REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION MISC. NO. E011 OF 2021

BETWEEN

JAMES NTHUKU KITHINJI.....PETITIONER

VERSUS

1. **THE DIRECTOR OF PUBLIC PROSECUTIONS**
2. **THE CHIEF MAGISTRATES COURT, KIBERA LAW COURTS.....RESPONDENTS**

JUDGMENT

Introduction:

1. The Petitioner, *James Nthuku Kithinji*, is the accused person in *Kibera Chief Magistrates Courts Criminal Case No. 743 of 2018, Republic -vs- James Nthuku Kithinji (*hereinafter referred to as ***'the Criminal Case').*** He was charged with offence of *assault causing actual bodily harm contrary to Section 251 of the Penal Code*.

2. Upon taking plea on 12th June 2018, the case went forward for hearing of the prosecution's case. Subsequently, on 26th May 2020, a ruling was delivered where the Court placed him on his defence

3. Dissatisfied with the ruling, the Petitioner applied to the High Court for Revision through *Criminal Revision No. 521 of 2020 (*hereinafter referred to as ***'the revision application')***.

4. The Petitioner contends that the revision application was disallowed on the grounds that the Petitioner was asking the Court to delve into the merits of the Criminal Case and that there were no detailed reasons by the trial Court upon which the High Court would make a re-evaluation.

The Petition:

5. Through an Amended Petition dated 1st October 2021, supported by the supplementary Affidavit of *James Nthuku Kithinji* deposed to on even date, the Petitioner approached this Court seeking to halt any further continuation of the Criminal Case.

6. Contemporaneously instituted with the Amended Petition was the Amended Notice of Motion Application dated 1st October

2021, (hereinafter referred to as '***the application'***) filed under certificate of urgency. It was supported by the Affidavit of James Kithinji sworn to on even date.

7. In the application, the Petitioner sought conservatory orders temporarily stopping the proceedings in the criminal case pending hearing and determination of the Petition.

8. Upon hearing the parties to the application, this Court directed on 14th December 2021, that the application be subsumed in the Petition and both be heard together.

9. In the main, the Petitioner pleaded that the Investigating Officer provided false testimony in the trial Court. He made reference to the P3 where on cross-examination, the Investigating Officer, insisted on relying on medical report from Government Doctors only despite two independent reports showing no injuries to the victim.

10. In a bid to show incidence of unlawful arrest, he pleaded that he was arrested before the compliant was lodged. He referred to the Charge Sheet which indicates that he was arrested on 1st June 2018, whereas the P3 Report shows that it was signed on 4th June 2018.

11. The Petitioner further posited that the Investigation Officer's testimony during cross-examination revealed that he was charged only on the basis that the complainant's statement had probative value.

12. The Petitioner further pleaded that the Investigating Officer committed perjury by lying on oath in contravention of section 108(a) of the Penal Code thus compromising his rights to fair trial.

13. He further posited that his fair trial rights were infringed upon when the Investigating Officer testified that he arrested the Petitioner solely on reliance on the statement of the complainant. It was his case that, in absence of a the P3 form authored by a Government officer, his arrest happened without any reasonable grounds in violation of section 29(a) of the Penal Code

14. In view of the contended perjury, unreasonable arrest and the resultant criminal charges, the Petitioner asserted that his prosecution going forward was tainted with illegalities warranting this Court's intervention.

15. It was his case that the P3 Report evidence which was used to support the prosecution's case was obtained illegally pursuant to his unlawful arrest. He posited that the complainant's statement, his arrest and the P3 form were all made with a predetermined outcome.

16. In further seeking to demonstrate impropriety by the prosecution he posited that it did not call witnesses to produce two medical reports that were referred to by the complainant in his testimony.

17. He claimed that the prosecution cherry-picked to manipulate evidence in order to mislead the Court in violation of Article 157 (11) and Article 50(2)(k) of the Constitution which denied him the opportunity to challenge hidden evidence.

18. It is his case that upon being denied the opportunity to re-start his case he asked the Court to waive his procedural requirement under section 160 of the Criminal Procedure Code and to reissue Court summons to DW1 and the Investigations Officer who had not responded to Court summons.

19. The Petitioner contended that the Court did not record his application to have the Court summon DW1 and the Investigating Office in contravention of section 197 of the Criminal Procedure Code.

20. In sum, the Petitioner posited that the conduct of the Criminal Case resulted in in a total failure of justice. In the application, he prayed for interim conservatory orders pending hearing and determination of the Petition.

21. In the Amended Petition, he prayed for the following Orders;

aa) A declaration be issued that the arrest of the Petitioner by the Investigating Officer violated his constitutional rights and in

particular Article 29 (a) of the Constitution of Kenya 2010, and was therefore unconstitutional.

bb) A declaration be issued that; the arrest of the Petitioner AND the preferring of the charge of assault causing actual bodily harm against him by the Investigating Officer, additionally violated his constitutional rights and in-particular Article 27 (1). Article 27 (4), and Article 28 of the Constitution of Kenya 2020, and was therefore unconstitutional.

cc) A declaration be issued that the P3 Report evidence was obtained in a manner that violated the Petitioner's rights or fundamental freedoms in the Bill of Rights, in particular Articles 27 (1), 27 (4), 28, and 29 (a) of the Constitution of Kenya 2010, and that the P3 Report evidence is inadmissible as it violates Article 50 (4) of the Constitution

dd) A declaration be issued that the Petitioner's constitutional rights to a fair hearing and fair trial, in particular Articles 50 (1) and 50 (2) of the Constitution of Kenya 2010, have -been fatally violated and consequently to declare a mistrial in the entire case against the accused person.

ee) An order be issued declaring that the P3 Report evidence adduced in the lst Respondent's case in KIBERA CRIMINAL CASE No. 743 of 2018 is inadmissible as it violates Article 50 (4) of the Constitution.

gg) An order be issued terminating the I Respondents case against the Petitioner in KIBERA CRIMINAL CASE No. 743 of 2018, and acquitting the Petitioner unconditionally.

h) Appropriate directions be issued for costs of this amended Petition.

i) Such other orders be issued as befits the interests of justice.

