Petitioner set out how she was subjected to inhuman and degrading treatment. She candidly described how the conduct of the Police was not in consonance with her rights as provided for in *the Constitution*. She went into the manner in which the actions of the 2nd Respondent were an abuse of their powers and how they violated her constitutionally guaranteed rights.
70. It is now a well-developed principle that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272 where the court stated:-

“Constitutional violations must be pleaded with a reasonable degree of precision.
71. The Articles of *the Constitution* which entitle rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.
72. This Court finds and hold that the Petition has in sufficient detail been crafted with precision on the rights and fundamental freedoms allegedly violated as to call upon this Court to consider the Petition on merit as the Petitioner relied on Articles 1, 2, 3, 10, 19, 20(1)& (2), 3 &4, 21(1), 23(1) & (3), 27 (1), 28,29, 31(C), 36 (1) 45, 47,48, 258(1) & 259(1) of *the Constitution* and explained the alleged violations in relation to the Constitutional rights under *the Constitution*.
73. Article 157 of *the Constitution* establishes the Office of the Director of Public Prosecutions as under: -



- 1) There is established the office of Director of Public Prosecutions.
 - 2) The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.
 - 3) The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.
 - 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.
 - 5) The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.
 - 6) The Director of Public Prosecutions shall exercise State powers of prosecution and may--
 - a) 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;
 - b) 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
 - c) 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).
 - 7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.
 - 8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.
 - 9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
 - 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.
 - 12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.
74. There is, as well, the Office of Director of Public Prosecutions Act No. 2 of 2013 (hereinafter referred to as 'the ODPP Act'). It is an Act of Parliament aimed at giving effect to Articles 157 and 158 of *the Constitution* and other relevant Articles of *the Constitution* and for connected purposes. The ODPP Act provides in Section 4 the guiding principles in prosecution of cases as follows:
- (4) In fulfilling its mandate, the Office shall be guided by *the Constitution* and the following fundamental principles—



- (a) the diversity of the people of Kenya;
- (b) impartiality and gender equity;
- (c) the rules of natural justice;
- (d) promotion of public confidence in the integrity of the Office;
- (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
- (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
- (g) protection of the sovereignty of the people;
- (h) secure the observance of democratic values and principles; and
- (i) promotion of constitutionalism.

75. Article 243 of *the Constitution* establishes the National Police Service. Under Article 244, *the Constitution* provides the objects and functions of the National Police Service as follows: -

- (a) strive for the highest standards of professionalism and discipline among its members;
- (b) prevent corruption and promote and practice transparency and accountability;
- (c) comply with constitutional standards of human rights and fundamental freedoms;
- (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
- (e) foster and promote relationships with the broader society.

76. The National Police Service is under the command of the Inspector-General of Police. The manner in which the Inspector-General of Police is to carry out its mandate is provided for under Article 245(2) (b) and (4) of *the Constitution* as follows: -

- 1. The Inspector General –
 - (a)
 - (b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.

77. The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector General with respect to—

- (a) the investigation of any particular offence or offences;
- (b) the enforcement of the law against any particular person or persons; or
- (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

78. Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.



79. Article 157(4) of *the Constitution* provides that: -

Article 157(4) of *the Constitution* provides that: -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.

80. Sections 24, 27 and 35 of the Police Act variously provide for the functions of the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations respectively as follows: -

24. The Functions of the Kenya Police Service

The functions of the Kenya Police Service shall be the—

- (a) provision of assistance to the public when in need;
- (b) maintenance of law and order;
- (c) preservation of peace;
- (d) protection of life and property;
- (e) investigation of crimes;
- (f) collection of criminal intelligence;
- (g) prevention and detection of crime;
- (h) apprehension of offenders;
- (i) enforcement of all laws and regulations with which it is charged; and
- (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

27. The Functions of the Administration Police Service

The functions of the Administration Police Service shall be the—

- (a) provision of assistance to the public when in need;
- (b) maintenance of law and order;
- (c) preservation of peace;
- (d) protection of life and property;
- (e) provision of border patrol and border security;
- (f) provision of specialized stock theft prevention services;
- (g) protection of Government property, vital installations and strategic points as may be directed by the Inspector-General;
- (h) rendering of support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties;



- (i) co-ordinating with complementing Government agencies in conflict management and peace building;
- (j) apprehension of offenders;
- (k) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

81. Having set out the constitutional and statutory provisions in which the Respondents get their powers from, it is prudent for the court to make findings as to whether the respondents exceeded their powers. It was the petitioner's case that she was already an adult by the time when the sexual offence was purported to have been committed and she forwarded her birth certificate and identity card for the Prosecutor to confirm that she was not a minor, despite the prosecutor having these documents in her possession he did not halt the trial nor order the National Police Service to carry out fresh investigations. That she instead he coerced the petitioner to testify forcefully and when she declined and applied Section 152 of the Criminal Procedure Code to have her committed to jail for 8 days which as a result of the trial court not sitting on the scheduled date, the petitioner ended up being detained for a period of 24 days in utter disregard to her rights and freedoms as enshrined in *the Constitution* (2010).
82. The Petitioner also averred that she has continued to be subjected to cruel inhuman and degrading treatment by the respondents in that she was subjected to a medical procedure whose objective was to support the narrative that she had been defiled yet she was an adult and that the examination was done without her consent.
83. She averred that despite her plea that she was an adult and she did not want participate in an illegality, the office of the Director of Public Prosecution could hear none of that and upon declining to testify she was detained for a period of 24 days which confirmed that her dignity and self worth was violated.
84. That the respondents actions were therefore in blatant violation of Article 28 of *the Constitution* as well as Article 7 of the international Covenant, on Civil and political rights and Article 4 of the African Charter on people's and Human rights.
85. On the violation of the petitioner's right to privacy, she averred that this was breached by intrusion of the respondents on the wrong assumption that she was a minor that had been defiled and also by being subjected to arbitrary medical examination without her consent.
86. Article 157(11) calls upon the Director of Public Prosecutions while exercising the powers conferred by *the Constitution* to 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.
87. In so far as withdrawal of the case is concerned, that is the mandate within the Director of Public Prosecution and the petitioner cannot impose the withdrawal of the charge.

Disposition

88. This Court's mandate is derived from Article 165 of *the Constitution* and relevant Statutes. This Court will legally address the Constitutional Petition where full facts are presented before this Court and pleadings filed by both/all parties and/or evidence of service is presented to Court.
- Specific to this case is the conduct of the prosecution of defilement case and/or withdrawal of the same by the Prosecution.
89. The issue/conduct of the criminal case in the Trial Court should/shall be allowed to complete the process hearing upto the logical conclusion and the Trial Court shall deliver Ruling or Judgment.



90. On the other hand, the Prosecution is by ODPP resulting from investigations from the Police Service. The ODPP is independent in conduct of its mandate to process prosecution within the tenets of *the Constitution* and the law.
91. ODPP/Prosecutor may present to the Trial Court the notice to withdraw the criminal case/proceedings and the Trial Court to exercise its mandate and determine the same.
92. Until there is a determination either vide Ruling and /or Judgment of the Trial Court, in the absence of the full Court record so as to present full facts of events culminating to the Petition by the Petitioner, the Petition is premature, this Court will not make any informed decision.
93. This petition lacks merit and stands dismissed.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 26TH APRIL, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

