



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 101 OF 2021

[Formerly Nairobi Petition No. E466 of 2021]

AMANI TECHNOLOGY LIMITED.....1st PETITIONER

BEATRICE MWANULI NYABERA.....2nd PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1st RESPONDENT

THE ANTI-COUNTERFEIT AGENCY.....2nd RESPONDENT

**THE EXECUTIVE DIRECTOR, ANTI-COUNTERFEIT
AUTHORITY.....3rd RESPONDENT**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....INTERESTED PARTY

JUDGMENT

1. The Petitioners' case as I glean it from the Petition dated 2nd November 2021 is that the 2nd Petitioner was arraigned in Mombasa Chief Magistrate's Court Criminal Case No. 1454 of 2019, Republic v Beatrice Mwanuli Nyabena charged with the offence of importing into Kenya, packaging material with a counterfeit mark applied thereto contrary to section 32(n) as read with section 35(1) (a) of the Anti-Counterfeit Act¹(herein after referred to as the Act). He also faces a second count of importing into Kenya, in the course of trade, goods or items except raw materials that is unbranded contrary to section 32 (k) as read with section 35(1)(a) of the Anti-counterfeit Act.

¹ Act No. 3 of 2003.

2. They contend that on 8th July 2021, the 2nd Petitioner applied to the 3rd Respondent to be supplied with samples of the seized goods under section 27(3) of the Act but to date no response has been received. They aver that on 23rd July 2021 they were supplied with the documents listed in paragraph 11 of the Petition minus the said samples. They aver that the failure to supply the said samples has the effect of depriving the 2nd Petitioner details of the charges, the opportunity of subjecting the samples to alternative tests, if need be, reasonable access to prosecution evidence and opportunity to adduce evidence.
3. They contend that section 32(k) of the Act is unconstitutional; that the act does not define the term “brand” and or “branding” as used in section 32(k) or the attributes goods must bear to be classified as “branded” or “unbranded.” They state that the said section is vague and overbroad because it does not clearly state the nature of goods it prohibits; that it lacks certainty which is necessary in penal statutes, the absence of which confers an unlimited and unfettered discretion to the 2nd Respondents to arbitrarily seize goods of whatever nature in contravention of Article 40 of the Constitution and mounting criminal prosecutions.
4. They also state that section 58D of the Trademarks Act² and section 32 of the Anti-counterfeit Act establish similar offence but different penalties, so, the 2nd Petitioner is apprehensive that her right to equal protection of the law under Article 27 (1) of the Constitution may be violated because of possible disparity in sentencing. They contend that the Respondents failure to approve the 2nd Petitioners application for samples deprives her reasonable access to evidence and a contravention of her right to a fair trial and an affront to Articles 27, 35 and 47 of the Constitution.
5. As a consequence of the foregoing, the Petitioner prays for: -
 - a. *A declaration that section 32(k) of the Anti-counterfeit Act is vague, overboard and lacking in certainty and is therefore unconstitutional.*
 - b. *A declaration that section 32 (k) of the Anti-counterfeit Act contravenes Article 40(1)(a) and (b), 40(2)(b) of the Constitution and is therefore unconstitutional.*

² Cap 506, Laws of Kenya.