The Petitioner's submissions:

22. The Petitioner further urged his case through written submissions dated 4th October 2021.

23. In asserting violation of the right to fair hearing, he found support in Criminal Appeal No. 69 of 2012 *Joseph Ndungu Kagiri v Republic* [2016] eKLR where it was observed thus: -

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person.

24. Further reliance was placed on the Indian Supreme Court decision in *Rattiram v State of M.P. [12]*, to claim violation of Article 50 on fair trail rights where it was observed: -

Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused person should not be prejudiced. Fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism.

25. On the foregoing, he submitted that this Court has the power to stop his further prosecution and hence preserve integrity of the judicial process. He referred the Court to *Kuria & 3 Others versus AG* [2002) 2 KLR 69 where it was observed as follows: -

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

26. The Petitioner submitted that his arrest was unlawful since it fell short the '*reasonable grounds*' requirement under section 29 of the Criminal Procedure Code and section 58 of the National Police Service Act.

27. To demonstrate impropriety of his arrest, for lack of reasonable cause, Court's attention was drawn to the United States decision in *Monroe v Pape*, 221 F. Supp. 635 (N.D. Ill. 1963) where the Court stated: -

They are the terms 'probable cause' and 'reasonableness' "For example, it is said that an arrest may be made without a warrant when a crime has in fact been committed and the arresting officer has probable cause for making the arrest. The statutes of Illinois replace the term 'probable cause for making the arrest' with the term 'has reasonable ground for believing that the person [arrested committed the crime]'[Whichever of the terms is used, the idea to be conveyed is that the information justifies more than a suspicion, though it need not contain evidence sufficient to bring about a conviction Therefore, probable cause for an arrest without a warrant, is reasonable ground of probability supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused guilty.

28. The Petitioner reiterated that the decision to prosecute him was arbitrary. Reference was made to Constitutional Petition No. 252 of 2019 *Pevans East Africa Limited v Betting Control and Licensing Board & 2 Others; Safaricom Limited & another (Interested Parties* [2019] eKLR where the Court stated that: -

Arbitrary and Capricious means doing something according to one's will or caprice and therefore conveying a notion of a tendency to abuse the possession of power. This is one of the basic standards for reviewing administrative decisions. Under the "arbitrary and capricious" standard, an administrative decision will not be disturbed unless it has no reasonable basis. When an administrator makes a decision without reasonable grounds or adequate consideration of the circumstances, it is said to be arbitrary and capricious and can be invalidated by a court on that ground. In other words, there should be absence of a rational connection between the facts found and the choice made.

29. In respect to admissibility of P3 form, he submitted that there was no causal connection between the complainant's alleged violated rights and the evidence that was obtained as a result of the violation. It was his case that the P3 form was obtained with a predetermined outcome.

30. The Petitioner submitted that there was suppression of evidence that was favourable to him by the prosecution which an act which was aimed at securing a conviction by all means. He stated that by first suppressing the Kileleshwa Medical Plaza Report evidence from the Court, and then later subverting the process of truthfully adducing the same evidence into the Court record via DWI, the 1st Respondent irredeemably violated the Petitioner's/accused person's guaranteed right under Article 50 (2) () of the Constitution to adduce and challenge evidence.

31. Reliance was placed on the decision in *David Kariuki Mutura -vs- Republic* [2005] eKLR in dealing with suppression of evidence where it was held:

These witnesses were not called to testify. In the case of GEORGE NGOSHE JUMA & ANOR VS ATTORNEY GENERAL, MISC CRIMINAL APPLICATION NO. 345 OF 2001, The Constitutional Court held that the prosecution has a duty to bring before Court all the evidence gathered to ensure that justice is done. The prosecution cannot be allowed to suppress evidence in their possession even if it is in favour of the accused. Unfortunately, this is what seems to have happened in the instant case. The investigating officer was selective in the evidence he wanted adduced before Court, There was evidence recorded from witnesses that was in favour of the Appellant. This evidence was suppressed for no apparent reason. I think in this regard the Appellant's complain that the Learned Trial Magistrate erred in disregarding the fact that the prosecution had deliberately suppressed the evidence of the eye witnesses to the accident despite having taken statements from them has some justification. I think that in those circumstances, the trial Magistrate ought to have drawn the necessary inference that the evidence that would have been adduced by the said witnesses would have been unfavorable to the prosecution case.

32. It was his case that Article 50(4) of the Constitution sets its "exclusionary rule" to admission of evidence that would render the trial unfair or that would otherwise be detrimental to justice.

33. To buttress unfairness of the trial, support was found in Criminal Appeal No. 198 of 2010, *Republic v Edward Kirui* [2014] eKLR where the Court of Appeal drew persuasion from the India Supreme Court case of *Zahira Habibullah Sheikh & Another V State of Gujarat & Others* AIR 006 SC 1367 where the Court observed;

It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned.

