



**Ali v Director of Public Prosecutions & another (Petition E188 of 2021)
[2023] KEHC 1468 (KLR) (Constitutional and Human Rights) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E188 OF 2021

HI ONG'UDI, J

FEBRUARY 28, 2023

BETWEEN

MUKHTAR IBRAHIM ALI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

**CHIEF MAGISTRATES COURT (MILIMANI LAW COURTS 2ND
RESPONDENT**

JUDGMENT

1. This petition dated 26th May 2021 was filed under Articles 22(1) of the *Constitution* for the alleged contravention of Articles 1, 2, 4, 9 and 10 of the *Constitution*. The petitioner seeks the following prayers:
 - i. A declaration be issued that the continued trial of the petitioner in the Chief Magistrate's Court Criminal Case No.795 of the 2019 will be in breach of the petitioner's fundamental right to a non-derogable fair trial guaranteed under Article 25 (c) of the *Constitution*.
 - ii. A declaration be issued that the issuance, publication and dissemination of a declaration of the petitioner as a 'specified entity' under the provisions of the Prevention of Terrorism without due process was in breach of the petitioner's fundamental right to human dignity guaranteed under Article 28 of the *Constitution*.
 - iii. A declaration be issued that the intended transfer of his criminal trial from one subordinate court to Kahawa Court at Kamiti Maximum Security Prison will breach his fundamental right to a fair and public hearing as guaranteed under Articles 50(2) of the *Constitution*.



- iv. A declaration be issued that the intended transfer of his criminal trial from one subordinate court at Milimani Law Courts to Kahawa Court at Kamiti Maximum Security Prison will breach his fundamental right to a fair trial which includes the right to adequate time and facilities to prepare a defence, and a public hearing guaranteed under Article 50(2) (c) and (d) of the Constitution.
- v. Orders consequential to the above declarations:
 - a. Prohibiting by injunction the 1st respondent from taking any further steps towards prosecuting the petitioner in the Chief Magistrate’s Court Criminal Case No.795 of 2019.
 - b. Prohibiting the Chief Magistrate’s Court or any other subordinate Court taking over from the said Chief Magistrates Court at Milimani from further hearing of that Court’s Criminal Case No.795 of 2019(Republic v Mukhtar Ibrahim Ali).
- vi. Damages for breaches and violations of the petitioner’s fundamental rights.
- vii. Costs.
- viii. Any other order that this Honourable Court may deem just and fit in the circumstances.

The Petitioner’s case

2. The petition is supported by the petitioner’s sworn affidavit of 26th May 2021. He averred to having been profiled as a terrorist due to his ethnic background which is Kenyan Somali and his Muslim faith. He further deponed that he was on 19th January 2019 arrested alongside Isaak Hussein Hassan for their alleged connection to the Dusit 2 Terrorist Attack in Nairobi *vide* Chief Magistrate’s Court Miscellaneous Application No. 260 of 219 the prosecution sought to have them detained at the Anti-Terrorism Police Unit 9 (ATPU) for 30 days for completion of investigations. This was allowed by the Court and an Order issued.
3. The petitioner was eventually charged with others on 26th February 2019 for the offence of conspiracy to commit a terrorist act inside Kenya contrary to section 23(2) of the Prevention of Terrorism Act (MII 1). A further application by the 1st respondent for further detention of the petitioner was declined by the Court, which granted him bond. He was remanded as he was not able to avail sureties. He was produced in Court on 4th March 2019 with fresh charges. A fresh application for bond was made and a ruling delivered on 15th March 2019 after a few deferments, and he was denied bail.
4. The matter was thereafter severally adjourned as the prosecution was not ready since no witnesses statements had been supplied and no consolidation as sought had been done.
5. The petitioner faced fresh charges on 22nd July 2019, under Chief Magistrate’s Court Criminal Case No. 795 of 2019. His bond terms were reviewed *vide* High Court Miscellaneous Application No. 162 of 2019. The matter was then listed for pre-trials on 13th September 2019. Prior to this date the trial court suo moto called for and obtained a probation officer’s report and upon receipt of the same admitted him on bail whose terms have remained to date. The High Court rejected the 1st respondent’s application to have the trial Court’s orders set aside.
6. He deponed that the petitioner was later listed by the Inspector General as one of the persons he sought to declare as “specified Entities.” He was required to demonstrate within 7 days why he should not be so declared. His advocate responded through a letter dated 15th March 2020 (MIA -12). Furthermore



the 1st respondent in its letter dated 7th April 2021 to the 2nd respondent sought a mention for fresh counter terrorism cases in Milimani to be transferred to Kahawa Law Courts.