- c. An order quashing count 11 in criminal case number 1454 of 2019 on account of the unconstitutionality of section 32(k) of the Anti-counterfeit Act.*
 - d. A declaration that the application and the threat of application of section 35(1)(a) and (b) of the Anti-counterfeit Act has both a discriminatory effect and precludes the 2nd Petitioner from the benefit of the least severe of the prescribed punishments for the offences under section 32 of the Anti-counterfeit Act and is therefore unconstitutional.*
 - e. A declaration that the failure by the 3rd Respondent to approve the 2nd Petitioners application for samples violates the 2nd Petitioners right to a fair trial under Article 25(c) and 50(2)(c)(j) and (k) of the Constitution and is therefore unconstitutional.*
 - f. An order of mandamus compelling the 3rd Respondent to approve the 1st and 2nd Respondents application for samples dated 15th July 2021 and 21st October 2021 respectively.*
 - g. Any other order that this court shall deem fit and just to grant.*
 - h. The costs of this Petition be awarded to the Petitioners.*
6. The 1st Respondent filed grounds of opposition dated 1st February 2022 stating that the Petition is misconceived, frivolous, vexatious and an abuse of court process; that it lacks precision, its pre-mature; and that the Petitioners have not demonstrated that they will not be accorded a fair trial in the lower court.
7. The 2nd and 3rd Respondents filed a Notice of a Preliminary Objection dated 15th December 2021 stating that this court lacks original jurisdiction to entertain this matter; that the Petitioners failed to exhaust the remedies provided under Article 35 of the Constitution and Regulation 21 (2) of the Anti-counterfeit Regulations (the Regulations). They also filed the Replying affidavit dated 15th December 2021 sworn by Collins Okoth a duly Gazetted officer who was the investigating officer in the criminal case. Key highlights of the affidavit are that section 33 of the Act empowers the 2nd Respondent and its officers to take action either upon a formal complaint or on their own motion in respect of any act or conduct of dealing in counterfeit goods; that he inspected container No. MSKU 8092689 on 24th May 2019 and

found suspected counterfeit HP cartridges and unbranded bags and he learnt that the 2nd Petitioner was the importer, hence, the 1st Petitioner is a stranger to this case. Further, the 2nd Petitioner evaded attending court since 2019 culminating in her arrest in 2021.

8. Other salient points in the 2nd and 3rd Respondent's affidavit are: - that the seized goods are exhibits in the criminal case, so, they cannot be availed to the 2nd Petitioner; the Act does not envisage a suspect to test exhibits; that samples can only be availed on formal application and upon payment of the requisite fees of **Kshs. 5,000/=** which the 2nd Petitioner never paid. Additionally, it is the 2nd and 3rd Respondent's case that the issues raised herein ought to be raised before the trial court; that the Petitioners have not exhausted the mechanism provided under Regulation 21 (2); that this Petition is an attempt to delay the criminal trial; and, that insisting to be provided with samples without payment is an affront to section 71(1) of the Interpretation and General Provisions Act.³

9. They contend that this Petition is premised on ignorance of the law and it does not raise constitutional issues. Further, sections 35 (1)(a) and 32 (k) are not constitutional and section 58 of the Trade Marks Act can only arise if the Petitioner is charged under the said Act and as set out in section 2 of the Act, the Act is to be read together with the Copyright Act,⁴ The Seeds and Plant Varieties Act,⁵ The Trade Marks Act⁶ and the Industrial Property Act,⁷ so, had the Petitioners read these other Acts they would have appreciated the meaning of the word "brand."

10. On 16th December 2021, I noted that these proceedings challenge criminal proceedings in the lower court and I enjoined the Director of Public Prosecutions as an Interested Party. Following the joinder, the DPP filed grounds of opposition dated 18th February 2022 stating that the Petition does not disclose bad faith or illegality on the part of the DPP nor does it show that the prosecution aims at achieving collateral purposes. Further, that the DPP consented to the prosecution after he was satisfied there exists of credible evidence. Also, the Petition does not

³ Cap 2, Laws of Kenya.

⁴ Cap 130, Laws of Kenya.

⁵ Cap 326, Laws of Kenya.

⁶ Cap 506, Laws of Kenya.

⁷ Act No. 3 of 2001.

meet the tests in *Anarita Karimi Njeru v Republic*; and, Article **50** of the Constitution provides sufficient safeguards in criminal trials.