There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted ...

34. Further reliance was placed in *Republic v Director of Public Prosecutions 2 others Ex Parte Edwin Harold Dande & 3 others*, Judicial Review Application No. 8 of 2017, [2018] eKLR**.**

35. The Petitioner submitted that the culmination his prosecution amounted to mistrial which called for this Court's intervention. In urging the Court to declare it as such, he referred to the Court of Appeal in *Kitsao v Republic* [2007] EA 157 (CAK) and the one in *Matsiko v Uganda* [1999] I EA 184 where the Court of Appeal of Uganda rendered a case a mistrial for violating constitutional rights of the accused person.

36. To further illustrate unfairness of the trial, the Court was referred to the Court of Appeal in *Peter M. Kariuki v Attorney General*; Civil Appeal No. 79 of 2012, [2014] eKLR where the Court quashed a conviction founded on egregious violation of fundamental rights.

"We have found that violations of the appellant's constitutional rights went far beyond his right to liberty and .fundamentally implicated his right to a fair trial. Those violations cannot be appropriately remedied by an award of damages alone. A conviction founded on such palpable and glaring violation of the right to a fair trial ought not to be allowed to stand. A conviction arrived at on the back of egregious violations of the magnitude and scale we have found in this appeal, is in addition, a danger not only to the appellant, but to society itself. This is particularly the case when the violations are committed by a court created by law and enjoined to uphold the rule of law."

37. In asserting the need to observe fairness in administration of justice, he stated that the conduct of the prosecution was inappropriate. He found support in Republic -vs- Kamlesh Mansukal Damji Pattni, Criminal Case 229 of 2003, [2005] eKLR.

38. The Petitioner maintained that the powers of the prosecution are not absolute under Article 157(11) of the. He referred the Court to Criminal Appeal No. 23 of 2017, *Peter Thinga Ngamenya -vs- Republic* where prosecutorial powers, in respect to interests of administration of justice, impartiality and public interest, were discussed in the following manner;

56. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standard provided under the Constitution and the Office of the Director of Public Prosecutions Act. Some of these principles are the interests of the administration of justice, impartiality, promotion of public confidence the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya and the need to serve the cause of justice, prevent abuse of the legal process and public interest. The office of the Director of Public Prosecution is also required to promote constitutionalism. Some of the principles of constitutionalism are to be found in Article 10 of the Constitution and these include transparency and accountability."

39. On the part of the 2nd Respondent, the Petitioner submitted that it failed its constitutional and statutory duty to be a neutral arbiter thus resulting in a total failure of justice. He referred to the Court's order disallowing him the chance to start afresh the examination of the defence witness and failure to waive the requirements of section 160 of the Criminal Procedure Code.

40. On the basis that the trial Court requested the Petitioner to make a formal application for the recall of DW1 and disobedience by the Investigating officer to summonses, he submitted that he was denied the right to fair hearing.

41. Impropriety of the 2nd Respondent was further claimed to have arisen from the fact that the Court failed to record the narrative of proceedings as accurately as possible. It was his case that the proceedings of 2nd October 2020 were incomplete and inaccurate and as such a nullity for failure to abide by the mandatory requirements of section 197 of the CPC.

42. To buttress the importance of section 195(1)(b) of the CPC support was found in High Court decision in *Maurice Mutembei Kathumbiki* where it was observed as follows: -

The provisions of S.197(J)(b) are coached in mandatory terms. The magistrate is required under that section to take evidence down in the form of a narrative. There is a reason that the law requires the evidence to be recorded in form of a narrative. It is of supreme

importance that the court records the testimony of the witnesses in the exact words used by them and as accurately as possible. It so recorded that it can be said that the record is accurate and that it reflects what the witness said in their evidence.

We find that the learned trial magistrate failed to comply with the procedural and mandatory provisions of the law. That failure to comply with mandatory procedural laws rendered the proceedings defective and therefore a nullity. Accordingly, we set aside the conviction entered against the appellant and also the sentence.

43. The Petitioner appeared in person to highlight his case. He submitted that his right not to be deprived of freedom arbitrarily without just cause as guaranteed under Article 29(a) of the Constitution had been violated. It was his case that the arrest culminated in violation his right to equal treatment of the law under Article 27 of the Constitution.

44. It was his case that the Police had no reasonable grounds when they arrested him without a warrant of arrest thus resulting in violation of his rights.

45. He asserted that the P3 form used in the criminal case was inadmissible as it illegally obtained. He claimed that it ought not to be part of the record in the criminal case since it affected his ability to adduce and challenge evidence.

46. It was further his case that trial Court violated his right when it stood down his witness and was therefore deserving of the orders prayed for.

47. In rebutting the Respondent's case that this Court had no jurisdiction on account of res-judicata, he stated that no deposition had been made to that end. He urged the Court to disregard it.

48. The Petitioner prayed that the Petition be allowed as prayed.

The Respondents' case:

49. The 1st Respondent's opposed the Petition and the application through Grounds of Opposition dated 16th September 2021.

50. It was its case that it acted within the confines of Article 157 of the Constitution and all other laws incidental thereto in exercising prosecutorial powers. To that end, it claimed that Director of Public Prosecutions is subject only to the Constitution and the law; does not require the consent of any person or authority; is independent and not subject to the direction or control of any person or authority.