7. The petitioner therefore listed the following grounds as the basis of his petition.
 - i. It is not possible to hold a fair trial against the petitioner for failure to comply with the Chief Magistrate's Order dated 6th March 2019.
 - ii. A subordinate Court does not have jurisdiction to transfer a matter to another subordinate Court.
 - iii. The 1st respondent abused its power by seeking to mention a criminal case pending before one magistrate Court and transfer the same to another subordinate court.
 - iv. The proposed trial of the petitioner in Kamiti Maximum Security Prison will not be a public hearing hence breaching his right under Article 51(1) of the Constitution.
 - v. The public profiling of the petitioner as a 'specified entity' without giving him an opportunity to be heard and make representations denied the petitioner his right to fair hearing and dignity.
 - vi. The petitioner's right to presumption of innocence has been breached.

The 1st Respondent's case

8. In response, the 1st respondent filed its replying affidavit dated 28th March 2022 sworn by Harrison Kiarie, his Prosecution counsel. He averred that the 1st respondent can institute criminal charges against anyone in accordance with his mandate under Article 157 of the Constitution and that is exactly what was done. Further that the petitioner had not shown how his rights had been violated. He deponed that *vide* a letter dated 7th April 2021, the 1st respondent had invited the Milimani Law Courts (Chief Magistrates Court) to make a report to the High Court pursuant to Section 81(2) of the Criminal Procedure Code for transfer of terrorism cases from Milimani Law Courts to Kahawa Law Courts.
9. He deponed further that the then Chief Magistrate Hon. Francis Andayi made a report to the Presiding Judge in the High Court (Criminal Division) recommending that the cases be transferred to Kahawa Law Courts. In the matter, the accused persons including the petitioner then appeared before Hon. Lady Justice Grace L. Nzioka *vide* Miscellaneous Applications No. 225, 226, 227, 228 and 229 of 2021 and made their submissions. Thereafter G. Nzioka J did a ruling in which she ordered all the mentioned cases to be transferred to Kahawa Law Court.
10. Furthermore, that the case against the second accused person, Mohammed Abdi Ali in Milimani Criminal Case No.795 of 2019 was transferred to Kahawa Law Courts. The case against the petitioner who is the 1st accused person in the matter was directed to await determination of the instant petition. The deponent stated that the hearing of the terrorism cases had commenced and were due to be concluded by the end of 2022.
11. He further deponed that Kahawa Law Courts is not a secret Court as alleged by the petitioner. The same is accessible to all members of the public. He informed that the court was established by the Rtd. Chief Justice, Hon. David Maraga via Gazette Notice No.375 of 24th January 2020 as a specialized Magistrates Court dedicated to hearing and determining counter terrorism and related high risk cases. It was officially opened on 11th December 2020. He added that the aim of the Court was to decongest cases within and outside Nairobi while granting a fair trial to the parties by determining the cases expeditiously.



12. He deponed that the terrorism case against the petitioner was not based on his ethnicity or religion. The same had not taken off because of several interlocutory applications, the parties delays and heavy caseload at Milimani Criminal Courts. In view of this, he urged the Court to dismiss the petition since it was an abuse of the Court process and have the matter referred back to the Presiding Judge, Criminal Division.