11. The Petition was canvassed by way of written submissions. The Petitioners submitted that Section **35(1)(a)** and **(b)** of the Anti-Counterfeit Act prescribes penalties for those convicted of the offences outlined at Section **32** of the same Act. They submitted that section **58D** of the Trademarks Act creates the same offence as in Section **32(n)** of the Anti-Counterfeit Act but prescribes a difference Sentence, so, there is a disparity in the sentences for the same offence. To buttress this argument, they cited *Joseph Kaberia Kahinga & 11 others v The Attorney General*⁸ in which the court addressing the disparities between Section **297(1)**, Section **297(2)** and Section **389** of the Penal Code⁹ stated that a person could be charged with either offence arising from the same facts yet under one section the offence attracts a more severe punishment. The court underscored the need for certainty in law.

12. The Petitioners cited *Evanson Muiruri Gichane v Republic*¹⁰ in which the Court of Appeal after examining Sections **297(2)** and **389** of the Penal Code observed that an accused person is entitled to the less punitive of the two sentences. Fortified by the above holding, the Petitioners cited Articles **27(1)**, **(4)**, **(6)** and **50(2)(p)** of the Constitution and argued that the charge as brought under Section **32(n)** as read with Section **35(1)(a)** of the Anti-Counterfeit Act poses the threat of conviction and sentence under the said provisions, which is a serious threat to the **2nd** Petitioner's freedom from discrimination, right to equal protection and benefit of the law and the benefit to the least severe sentence. The Petitioners argued that it is from the said threat that the **2nd** Petitioner seeks to be protected by this court under Articles **23** and **165** of the Constitution. They submitted that the application of section **35** of the Act inevitably produces discriminatory results against those on whom it is applied upon conviction. They argued that in determining the Constitutionality of a statutory provision, the Court needs to examine not only the purpose of the provision but also its effect and relied on *Olum and Another v Attorney*

⁸ [2016] e KLR.

⁹ Cap 63, Laws of Kenya.

¹⁰ Criminal Appeal No. 277 of 2007.

*General*¹¹ cited in *Cyprian Andama v The Director of Public Prosecutions & 2 others*.¹² They dismissed the argument that the disparity created by the above provisions is cured by section **63** of the Interpretation and General Provisions Act.

13. They submitted that the Anti-Counterfeit Act and the Trade Marks Act were enacted prior to the promulgation of the 2010 Constitution and at a time when Section **63** of the Interpretation and General Provisions Act would offer a safe haven for disparities in sentencing which disparities though inherently unjust, would probably surmount constitutional challenge on account of Section **63** of Interpretation and General Provisions Act. They submitted that under the present constitution, the court should assert the supremacy of the Constitution.
14. To further fortify his argument, the Petitioners cited Section **7(1)** of the Sixth Schedule to the Constitution which provides that all law in force immediately before the effective date continues shall be construed with such alterations, adaptations, qualifications and exceptions to conform with this Constitution. They submitted that Section **63** of the Interpretation and General Provisions Act is not the refuge to statutes enacted in the past constitutional regimes. They submitted that it is for a statute to bend towards conformity with the Constitution and not the Constitution to conform with the statute.
15. The Attorney General relied on the **2nd** and **3rd** Respondents submissions.
16. The **2nd** and **3rd** Respondents submitted that the Petition is premised on a fallacy and it is a deliberate attempt to mislead the court that the offences created by section **32(k)** of the Act are similar to offences created by section **58D** of the Trade Mark Act yet the penalties are different and the ingredients of the offence are different and the two statutes are different. They submitted that the Anti-counterfeit Act deals with counterfeit goods while the Trade Marks Act deals with forgery of a trade mark. They argued that section **35 (1) (a) & (b)** of the Anti-Counterfeit Act provides for penalties for the offence created under section **32(k)** while section **58 (D) (f)** of the Trade Mark Act provides for penalty not exceeding **Kshs. 200,000/=** or

¹¹ [2002] 2 E.A.

¹² Nairobi Constitutional Petition No. 214 of 2018.

imprisonment for term not exceeding 5 years or both. They submitted that the offences and penalties under the above provisions are different.