51. It further posited that the Petitioner could not direct the 1st Respondent on how it ought to carry out its constitutional mandate by stating who ought to be charged, what evidence ought to be adduced and even what charges to prefer. It was its case that the 1st Respondent ought to only be guided by provisions of the law as per Article 157(11) of the Constitution.

52. In urging the Court not to allow the Petition, it was stated that High Court would be interfering with the independence of the 1st and 2nd Respondents by quashing the proceedings in the criminal case without any justifiable cause.

53. It was its case further that the Petitioner has merely stated the provisions of the Constitution but has failed to demonstrate that the 1st Respondent has not acted independently or will not act independently so as to trigger High Court's intervention.

54. It further stated that the decision made by the Director of Public Prosecutions on whether to prefer criminal charges is based sufficiency of evidence. Therefore, Petition ought to be disallowed since the decision to charge was solely based on the sufficiency of evidence and not on any other extraneous factors.

55. In making the case for the 2nd Respondent, it was stated that the proceedings demonstrate that the Court adhered to provisions of the Constitutional edict under Article 25, 50, 159 and 160 on the right to a fair hearing in all respects.

56. It claimed that the Petition was instituted in bad faith, is frivolous, misconceived, premature and an abuse of the Court meant to derail and defeat the cause of justice in the trial Court.

57. It was its position that the propriety of the criminal case in as far as accuracy and correctness of the evidence or facts gathered through investigation is concerned can only be assessed and tested by the trial Court.

58. On the foregoing, the 1st Respondent claimed that the Petitioner is assured of fair trial and protection of the law.

59. Separately, the 1st Respondent stated that the criminal case was at defence hearing and the Petitioner ought to tender his defence before the trial Court and not the Constitutional Court as he is now doing.

60. It was its case that the right to fair administration action under Article 47(1) of the Constitution was complied with during the investigations, arrest, arraignment and subsequent prosecution of the Petitioner.

61. The 1st Respondent stated that the Petition was a call for the Constitutional Court to consider the merits of the prosecution's case before final determination by the trial Court.

62. It asserted that the Petitioner, if dissatisfied with the outcome, had the right of appeal.

63. On a different tangent, the 1st Respondent stated that the issues raised by the Petition was *res-judicata* as they had been dealt with by the *High Court Criminal Division in Criminal Revision 521 of 2020* by Hon. Justice Kimaru and a ruling delivered on 24th June 2020.

64. In the end, it prayed that the application and Petition be dismissed with costs to the 1st Respondent.

The Submissions:

65. It was submitted by *Miss Marinda*, Counsel for the Respondents, that the Petition reiterating that it was an attempt to have the Constitutional Court delve into the issues before the trial Court.

66. It was her further submission that no violation had been proved and the Respondents will ensure that the Petitioner's rights are protected. She stated that the criminal case was at the defence stage and no *prima-facie* case had been established by the Petitioner regarding violation of his rights.

67. It was further her case that the issues raised in the Petition were canvassed in Criminal Revision No. 521 of 2020 and as such the prayers sought in the Petition are *res-judicata*.

68. Counsel submitted that the Petitioner claimed misconduct by the Respondents at the defence hearing for which the Petitioner appealed to the High Court for revision. He further stated that the Revision did not take off until he withdrew and filed the instant Petition claiming that he had filed the revision in the wrong Court.

Issues for Determination

69. Flowing from the foregoing, the issues that emerge for determination are as follows: -

i. Whether this Court's jurisdiction is outed by the bar of res-judicata.

ii. Whether the Petitioner's arrest and detention violated his constitutional rights under Article 49 of the Constitution.

iii. Depending on (ii) above, whether the conduct of the proceedings in the trial Court violated the Petitioner's right to fair trial under Article 50(2)(k) of the Constitution.

70. I will henceforth consider the issues sequentially.

Analysis and Determinations:

i. Whether this Court's jurisdiction is outed by the bar of *res-judicata:*

71. A challenge on court's jurisdiction must be ascertained from the very onset because anything purportedly done without jurisdiction is a nullity.

72. In Constitutional Petition E008 of 2022, ***Okiya Omtatah Okoiti v Attorney General & another*** [2022] eKLR this Court discussed the doctrine of jurisdiction in the following fashion: -

22. *The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others* consolidated with Civil Appeal No. 139 of 2017 *County Government of Embu & Another vs. Eric Cheruiyot & 15 Others* (unreported) *in a decision rendered on 8th February, 2022 spoke to the doctrine of jurisdiction in general as follows: -*

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

37. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S' v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

…Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

39. *The Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:*

…a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

40. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, **Application No. 2 of 2011**, *the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:*

(68). A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

73. The challenge on this Court's jurisdiction arises from the 1st Respondent's contention that the dispute herein had previously been conclusively determined by the Court in *High Court Criminal Division in Criminal Revision 521 of 2020.*

74. The Petitioner did not challenge the existence of the Criminal Revision application between him and the 1st Respondent. He,

however, opposed the bar of *res-judicata* by stating that the 1st Respondent did not depose to that bar and as such it is improperly raised.

75. In ***Okiya Omtatah Okoiti -vs- Attorney General & another*** case (supra) this Court discussed the bar of *res-judicata* generally and spoke to the manner in which it ought to be raised and whether it is applicable in Constitutional Petitions. It observed as follows: -

28. The doctrine of res judicata is not novel. Its genesis is in Section 7 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya which provides that: -

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.