The Petitioner's submissions

13. The petitioner filed written submissions and a list of authorities dated 8th April 2022 through the firm of Gitobu Imanyara and Company Advocates. Counsel commenced by clarifying that the petitioner did not oppose the jurisdiction of the High Court to transfer cases, but the reference to Kahawa Law Courts as a specialized court. Further that it was the 1st respondent who instigated the transfer of the matter from one lower Court to another which was unprocedural.
14. Similarly, Counsel argued that one subordinate court does not have jurisdiction to transfer to another subordinate court a matter pending before it. He added that the transfer of the petitioner's case to Kahawa Law Courts would prejudice him and cause delay in its determination violating his right to fair administrative action which is expeditious. To support this argument counsel relied on *Mutia Muindu t/a Mutibra Auctioneers v CFC Stanbic Bank LTD Garnisbee & another*, Misc.App. Cause No.2 of 2015 where it was observed that transferring of the file to Nairobi would not only have delayed the determination of the dispute but that it would be expensive for the respondents. Also see *Hangzhou Agrochemicals Industries LTD v Panda Flowers Limited* (2012) eKLR.
15. Counsel further submitted that the respondents had violated the petitioner's fundamental rights. He argued that the criminal case against the petitioner was based on his ethnicity and Muslim faith. Furthermore, that the Gazette Notice targeting 'specified entities' was illegal and unlawful since it lacked a statutory basis and violated his right under Article 28 of the *Constitution*. The same he argued occasioned damage to the petitioner's reputation and psychological torture in violation of Article 29(d) of the *Constitution*.
16. He further submitted that since the charges preferred against the petitioner dated 26th February 2019 never took off and that the case has encountered constant derailment the petitioner's right to a fair trial under Article 50(2) of the *Constitution* was violated causing him anguish. In support he relied on the case of *Republic v Ethics and Anti-Corruption Commission and 2 others ex parte Eratus Gatebe* (2014) eKLR where the Court appreciated the necessity of observing the principles of natural justice to achieve procedural fairness and fair decision. In conclusion he argued that the respondents had failed to justify the transfer of the matter to Kahawa Law Courts and so urged the Court to grant the prayers sought.

The 1st and 2nd Respondents' submissions

17. The respondents' submissions were filed through the 1st respondent's Prosecution Counsel, Peris Gathu. They are dated 18th May 2021. On whether the petitioner's fundamental rights were violated, Counsel submitted that the petitioner ought to demonstrate how these rights were violated as set out in the case of *Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272*. In support of this position, Counsel relied on the case of *Leonard Otieno v Airtel Kenya Limited [2018] eKLR* where the Court observed that the presentation of clear *evidence* in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Similar reliance was placed on the cases of *William and Others v Spautz [1993] 2 LRC 659*, and *Matiba V*



- Attorney General (1990) KLR 666. For this reason, Counsel argued that the petition is an abuse of the Court process since none of these requirements had been met by the petitioner.
18. In reference to Articles 24 (1) & 160 of the Constitution counsel submitted that a right may be limited if the limitation is reasonable and justifiable. Further that the exercise of judicial authority, is not subject to the control or direction of any person or authority hence matters before courts are heard on merit contrary to the petitioner's allegations.
 19. On whether the petitioner is entitled to the reliefs sought, Counsel submitted that pursuant to its letter dated 7th April 2021, the 2nd respondent wrote to the Presiding Judge in the Criminal Division of the High Court *vide* a letter dated 8th July 2021 on the matter. This was pursuant to Section 81(1) and 81(2) Criminal Procedure Code which gives the High Court power to transfer cases. In view of the procedure undertaken as spelt out in the 1st respondent's replying affidavit Counsel submitted that the law was well followed and further that the petitioner and other parties had, had the opportunity to address the High Court on the matter before the Ruling was made.
 20. On the prosecutorial authority of the 1st respondent, Counsel while relying on Article 157 of the Constitution and the case of Hon. James Ondicho Gesami v The Attorney General & others, Petition No. 376 of 2011 submitted that the 1st respondent is at liberty to prefer charges against any party as long as he finds sufficient *evidence* to support his decision. That the 1st respondent's requirement for a party to submit to investigations and prosecution does not in any way amount to a breach of his fundamental rights. Similar reliance was placed on the cases of Mohamed Ali Swaleh v The Director of Public Prosecution & another - High Court Mombasa Petition No. 2 of 2017 and Republic v Commissioner of Police & another (2012) eKLR.
 21. She therefore submitted that the court ought not to usurp the Constitutional mandate of the 1st respondent to investigate and undertake prosecution in the exercise of the discretion conferred upon his office as held in the case of Republic v Attorney General & 4 Others Ex parte Kenneth Kariuki Githii (2014) eKLR. Similar reliance was placed on the cases of Pauline Raget Adhiambo Agot v DPP and 5 others (2010) Petition no. 446 of 2015, AG V AG & 3 Others Ex parte Thomas Nganga Munene (2014) Petition no. 166 of 2013, Thuita Mwangi & 2 others v Ethics and Anti-Corruption Commission & 3 others (2004) eKLR, Total Kenya Limited & 9 others v Director of Criminal Investigation Department and 3 others (2013) eKLR, among others.
 22. Counsel further submitted that for orderly functioning of State organs, each arm of government should be allowed to exercise its powers without interference from the other arms in line with the doctrine of separation of powers. This emphasis was appreciated in the case of Dr. Alfred N. Mutua v. The Ethics and Anti-Corruption Commission & others, Misc. Application No. 31 of 2016. She therefore submitted that in view of the circumstances herein it was the petitioner who was culpable for abuse of the court process as there was no substantial ground for his petition. In support she cited the case of King v Henderson [1898] AC 720 at 731, where it was held that an abuse of process does not exist unless the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others. Counsel accordingly urged this Court to find that the petitioner is guilty of abusing the Court process and so not entitled to the reliefs sought.