17. Further, the 2nd and 3rd Respondents submitted that the Petition does not meet the tests in *Anarita Karimi Njeru v Republic* nor have the Petitioners demonstrated how section 32(k) of the Anti-counterfeit Act violates the constitution. Additionally, they submitted that the Petitioners have failed to exhaust the mechanism provided by Article 35 of the Constitution and section 14(1)(a) of the Access to Information Act¹³ and approach the High Court as provided under section 23 (3) of the said Act.

18. The 2nd and 3rd Respondents cited Regulation 11(1) which requires payment of a fee of **Kshs. 5,000/=** and argued that the Petitioners never paid the said fees, so, the Respondents were not obligated to respond to the request and on *Bernard Murage v Fine Serve Africa Ltd & 3 others*,¹⁴ *COD & Another v Nairobi City Water & Sewerage Co Ltd*¹⁵ and *Stella Nyawira Njugi & another v Nyeri Water & Sanitation Company Ltd (NYEWASCO)*¹⁶ all of which underscored the need to exhaust statutory remedies holding that courts ought to be the last resort.

19. Also, the 2nd and 3rd Respondents submitted that this court lacks original jurisdiction in matters relating to access to information and the Regulations and cited *Mutanga Tea & Coffee Company Ltd v Ahikara Ltd & another*¹⁷ which upheld a preliminary objection challenging the court's jurisdiction to entertain a dispute without exhausting the mechanism provided under the Physical Planning and Land Use Act¹⁸ and the Environmental Management and Coordination Act.¹⁹ They also cited *Rich Productions Ltd v Kenya Pipeline Company & another*²⁰ which held that such dispute resolutions forums are established to ensure that disputes are resolved by those with technical competence and jurisdiction. (Also cited *Speaker*

¹³ Act No. 31 of 2016.

¹⁴{2015} e KLR.

¹⁵ [2015] e KLR.

¹⁶ [2021] e KLR.

¹⁷ [2015] e KLR.

¹⁸ Act No. 13 of 2019.

¹⁹ Act No. 8 of 1999.

²⁰ Pet No. 173 of 2014.

*of the National Assembly v James Njenga Karume*²¹). They also cited the exemptions under section **6(1) (e)** of the Access to Information Act which excludes disclosure of information which may substantially prejudice commercial interests including intellectual property rights of that entity or third party from whom information was obtained.

20. Regarding the submission that section **32(k)** of the Anti-counterfeit Act is vague, overboard and lacks certainty, they submitted that the act cannot be read in isolation but has to be read in tandem with the statutes listed in section **2** of the Act. They submitted that had the Petitioners read the said Acts, they would have appreciated that the word "brand" is a legal term used in the Trade Marks Act while "unbranded" is a simple English word. Further, they argued that the Petitioners have not demonstrated the alleged unconstitutionality of the said provision.

21. On the alleged disparity in punishment, they cited section **63** of the Interpretation and General Provisions Act which expressly provides that where an act or omission constitutes an offence under two or more written laws, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under any of the laws, but shall not be liable to be punished twice for the same offence. They also argued that in any event, sentencing is a matter of the discretion of the trial court, and, that, section **32(k)** of the Anti-counterfeit Act and section **58(D)(f)** of the Trade Marks Act are different and there is no constitutional basis for two different offences to have similar sentences. They submitted that the **2nd** Petitioner is not facing charges on both statutes and that Article **50(2) (p)** cited by the Petitioners has no application in the circumstances of this case. They relied on *Margrat Lima v Republic*²² and submitted that it is not the duty of the court to determine who is to be charged and for which offence. They distinguished the decision in *Joseph Kaberia Kahiga & 11 others v The Attorney General*²³ on grounds that the offences in the said case are different.

22. They submitted that the Petitioners have not availed to themselves the mechanism under section **27(3)** of the Act and that samples can be availed upon payment of the prescribed fees

²¹ [1992] e KLR.

²² [2016] e KLR.

²³ [2016] e KLR.

as required by Regulation **11 (2)**. Further, the Petitioners argument section **71(1)** of the Independent and General Provisions Act which precludes the **3rd** Respondent from performing a function until payment is made. They further submitted that in criminal cases, exhibits are never handed over to the suspects to deal with it as he deems fit and, in any event, the **1st** Petitioner is a stranger to the criminal proceedings.