29. The Supreme Court in a decision rendered on 6th August, 2021 in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR comprehensively dealt with the different facets making up the doctrine of res judicata.

30. In the first instance, the Apex Court framed the issues for determination as follows: -

a) Did the High Court procedurally consider the plea of res judicata"

b) Did the finding by the High Court on res judicata infringe on the Petitioner's right to fair hearing condemning them unheard"

c) Were the learned Judges of the Court of Appeal justified in holding that the doctrine of res judicata applied to the current case; was the Paluku case the same as the Appellants' herein"

d) Is this doctrine of res judicata applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation"

e) If the doctrine of res judicata is applicable to constitutional matters with the rider that it should be invoked in constitutional litigation only in the rarest and clearest of cases, on whom lies the burden of proving such rarest and clearest of cases"

f) What constitutes such "rarest and clearest" of cases"

g) Who bears the costs of the suit.

31. On the ***procedure for raising the plea*** *of res judicata, the Supreme Court alluded to the position that the plea is anchored on evidential facts and that such facts ought to be properly raised in a matter. In that case, the plea of res judicata had been raised by way of Grounds of opposition and in the Replying Affidavit.*

32. The Court, in dismissing the argument that the issue was improperly raised before Court, stated as follows: -

[53] Instead, and contrary to the Appellants submissions, the plea of res judicata was raised through both grounds of opposition and replying affidavits in response to the Appellants application. It is also evident that through the Replying Affidavits of the 3rd and 4th Respondents, evidence by way of the Judgment of JR No. 130 of 2011 was introduced through an affidavit to bolster the plea of res judicata.

[54] It is further evident that the Appellants were not condemned unheard or shut out from the proceedings. The proceedings demonstrate that the Court accorded the Appellants the two justiciable elements of fair hearing: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable.

[55] This ground of appeal must therefore fail.

*33. On **whether the doctrine of res judicata applies to constitutional Petitions**, the Supreme Court endeavoured an extensive discussion and comparative analysis in various jurisdictions. It also captured the various opposing schools of thought on the issue.*

34. In the end, the Court found that the doctrine, rightly so, applies to constitutional Petitions. This is what the Court partly stated: -

81. We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.……

[82] If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of the Constitution in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.

35. The Apex Court went ahead and rendered itself on the threshold for proving the applicability of the doctrine. The Court stated as follows: -

[86] We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

a) There is a former Judgment or order which was final;

b) The Judgment or order was on merit;

c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d) There must be between the first and the second action identical parties, subject matter and cause of action

36. On the commonality of the parties, the Court noted as follows:

[93] The commonality is that the Appellants herein and the Applicants in Jr 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo. They have the same interests and therefore the raise the complaints regarding the two certificates, FERI & COD. The answer is in the affirmative and we find we cannot fault the High Court or the Court of Appeal for concluding as such.

37. In dealing with the contention as to whether the issues raised in the two suits therein were directly and substantially the same, the Supreme Court noted that the initial suit was instituted by way of a judicial review application whereas the subsequent suit was by way of a constitutional Petition. The Court also noted that the issues raised in the constitutional Petition were more than those decided in the judicial review application.

38. The Supreme Court disagreed with the Court of Appeal and found that the doctrine was not applicable in the matter. The Court held that: -

[97] From the face of it, it would appear that the issues in the present suit and JR 130 of 2011 are directly and substantially the same. However, the Appellants herein predicated their petition on inter alia grounds that the bilateral agreement should have been approved by Parliament in order to form party of Kenyan law and in failing to do so, the Respondents contravened Article 2. They

further alleged that the Respondents herein purported to usurp to the role of Parliament and in doing so contravened Articles 94(5) and (6) of the Constitution. They further alleged that the FERI and COD certificates threatened to infringe their right to property under Articles 40(1)(a) and (2)(a) when the Respondents threatened to arbitrarily deprive them of their property. The Court sitting in determination of a judicial review application did not have jurisdiction to render itself on these issues. We therefore find that the principle of res judicata was wrongly invoked on this ground. (emphasis added).

39. On the competency of the Court deciding the matters in issue, the Supreme Court noted the close relationship between the issue as to whether the current suit had been decided by a competent court and whether the matter in dispute in the former suit between the parties was directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.

40. The Apex Court had a lengthy discussion on the matter. It made reference to several decisions and in the end rendered itself as follows: -

[107] The Court when determining a constitutional petition is empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision. The essence of merit review is the power to substitute a decision which the Court can do when determining a constitutional petition. Further the Court is further empowered to grant not just judicial review orders but any other relief is deems fit to remedy any denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This Court in its decision in Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR went ahead to reaffirm use of structural interdicts and supervisory orders to redress the violation of a fundamental right in order to allow the development of Court-sanctioned enforcement of human rights as envisaged in the Bill of Rights.

[108] We arrive at the inescapable conclusion that the High Court in determining a judicial review application, exercises only a fraction the jurisdiction it has to determine a constitutional petition. It therefore follows that a determination of a judicial review application cannot be termed as final determination of issues under a constitutional petition. The considerations are different, the orders the court may grant are more expanded under a constitutional petition and therefore the outcomes are different.

[109] The Court in hearing a constitutional petition may very well arrive at the same conclusion as the Court hearing a judicial review application. However, the considerations right from the outset are different, the procedures are different, the reliefs that the court may grant are different, the Court will be playing fairly different roles.

[110] We consequently arrive at the conclusion that the Court of Appeal erred in holding that the doctrine of res judicata applied to the current case. The Court of Appeal should have at that point found that the High Court was wrong in its conclusion.