Analysis And Determination

23. From the parties' pleadings, submissions, and authorities cited I find the issues that stand out for determination to be as follows:
 - i. Whether the trial of the petitioner in Criminal Case No.795 of 2019 breached his right to a fair trial.



- ii. Whether the publication of the petitioner as a ‘specified entity’ was done lawfully.
- iii. Whether the purported transfer of the petitioner’s case from Milimani criminal Law Courts to Kahawa Law Courts is lawful.
- iv. Whether the petitioner’s fundamental rights and freedoms under the Constitution were violated by the respondents; and
- v. Whether the petitioner is entitled to the reliefs sought.

Whether the trial of the petitioner in Criminal Case No.795 of 2019 breached his right to a fair trial

- 24. This issue is founded on the following factors. First that the petitioner was subjected to degrading treatment since the charge against him dated 26th February 2019 has never been prosecuted. Further, the various adjournments of the matter and lastly the seeking of transfer of the case to Kahawa Law Courts. The petitioner argued that these actions were intended to cause him anguish, oppression and assist in preventing a procedurally fair public trial by the 1st respondent.
- 25. The 1st respondent while emphasizing its constitutional mandate noted that it had acted lawfully and argued that the delay had been occasioned by several interlocutory applications, parties’ delay and heavy case load in Milimani Criminal Court.
- 26. The 1st respondent’ derives his powers from Article 157(6) of the Constitution which provides as follows:

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).
- 27. This Article is recapped in the office of the Director of Public Prosecutions Act, 2013 (ODPP Act) at section 5. To exercise this power objectively and independently the 1st respondent is under Article 157(10) granted the following scope:

(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.

- 28. The same is also recapped under section 5 of the ODPP Act. It is certain from a reading of the Constitution and enabling statutes that the 1st respondent’s mandate is grounded in law. Supplementary to this is his enjoyment of absolute independence as he carries out his role. This is a factor that has also been esteemed by the Courts, which are generally reluctant to interfere with the 1st respondent’s mandate unless one can demonstrate and prove that the exercise of power was ultra vires.



29. In the case of *Justus Mwenda Kathenge v Director Of Public Prosecutions & 2 others* [2014] eKLR the Court while speaking to the constitutional mandate of the 1st respondent held that the Courts cannot interfere with the exercise of the above mandate unless it can be shown that the provisions of Article 157(11) have not been adhered to. The Court also referred to *Gulam & another v Chief Magistrate's Court & another* [2006] eKLR where the learned judge held that;

“Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any Prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other improper purpose such as undue harassment of a party or abuse of the process of court.”

30. From the foregoing it is clear that while the courts will generally not interfere, with the said mandate, the Court will not hesitate to do so where the circumstances of a case call for such interference in the interest of justice. This was appreciated in the case of *Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another* [2019] eKLR where the Court discussing the delicate balance between instigation of criminal proceedings by the 1st respondent and this court’s intervention opined as follows:

“43.The general rule in these kinds of proceedings is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the *Constitution*...if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.”

31. The court went further to state that:

“50.It is therefore clear that whereas the discretion given to the Respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence... the Court will not hesitate to bring such proceedings to a halt...”

32. What is clear is that this petition revolves around the manner in which the 1st respondent has been handling the petitioner’s case. An examination of the *evidence* adduced by the petitioner only confirms that the prosecution of the petitioner’s criminal case followed the law and procedures laid down. The petitioner’s dissatisfaction with the manner in which the 1st respondent carries out his mandate cannot suffice as a ground for faulting the 1st respondent’s mandate.