23. Regarding the plea for *mandamus*, they submitted that the Petitioners never complied with section **27(3)** of the Act, so, the **3rd** Respondent is precluded by section **71** of the Interpretation and General Provisions Act from availing the samples, so he is not under a duty to release the said documents. Lastly, the **1st** Petitioner has no *locus standi* to bring these proceedings.

24. Counsel for the Interested Party filed submissions on **18th** February 2022. However, the submissions relate to the application for conservatory orders not the Petition. It will serve no utilitarian value for me to consider them.

25. For starters, I commence my determination by addressing the Petitioners' argument that section **32 (k)** of the Act is vague and overbroad because it does not clearly state the nature of goods it prohibits. The Petitioners also argued that the said provision lacks certainty, a necessary attribute in penal statutes because it does not define the terms:” branded” and “unbranded.” They state that the absence of clarity confers an unlimited and unfettered discretion to the **2nd** Respondents agents to arbitrarily seize goods of whatever nature in contravention of Article **40** of the Constitution and also mount criminal prosecutions.

26. Section **32 (k)** of the Act provides that it shall be an offence for any person to— import into Kenya, in the course of trade, any goods or items except raw materials that is unbranded. Determining the alleged vagueness or overbroad entails interpreting the said provision. A useful starting point in addressing the issue under consideration is to recall some important basic guiding principles in construction of statutes. These are:- **(a) presumption against "absurdity"** – meaning that a court should avoid a construction that produces an absurd result; **(b) the presumption against unworkable or impracticable result** - meaning that a court should find against a construction which produces "unworkable or impracticable" result; **(c)**

presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result and, lastly,(e) the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," " economic", "social" and "political" or "otherwise." The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

27. **Lord Diplock** in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG*²⁴ commented that the acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. The need for legal certainty demands that rules by which the citizen is to be bound should be ascertainable by him by reference to identifiable sources that are publicly accessible, clear and not vague. It is important to have clarity and certainty. Under the principle of legality, two principles emerge: - (a) no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and (b) no one should be punished for any act which was not clearly ascertainably punishable when the act was done.

28. A statute is **void for vagueness** and unenforceable if it is too vague for the average citizen to understand. There are several reasons a statute may be considered vague; in general, a statute might be called void for vagueness reasons when an average citizen cannot generally determine what persons are regulated, what conduct is prohibited, or what punishment may be imposed. A statute is also void for vagueness if a legislature's delegation of authority to administrators is so extensive that it would lead to arbitrary prosecutions.²⁵ To summarize the contents of the doctrine void for vagueness, it establishes specific criteria that all laws, or any legislation must

²⁴ {1975} AC 591, 638

²⁵ "Vagueness doctrine definition". *Cornell University Law School Legal Information Institute.*

meet, to qualify as *constitutional*. Such criteria include the following: - (a) Law must state explicitly what it mandates, and (b) what is enforceable, (c) Definitions of potentially vague terms are to be provided.

29. As Justice Thurgood Marshall once wrote, vague laws “lead citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.”²⁶ The “void-for-vagueness doctrine.” requires that the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.’ The void-for-vagueness doctrine also requires that penal statutes be defined in a manner that does not encourage “arbitrary and discriminatory enforcement” by law enforcement authorities.’ In *Grayned v City of Rockford*,²⁷ the United States Supreme Court articulated the critical policy considerations that are at the heart of the due process mandate requiring avoidance of statutory vagueness: -

“Vague laws offend several important values. First, because [this Court] assume[s] that man is free to steer between lawful and unlawful conduct, [this Court] insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.”

30. Consequently, when a claim of unconstitutional vagueness is raised in a court of law, there are two basic questions to be asked when determining whether a statute is void because of its vagueness. One, does this statute provide fair notice or warning to the citizens as far as what is and is not prohibited or required by the statute?²⁸ Two, does this statute provide an

²⁶<https://www.forbes.com/2010/03/30/vague-laws-economy-government-opinions-contributors-timothy-sandefur.html>

²⁷ 408 U.S. 104 (1972).