41. The Supreme Court also discussed two exceptions to the doctrine of res judicata. The Court stated as follows: -

[84] Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.

[85] In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception.

42. The Supreme Court had earlier expressed itself on the doctrine of *res judicata* in *Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR where it delimited the operation of the doctrine of *res-judicata* in the following terms;

[317] The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the

protection of the integrity of the administration of justice" all in the cause of fairness in the settlement of disputes.

[318] This concept is incorporated in Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:

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.

[319] There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89.

[320] So, in the instant case, the argument concerning res judicata can only succeed when it is established that the issue brought before a Court is essentially the same as another one already satisfactorily decided, before a competent court.

[333] We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route" (Workers' Compensation Board v. Figliola [2011] 3 S.C.R. 422, 438 (paragraph 28)).

[334] Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the Courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In Omondi v. National Bank of Kenya Ltd. & Others, [2001] EA 177 the Court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit."

[352] The Judicial Committee of the Privy Council, in Thomas v. The Attorney-General of Trinidad and Tobago, [1991] LRC (Const.) 1001 held that "when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules." That court relied on a case decided by the Supreme Court of India, Daryao & Others v. The State of UP & Others, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of res judicata. The Indian Court also rejected the notion that res judicata could not apply to petitions seeking redress with respect to an infringement of fundamental rights. Gajendragadkar J stated:

But is the rule of res judicata merely a technical rule or is it based on high public policy" If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law, then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of res judicata…has no doubt some technical aspects…but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32.

[353] Kenya's High Court recently pronounced itself on the issue of the applicability of res judicata in constitutional claims. In Okiya Omtatah Okoiti & Another v. Attorney General & 6 Others, High Court Const. and Human Rights Division, Petition No. 593 of 2013 [2014] eKLR, Lenaola J. (at paragraph 64) thus stated:

Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

[354] On the basis of such principles evolved in case law, it is plain to us that the 1st, 2nd and 3rd respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue.

[355] However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of Articles 22 and 23 of the Constitution.

43. The Court of Appeal in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR (which decision was overturned by the Supreme Court) also, and so correctly, discussed the doctrine of res judicata at length. The Court stated in part as follows: -

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality" If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows: -

i) The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.

iii) The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or

substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

76. Having set out the parameters for one to successfully raise the bar of *res-judicata*, I now consider the merits of the 1st Respondent's case.

77. The 1st Respondent herein asserted the bar of *res-judicata* through Grounds of Opposition and written submissions only.

78. I take cue from the Supreme Court's position in ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others*** case (supra) where it was made clear that the bar of *res-judicata* despite being a matter of law is subject to proof by way of evidence. It was observed that a deposition backed by evidence is necessary to help Court identify incidence of various limbs of *res-judicata*.

79. The 1st Respondent only raised the jurisdictional issue in its Grounds of Opposition. The proceedings and ruling in the said criminal revision were not availed as to aid this Court compare and verify that indeed the requirements needed to operationalize the bar of *res-judicata* were raised in criminal revision application and as such the application tallied with the instant Petition.

80. In the premises, I find and hold that the doctrine of *res-judicata* was inappropriately raised and even if it had been raised correctly, there is no demonstrable evidence, save for the bare claim, to aid this Court ascertain its propriety.

81. The contention is hereby dismissed.

ii. Whether the Petitioner's arrest and detention violated his constitutional rights under Article 49 of the Constitution:

82. The Petitioner's claim for unlawful arrest stems from the contention that he was arrested before the complaint was lodged. It was his case that he was arrested on 1st June 2018 whereas the P3 form indicates that it was signed by on 4th June 2018, that id 3 days later.

83. The 1st Respondent rebutted the claim asserting that right to fair administration action under Article 47(1) of the Constitution was complied with during the arrest of the Petitioner.

84. To ascertain the validity of the Petitioner's claim, it is necessary to first look at the law on the rights of an arrested person.

85. Both the Constitution and statutory law guarantee an arrested person certain rights.

86. **Article 49** of the Constitution provides as follows: -

49. Rights of arrested persons

(1) An arrested person has the right—

(a) to be informed promptly, in language that the person understands, of—

(i) the reason for the arrest;

(ii) the right to remain silent; and

(iii) the consequences of not remaining silent;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) to be held separately from persons who are serving a sentence;

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.

87. The foregoing constitutional edicts are embellished by section 58 and 59 of the National Police Service Act in the following manner;

58. Power to arrest without a warrant

Subject to Article 49 of the Constitution, a police officer may without a warrant, arrest a person—

(a) who is accused by another person of committing an aggravated assault in any case in which the police officer believes upon reasonable ground that such assault has been committed;

(b) who obstructs a police officer while in the execution of duty, or who has escaped or attempts to escape from lawful custody;

(c) whom the police officer suspects on reasonable grounds of having committed a cognizable offence;

(d) who commits a breach of the peace in the presence of the police officer;

(e) in whose possession is found anything which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing;

(f) whom the police officer suspects upon reasonable grounds of being a deserter from the armed forces or any other disciplined service;

(g) whom the police officer suspects upon reasonable grounds of having committed or being about to commit a felony; or

(h) whom the police officer has reasonable cause to believe a warrant of arrest has been issued.