33. The documents annexed to the petition detail the processes that have been undertaken in the case upto this moment. Nothing in the process reveals malafide intentions by the 1st respondent and if any, none was not demonstrated. The petitioner’s claim that the 1st respondent desires to conduct a secret trial, fails as this Court takes judicial notice of the fact that Kahawa Law Courts was legally established, and is an open Court like any other. In my humble view the petitioner has not shown any extrinsic factors other than those dictated by law, to prove that the 1st respondent abused his power to justify this Court’s intervention. Against this backdrop, I find that the 1st respondent’s actions cannot be condemned as they were both procedural and lawful.



Whether the publication of the Petitioner as a ‘specified entity’ was done lawfully

34. The petitioner further challenged his being listed as a ‘specified entity’. He argued that this was done without following due process as provided for under the *Prevention of Terrorism Act*, 2012, hence breaching his right to human dignity as guaranteed under Article 28 of the *Constitution*. He further submitted that the Notice occasioned him psychological torture in violation of Article 29(d) of the *Constitution* since it arbitrarily condemned him without according him an opportunity to show why he shouldn’t be identified as such.
35. It is noted that the author of the ‘Notice of Intention to declare individuals and organizations as specified entities’ who is the Inspector General of Police, was not named as one of the respondents’ in this matter. The Court would therefore not know what his response would be.
36. For completeness of the matter however, this Court will address the issue based on the materials before it. The *Prevention of Terrorism Act*, 2012 under Section 3(1) describes a ‘specified entity’ as follows:
Where the Inspector-General has reasonable grounds to believe that—
- (a) an entity has—
 - i. committed or prepared to commit;
 - ii. attempted to commit; or
 - iii. participated in or facilitated the commission of, a terrorist act; or
 - (b) an entity is acting —
 - i. on behalf of;
 - ii. at the direction of; or
 - iii. in association with, an entity referred to in paragraph (a), he may recommend to the Cabinet Secretary that an order be made under subsection (3) in respect of that entity.
37. The procedure of issuing the specified entity order is provided under the same section as follows:
- (2) Before making a recommendation under subsection (1), the Inspector-General shall afford the affected entity reasonable opportunity to demonstrate why it should not be declared as a specified entity.
 - (3) Upon receipt of the recommendation under subsection (1), the Cabinet Secretary may, where he is satisfied that there are reasonable grounds to support a recommendation made under subsection (1), declare, by order published in the Gazette, the entity in respect of which the recommendation has been made to be a specified entity.
 - (4) The Cabinet Secretary shall, subject to subsection (5), inform the entity in respect of which the order is made, in writing, of his decision under subsection (3) together with reasons for arriving at that decision, within a period seven days from the date of declaring the entity a specified entity.
 - (5) A specified entity may apply to the Inspector-General requesting for the revocation of an Order made under subsection (3) in respect of that entity.
 - (6) If on an application made under subsection (5), the Inspector-General is satisfied that—



- i. there are reasonable grounds for making the application, recommend to the Cabinet Secretary the revocation of the Order; or
 - ii. there are no reasonable grounds for making the application, the Inspector-General shall reject the application and shall, within sixty days of receiving the application, inform the applicant of the decision.
- (7) A specified entity which is aggrieved by the decision of the Inspector-General under subsection (6) may apply to the High Court for a review of that decision within a period of sixty days from the date of receipt of the decision.
38. According to the Notice annexed to the petitioner’s petition, the persons named in it were directed to demonstrate within 7 days from the date of publication of the notice why they should not be declared as specified entities in line with Section 3(2) of the Act. What is clear from this Notice contrary to the petitioner’s assertion is that, the Inspector General of Police in accordance with the legal procedure gave the listed persons an opportunity to present their case. Annexed to the petition is copy of a letter dated 15th March 2020 (Annexure MIA – 12) showing a response to the NOTICE in question. The letter is by the petitioner’s counsel. Despite his claims, the petitioner has not shown any attempt to present his case before the Inspector General and subsequent denial of a hearing by the said office.