²⁸ See, e.g., *Kramer v. Price*, 712 F.2d 174, 176 (5th Cir. 1983) (“Vague statutes fail to provide citizens with fair notice or warning of statutory prohibitions so that they may act in a lawful manner.” (Citing *Connally*, 269 U.S. at 391)), *affid* on other grounds on reh'g, 723 F.2d 1164 (5th Cir. 1984).

ascertainable standard of guilt so that it does not encourage arbitrary and discriminatory enforcement?²⁹

31. If the answer to both of these questions is in the affirmative, then the statute will be upheld against a void-for-vagueness challenge. However, if a statute fails either part of the test, the statute is void because of its vagueness. It is important to understand from the outset that the pursuit of a void-for-vagueness finding is an uphill battle. An elementary, but critical, point in this type of challenge is that courts begin their analysis with the presumption that the statute under attack is valid. Also, a court, must give a statute a reasonable interpretation to avoid unconstitutional indefiniteness. A statute is void for vagueness if it fails to draw reasonably clear lines between lawful and unlawful conduct such that the defendant has no way to find out whether his conduct is controlled by the statute. Vague statutes are constitutionally unacceptable because they fail to provide citizens with fair notice or warning of statutory prohibitions so that they may act in a lawful manner.

32. The courts actually measure vagueness claims by consideration of: (1) the significance of the legislative enactment, i.e., its importance in the larger social scheme; (2) the necessity of the statutory ambiguity in achieving the underlying goal; and (3) the impact of the legislation "on protected or desirable conduct. The concepts of overbreadth and vagueness are, in some sense, distinct and yet, in other regards, inseparable. A statute is overbroad when its language, given its normal meaning, is so broad that the sanctions may apply to conduct which the state is not entitled to regulate.

33. Earlier in this determination, I reproduced section **32(k)** of the Act. I have placed the said provision side by side with the tests for vagueness discussed above particularly at paragraphs **33, 34** and **35** of this judgment. A reading of the above section and the tests for vagueness discussed above reveals that the law maker deployed very simple nomenclature which conveys the natural and ordinary meaning of the words. The said provision is clear. A reading of the provision does not suggest more than one meaning. Simply put, the provision is not vague or

²⁹See, e.g., Kolender, 461 U.S. at 358 ("Where the legislature fails to provide certain minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" (Alteration in original) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)))

ambiguous or overbroad. It follows that the argument that the said provision is vague and overbroad collapses.

34. The Petitioners also challenged the constitutional validity of sections **32(k) and 35 (1) (a)** on several fronts. One, they argued that section **35 (k)** does not define the term “brand” and or “branding” as used in the said section nor does it define the attributes goods must bear to be classified as “branded” or “unbranded.” This, they argued leaves a room for arbitrariness on the part of the **2nd** and **3rd** Respondents. Two, they argued that the offences created by section **32** of the Anti-counterfeit Act and section **58D** of the Trade Marks Act are the same yet the penalties are different. This, they argued creates a scenario whereby in the event of conviction, the **2nd** Petitioner risks losing the benefit of been given the less severe punishment. Three, they argued that the disparity in sentences created by these two provisions is unconstitutional. Four, it was also argued that the Respondents failure to avail samples to the **2nd** Petitioner impacts on her fair trial rights, hence it is also unconstitutional. Five, that the disparity created by the above provisions is an affront to Article **47** rights which guarantees equality before the law.
35. In resolving the above issues, it is necessary to recall, albeit briefly, the guiding principles for constitutional and statutory interpretation. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence.
36. Article **259** of the Constitution obliges courts to promote 'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance, an approach that has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation.' Constitutional provisions must be construed purposively and in a contextual manner. Courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation should not be “unduly strained.”³⁰

³⁰Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others vs. Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

It should avoid “excessive peering at the language to be interpreted.”³¹ We are obliged to understand the statutory provisions within the context of the grid, if any, of related provisions and of the Constitution as a whole, including the underlying values of the Constitution that must be promoted and protected. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.