59. Arrests and detentions by Police

An arrest by a police officer, whether with or without a warrant, shall be subject to the rules contained in the Fifth Schedule with respect to arrest and detention

88. The Fifth Schedule to the National Police Service Act enumerates how police are to discharge their power to arrest under

section 59(2) in the following way;

1. In the performance of the functions and exercise of the powers of arrest and detention set out in the Constitution and this Act or any other law, ***a police officer shall carry out an arrest and detention only as provided for in law.***

2. A police officer shall accord an arrested or detained person all the rights set out under Articles 49, 50 and 51 of the Constitution.

89. Further, for purposes of this suit, section 29 of the Criminal Procedure Code provides for arrests done without warrant as follows;

29. Arrest by police officer without warrant

A police officer may, without an order from a magistrate and without a warrant, arrest—

(a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence;

90. The First Schedule to the Criminal Procedure Code recognizes assault occasioning actual bodily harm as a cognizable offence upon which one may be arrested without a warrant.

91. The Petitioner faulted the basis of his arrest. He claimed that the Investigating Officers arrested him for the offence of assault causing actual bodily on the sole basis of the Complainants statement. As such, the Petitioner contends, the complainant's statement alone was not adequate to entitle the Investigating Officer to form the opinion that there was *reasonable grounds* for his arrest.

92. Flowing from the foregone, it is apparent that the Petitioner does not provide this Court with any reference or evidence upon which it can make a finding that the assessment of the arresting officer, based on the complainant's statement, did not amount to reasonable grounds.

93. Save for simply stating that there were no reasonable grounds justifying his arrest, there is no evidence, or particularity as to manner of violation of Article 49 of the Constitution. A perusal of the Amended Petition does not disclose or mention the particular provision in Article 49 and the way it was violated by the arresting officer.

94. On the other hand, the evidence of the Investigating Officer was to the effect that, upon reading the statement of the complainant, he formed the opinion that he had reasonable grounds to make the arrest.

95. The arresting officer's opinion regarding the probative value of the complainant's statement was not final. Similarly, the Petitioner's contention that the statement did not have reasonable grounds for his arrest are premature.

96. The rival positions are to be subjected to rigorous Court process of examination and cross-examination and subsequently constitutional and legislative test by the Trial Magistrate upon which a verdict will be reached. Such verdict is not final. Any aggrieved has the right to lodge an appeal to the High Court.

97. The Petitioner is therefore jumping the gun by urging this Court to draw conclusions at this stage. It is a bid to short-circuit the Court process especially in absence of clear identification of manner of violation of Article 49 and evidence diminishing the value of the impugned complainant's statement, for the Petitioner to whimsically adjudge his arrest unreasonable.

98. In the premises, absence any evidence of unfair arrest, this Court does find that the provisions of section 58 of the National Police Service Act and the Fifth Schedule to the Criminal Procedure Code was adhered to and no violation of the constitution has been demonstrated to have been violated under Article 49.

99. I hereby find and dismiss the claim that the Petitioner's arrest was unconstitutional.

iii. Whether the conduct of the proceedings before Trial Court violated the Petitioner's right to fair trial under Article 50(2)(k) of the Constitution:

100. This issue stems from the contention that the Investigating Officer provided false testimony in the trial Court in respect of P3 form during cross-examination.

101. The Petitioner is further of the position that the Medical Report ought not to have come from the Government doctors only, rather, there ought to have been admitted to evidence two other medical reports from independent doctors. It is his case that the complainant ought to have produced two other medical reports that he referred to in his testimony.

102. The Petitioner contends that the prosecution cherry-picked evidence in order achieve a particular desired outcome in violation of Article 50(2)(k) and 157(11) of the Constitution.

103. Essentially, the Petitioner challenges admissibility of the Medical Examination Report on three fronts. That it was acquired illegally, that the Investigating Officer committed perjury in respect of the contents of the Medical Examination Report and that the Investigating Officer supressed certain evidence that would have aided the Petitioner.

104. On the foregoing, the Petitioner claims that its reliance by the Trial Court will result in an unfair trial.

105. Article 50(2)(k) of the Constitution is on the right of an accused person to adduce and challenge evidence. The place of adducing and challenging evidence is mainly at the trial Court.

106. Any party aggrieved by the decision of a trial Court to admit or reject certain evidence has the recourse to the appellate Court or a Court exercising revisionary or supervisory jurisdiction over the trial Court.

107. I have carefully considered the arguments put forth by the Petitioner on this issue. Whereas the Petitioner may be aggrieved by the decisions of the trial Court in the process of admitting or rejecting to admit evidence, for such to culminate to an infringement of the Constitution, there must be a clear demonstration of how the alleged infringement occurred. In other words, such must surpass the normal riggers of adducing evidence before a trial Court.

108. I have painstakingly perused the lower Court record. On 3rd December 2020, the learned trial Learned Magistrate made certain remarks on the conduct of the Petitioner in requesting Court to acquit him and make a finding that DW1 perjured himself in the criminal case. The Court observed as follows: -

Clearly, the accused person has placed the cart before the horse. It would be a travesty to justice if the court can begin to make analysis of the testimony and evidence when there is a defence hearing to be done. That is unprocedural, wrong, prejudicial and clearly unjust.

109. The Learned Trial Magistrate went further and made the following compelling remarks regarding the Petitioner's invitation to have the Trial Court declare the case a mistrial. He observed: -

In any event why would I declare a mistrial for a trial that is not complete! I cannot comment on the merits of an ongoing case. Most of these submissions should be reserved in the final submissions after the defence case.