Whether the purported transfer of the Petitioner’s case from Milimani Criminal Law Courts to Kahawa Law Courts is lawful

39. In this matter the petitioner emphasized that he was not opposed to the High Court transferring matters to another Court. He however took issue with the manner in which the process of transfer was instigated by the 1st respondent instead of the 2nd respondent. He argued that this was in violation of the set legal procedure. Furthermore, he took issue with the 1st respondent’s reference to Kahawa Law Courts as a specialized Court for terrorism cases.
40. The 1st respondent denied this allegation stating that it had not directed the 2nd respondent who was at liberty to either give directions in the matter or make a report referring the matter to the High Court. In addition, the 1st respondent noted that Kahawa Law Court was the appropriate court to hear and determine the counter-terrorism crimes.
41. A perusal of the Ruling by G. Nzioka, J in Republic v Muktar Ibrahim Ali & others [2021] eKLR (Applications No.: 225, 226, 227 and 228 of 2021) dated 29th November 2021 discloses that the Court heard and determined the petitioner’s issues as raised therein. In principle, this Court is estopped by the doctrine of res judicata in making a determination on a matter that has already been determined.
42. For clarity this doctrine as provided under Section 7 of the Civil Procedure Act, provides as follows:
- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
43. The Supreme Court in the case of Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another Motion [2016] eKLR with regards to this doctrine observed as follows:
- “(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a



conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

44. Considering this, this Court cannot proceed to make a fresh determination over the issues as the same have been conclusively determined in *Republic v Muktar Ibrahim Ali & others* (supra). It will be helpful to restate what G. Nzioka J, found in the stated case, where in addressing the procedure undertaken to transfer the cases and its legality she opined as follows:

“23. However, the Respondents have raised several other issues in relation to the manner in which the Chief Magistrate’s court was moved by the letter dated, 7th April, 2021, to request the matter be transferred. I have read that letter in its entirety and I do not find any content where the ODPP has expressly directed the court to seek for the transfer of the cases to Kahawa Law Court. The letter reads in part as follows:

“For this reason the Office of the Director of Public Prosecutions requests that all fresh and/or part-heards (where not more than 3 witnesses have testified) counter-terrorism cases be mentioned on 15th April 2021, before the Honourable Chief Magistrate, Francis Andayi for purposes of giving directions/report in accordance with section 81(2) of the Criminal Procedure Code, Cap 75 laws of Kenya”

The Hon Chief Magistrate was at liberty to choose to either give directions, or make a report referring the matter to the High Court. The ODPP did not therefore have control on the option the Chief Magistrate opted for, and cannot be faulted for the same. It also suffices to note that, section 81 of the Criminal Procedure Code does not state how a Chief Magistrate may initiate the report. Unlike the High Court’s position, where it can move suo moto, there is no provision thereunder for the lower court to move suo moto.”

45. The Court agreeing with the petitioner with reference to the legal status of Kahawa Law Courts addressed itself as follows:

“26. To revert back to the main issue as to whether, the matters herein should be transferred or not, I find that, from the two letters written by the ODPP and the Chief Magistrate, the main reason for the transfer is that, a specialised court has been set up at Kahawa Law Court to hear the matter This Honourable court has been referred to the gazette notice establishing the court and I find that, it establishes the court as a magistrate’s court with supervisory jurisdiction of; Kiambu High Court with effect from 1st April, 2021. The gazette notice does not state the jurisdiction of the court.” Emphasis mine.

46. The Court went on to state that:

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“29. Be that as it were, I take judicial notice of the report in the press, by UNODC East Africa News in Nairobi, on 11 December 2020 which stated inter alia as follows: -



“The Chief Justice of Kenya, Hon David Maraga, presided over the official opening of the Kahawa Law Court which was constructed with support from the Global Maritime Crime Programme (GMCP).

The project was funded by the Government of the United States of America with support from the Government of the United Kingdom.

Situated in Kiambu County within the precincts of Kamiti Maximum Prison on the outskirts of Nairobi, this new court is the first and largest court in Kenya dedicated to counter-terrorism cases and related high-risk cases.

The launch of Kahawa Law Court was graced by senior government officials and representatives from the United States Government and the United Kingdom.

Speaking at the function, Hon David Maraga noted in his keynote address: “In any country that respects the rule of law, a fair trial is fundamental. I am very grateful to the partners who have made this possible. We appreciate the financial support from the development partners led by the United States and United Kingdom and the excellent coordination provided by the United Nations Office on Drugs and Crime who managed the implementation of this project”.