37. In construing the impugned provisions, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights. We are obliged to pursue an interpretation that permits development of the law and contributes to good governance. There are numerous rules of interpreting a statute, but without demeaning the others, the most important rule is the rule dealing with the statute’s plain language. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

38. All that the court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. When the constitutionality of legislation or a provision in a statute is challenged, a court ought first to determine whether, through “the application of all legitimate interpretive aids,”³² the impugned legislation or provision is capable of being read in a manner that is constitutionally compliant. Differently put, whether a law is invalid is

³¹ Johannesburg Municipality vs. Gauteng Development Tribunal and Others [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another 1950 (4) SA 653 (A) at 664G-H.

³²National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

determined by an objective enquiry into its conformity with the Constitution.³³This is because statutory provisions enjoy a presumption of constitutionality until it is rebutted.³⁴ The burden of demonstrating unconstitutionality of a statute lies on he who alleged the unconstitutionality. To justify unconstitutionality, there must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative one. It has been argued that sections **32** of the Anti-counterfeits Act and section **58D** of the Trade Marks Act create similar offence but different sentences.

39. The above argument is legally frail because: - First, the Petitioners have not been charged under both statutes, so the apprehension of not being accorded a lesser of harsher sentence is a mirage. Second, the two legislations govern different regimes. The Trade Mark Act is an of Parliament relating to the registration of trade marks. On the other hand, the Ant-counterfeit Act is an Act of Parliament to prohibit trade in counterfeit goods, to establish the Anti-Counterfeit Authority, and for connected purposes. Importantly, Section **58D** of the Trade Mark Act deals with prohibition of forgery of registered trade mark. Section **32** of the Anti-counterfeit Act creates offences under the said Act.
40. The sections of the law cited by the Petitioners are extracted from the Penal Code on sections dealing with similar offences. The decisions cited are of no relevancy to the issues under consideration. Importantly, section **63** of the Interpretation and General Provisions provides: -
- Where an act or omission constitutes an offence under two or more written laws, the offender shall, unless a contrary intention appears, be liable to be prosecuted and punished under any of those laws, but shall not be liable to be punished twice for the same offence.*
41. Even if one were to accept the Petitioners' apprehension as well founded (and it is not), the above provision protects the situation the Petitioners claim they may be faced with. In fact, the above provision accords to the letter and spirit of the Constitution by ensuring that an accused is not subjected to double jeopardy. The Petitioners argument that the above section does not conform to the constitutional text and spirit is without merit.

³³ Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

³⁴Counsel cited Lenaola J. in Council of County Governors vs Inspector General of National Police Service & 3 Others {2015}eKLR, Commissioner for Implementation of the Constitution vs Parliament of Kenya & Another, High Court Petition No. 454 of 2012 and Law Society of Kenya vs A.G & 2 Others {2013}eKLR.

42. The other challenge mounted by the Petitioners is that they have been denied the samples seized by the 2nd and 3rd Respondents despite being given other evidence held by the prosecution. They claim that they ought to be allowed to subject the exhibits to testing. This argument collapses not on one but on several fronts. One; the argument cannot surmount the provisions of Regulation **11(1)** which provides :-

11. (1) A person who wishes to obtain samples of goods seized for testing or analysis under section 27 (3) of the Act, shall apply in Form ACA 5 set out in the First Schedule.

(2) The application under paragraph (1) shall be accompanied by the fee specified in the Second Schedule.

43. The above provision is reinforced by section **71** of the Interpretation and General Provisions Act which provides: -

71. Act for which payment required need not be performed until payment made

(1) Where a person, public officer or local authority is required to do anything for which a fee is to be paid or a charge made under a written law, that person, public officer or local authority may decline to do that thing until the fee is paid or until payment of the charge is made, or, where the precise amount of the payment to be made cannot be ascertained until the thing has been done, until there is paid such an amount as may be estimated to be the correct amount by the person or public officer, or the responsible officer of the local authority, required to do the thing.