110. I find the foregoing findings of the learned trial Magistrate to be in consonance with the decision in Anti-Corruption and Economic Crimes Revision E004 of 2021, ***James Anthony Maingi -vs- Republic*** [2022] eKLR, where the Court referred to the decision in *Njuguna Mwangi & another v Republic* [2018] eKLR in respect of an ongoing case where applications on admissibility are lodged prematurely**.** It was observed thus: -

14. What is the effect of admitting an exhibit by the trial court after overruling an objection raised by the defence or prosecution challenging such admission" Production and admission of exhibits in the course of a trial is governed by laid down procedural and legal requirements whether in criminal or civil proceedings. Ordinarily, objections do arise when a party attempts to produce a document or materials relied on to prove one's case depending on the circumstances and attendant legal provisions governing such

production. Depending on the nature of evidence and Exhibit sought to be produced, courts quite often do make interlocutory rulings allowing or disallowing production of such exhibits.

15. In a situation such as the instant case which is challenging the admission of certain exhibits for failure to comply with certain legal requirements or standards before production and admission, it is perfectly within the purview or discretion of the trial court to determine the element of admissibility based on the relent law. The consequence of such admission improper or otherwise, would attract a ground of appeal by either party upon conclusion of the case depending on whether there is a conviction or not. That is why the Luke Ouma Ochieng vs R(supra) case is not relevant to this case as it was referring to a situation of an accused person who had already been convicted based on production of exhibits that had been objected to at the trial stage. The admissibility of exhibits objected to should be challenged or raised after conclusion of the trial at the appeal stage and not at the admission stage or in the middle of a trial.

16. The production and admission of the said exhibits does not amount to condemnation of the accused person. It is not automatic that the Applicants will be adversely affected by being convicted. ***In case of a conviction based on those exhibits, the Applicants shall have a remedy by way of an appeal. The power to admit exhibits or not is purely a matter of interpretation of the law by a trial court. It will be prejudicial to the trial and the eventual outcome of the case which is ongoing if this court were to make a finding that the admission was wrong. A court handling an application of this nature must act with extreme caution and restraint not to unnecessarily invoke revisionary powers thereby interfering with the trial court's proceedings thus prematurely jeopardising the appeal process. Courts are not infallible as mistakes may occur but there are properly prescribed remedies e.g appeals where appropriate.***

17. It would be a bad precedent for the High Court to intervene and annul each order made by a trial court in admitting each exhibit against the wish of the defence or prosecution. To allow such a scenario under revisionary powers would amount to anarchy in litigation thus entertaining several mini appeals in the middle of a trial of a case in the guise of exercising revisionary powers thus micromanaging and clogging the legal system by extension unreasonably delaying the expeditious disposal of cases and administration of justice.

18. Practically, it is inconceivable that every ruling on admission or non-admission of exhibit(s) by a trial court would automatically attract or generate a ground of revision. The grounds cited herein do not fall within the confines of an error envisaged under Section 362 of the CPC to call for revision. The Applicants have not been prejudiced by the admission of exhibits at this stage. The case is yet to be finalised. They will have a basis on appeal at the conclusion of the case in the event they are found guilty.

111. It is, therefore, undesirable that the Petitioner would be heard in an appellate court or this Court in respect of the production and admissibility of documents which have not yet been ruled on by the trial Court.

112. The Petitioner's approach of the matters is in conflict with the constitutional edict of expeditious disposal of case. Both the Petitioner and the complainant in the criminal case deserve expeditious disposal of the case.

113. Whereas the Petitioner has the right to file these proceedings, the Petition herein has the effect of delaying the criminal case.

114. The Court of Appeal in Nairobi Criminal Appeal No. 116 of 2007 ***Thomas Patrick Gilbert Cholmondeley vs. Republic*** (2008) eKLR the following was said;

…. We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of the Constitution. ***First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all.*** *In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practicing at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court*. (emphasis mine)"

115. It is not in contest that the proceedings in the criminal case are at the defence hearing. Not a single witness of the Petitioner has taken a stand yet. The Petitioner still has ample opportunity to adduce and challenge evidence in a much broader perspective.

116. As I come to a close on this issue, I must distinguish the Court of Appeal decision in ***Peter M. Kariuki v Attorney General*** Civil Appeal No. 79 of 2012, [2014] eKLR which the Petitioner relies on to have the criminal case declared a mistrial.

117. In the said case, the appellate Court was able to declare a mistrial after the High Court had expressed itself and made findings on every aspect of the dispute and convicted the Appellant.

118. In the instant case, the dispute is only at the defence stage. The quest for a declaration of mistrial is synonymous to asking this Court to analyse the merits of the criminal case.

119. It is on the foregoing that this Court must exercise restraint and not usurp the mandate of the trial Court by determining in its behalf admissibility of evidence placed before it.

120. In the end therefore, I do find and hold that the claim of unfair trial has not yet materialized to warrant this Court's intervention.

Disposition:

121. In the end, this Court does not find merit in the Petition and Notice of Motion.

122. They are both hereby dismissed in their entirety with each party bearing its costs.

123. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF APRIL, 2022.

A. C. MRIMA

JUDGE

JUDGMENT VIRTUALLY DELIVERED IN THE PRESENCE OF:

JAMES NTHUKU KITHINJI, PETITIONER IN PERSON.

MISS MARINDA, LEARNED COUNSEL FOR THE RESPONDENTS.

ELIZABETH WANJOHI – COURT ASSISTANT.