It is therefore a matter of public notoriety that the Kahawa Law court is designed to handle counter terrorism cases. In that regard, it is noteworthy that, all the respondents herein have been charged in the lower court with terrorism related crimes. On that ground per se, Kahawa Law Court is the appropriate court to hear and determine the counter terrorism crimes.”

47. To this end it is apparent that the petitioner’s averments in this petition are unfounded and that the procedure that was adopted in instigating the transfer of the cases was lawful and legally sound within the confines of the law. The same have therefore been addressed by a Court with a competent jurisdiction.

Whether the Petitioner’s fundamental rights and freedoms under the Constitution were violated by the Respondents’

48. It is the petitioner’s contention that the 1st and 2nd respondents’ actions as outlined in this case were in contravention of his rights as provided under Articles 25, 28, 29(d) and 50(2) of the Constitution. The 1st respondent on the other hand stated that the process of prosecution is one that is provided for by the law and in essence cannot be deemed to violate the petitioner’s rights. It was nevertheless emphasized that these rights were capable of limitation under Article 24 of the Constitution. Secondly the 1st respondent contended that the petitioner had failed to satisfy the threshold set out in the case of Anarita Karimi Njeru v Republic (1979)) KLR 1272 since he failed demonstrate how each of the specified rights were infringed upon in maintenance of the criminal proceedings.
49. The Court in the case of Husus Mugiri v Music Copy Right Society of Kenya & another [2018] eKLR citing the case of Anarita Karimi with approval expounded as follows:

“ 18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in Anarita Karimi Njeru v. Republic [1979] eKLR. That is, the applicant must specify which specific provisions of the Constitution that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent



has infringed the subject rights. This position has been reiterated time and again.

19. In *Meme v Republic* [2004] eKLR, the court restated the position in the Anarita Karimi Case (*supra*) as follows:-

“Where a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant’s instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complaints without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”.

50. From the above decisions and provisions I find that for a constitutional petition to be upheld it must satisfy the constitutional threshold. It follows that the mere citing of constitutional provisions is not enough. A petitioner must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated and the manner in which the said provisions are deemed to have been violated. This should stem from the facts and *evidence* of the case. Demonstration of violation of these rights requires putting down the factual basis upon which the rights are said to have been infringed, by way of *evidence*.

51. The Court in the case of *Edward Akong’o Oyugi & 2 others v Attorney General* [2019] eKLR described this component in the following way:

“72. Section 107 (1) of the *Evidence Act* [36] provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Additionally, I have severally stated that all cases are decided on the legal burden of proof being discharged (or not)..."

52. The Court went on to state that:

“73.

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the *Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear *evidence* in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

53. I now move to examine the facts presented in this case to enable me make a determination on this issue. The basis upon which the petitioner’s allegations of erroneous transfer of cases by one subordinate Court to another, the wrongful listing of his name as a ‘specified entity’ without following due process



and the sustenance of Chief Magistrate's Court Criminal Case No. 795 of 2019 being in violation of his constitutional right were not proved as no *evidence* was adduced to that effect.

54. Furthermore, besides making the allegation that the criminal case was brought against him due to his ethnic background as a Kenyan -Somali and his Muslim faith, there was nothing more presented to this Court on the same. It cannot be left unto this Court to guess or fill in the gaps in the petitioner's case. The petitioner is charged with the responsibility to discharge the burden of proof which he failed to do.
55. From the foregoing analysis and the material placed before this Court it is my humble finding that the petitioner failed to discharge his burden of proof. Delays in hearing the criminal case was because of the several uncalled for applications. Secondly there is no good reason placed before this Court to show why the petitioner did not raise the issue of the alleged constitutional violation before G. Nzioka J who dealt with the issue of transfer of the criminal cases to Kahawa Law Court. His co-accused in the said matter had his case transferred and is about to be finalized while the petitioner is pursuing this petition which he has failed to prove. I find myself in agreement with the holding in *Edward Akong'o Oyugi & 2 others (Supra)* where it was observed that:

“...Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the *Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear *evidence* in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

56. The inevitable conclusion is that the petitioner is not entitled to any of the reliefs sought as the petition dated 26th May 2021 is devoid of merit. The same is dismissed with costs.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 28TH DAY OF FEBRUARY, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