(2) Where a thing has been done for which an estimated amount has been paid, that amount shall be adjusted to the correct amount either by means of a further payment or by a refund of the amount overpaid.

44. The Petitioners have no basis at all, whether legal or equitable to insist on being supplied with samples they have not paid for. Worse still, they seek a writ of *mandamus* to compel the 3rd Respondent to release the samples. *Mandamus* is a discretionary remedy. A party seeking a discretionary remedy must approach the court with clean hands. To merit such an order, it must be shown that the Respondent have a legal duty to act and must have refused to act. Those elements are missing in this case. Third, there is an active criminal case in the lower court. The law on exhibits is that they remain in the custody of the prosecution until they are produced in

court as evidence, after which it remains in the custody of the court until the matter is finally determined.

45. Fourth, even if the request for exhibits was to be found to be merited (and it is not), the proper procedure would have been to make an application before the trial court and approach this court either on appeal or revision instead on converting the issue into a constitutional question. Courts abhor the practice of converting every question into a constitutional question. Not every dispute merits adjudication as a constitutional question, Parties should avoid trivializing the constitution by converting each and every issue into constitutional question. The Petitioner attended a pre-trial direction before the lower court. They should have presented their request there if at all it was necessary.
46. By now it is manifest that the argument that the failure to release the exhibits infringe the Petitioners fundamental rights under Articles **25 (c), 35, 47** and **50 (2) (j) and (k)** of the Constitution is a red herring, baseless and lacks both merit and substance.
47. It was argued that section **32(k)** of the Anti-counterfeit Act which provides that it shall be an offence for any person to— (k) import into Kenya, in the course of trade, any goods or items except raw materials that is unbranded offends Article **40 (10) (a) (b) (2)** of the Constitution. Article **40** rights are not absolute. In this regard, Article **24** of the Constitution provides: -

24. Limitation of rights and fundamental freedoms

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) *Despite clause (1), a provision in legislation limiting a right or fundamental freedom— (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation; (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.*

48. There was no attempt at all by the Petitioners to suggest that the limitation provided by the said section cannot pass an Article 24 analysis test. It was necessary to show that the impugned law or provision is unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

49. A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. The test of proportionality has been established to the following:- *Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?; Are the means in service of the objective rationally connected (suitable) to the objective?; Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective? Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?*³⁵

50. A limitation of a constitutional right will be constitutionally permissible if **(i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally**

³⁵G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak:

connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation (“proportionality *stricto sensu*” or “balancing”) between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.’ It is worth borrowing the words of the Canadian Supreme Court in *R v Oakes*³⁶ where Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

- a) *The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.*³⁷
- b) *Secondly, the means chosen for the law must be ‘reasonable and demonstrably justified’, which involves ‘a form of proportionality test’ with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance.’*³⁸

51. The prayer to quash the criminal proceedings, just like all the other prayers is not supported by any grounds. The High Court's inherent powers to quash, stay or prohibit criminal proceedings

³⁶ *R v Oakes* [1986] 1 SCR 103 [69]–[70].

³⁷ *R v Oakes* [1986] 1 SCR 103 [69]–[70].

³⁸ *Ibid*

are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India³⁹ held that *'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.'* The Supreme Court of India delineated the law in the following terms: -

*"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings...The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers."*⁴⁰

52. In view of my analysis, determination and conclusions arrived at above, the conclusion becomes inevitable that this Petition is totally unmerited. Accordingly, I dismiss the Petition dated 2nd November 2021 with no order as to costs.

Right of appeal

Dated, signed and delivered virtually at Mombasa this 27th day of May 2022

John M. Mativo
Judge

³⁹ See *Maharashtra vs Arun Gulab Gawali*.

⁴⁰ See *State of West Bengal & Others vs Swapan Kumar Guha & Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. Ugar Suri & Ano vs State of U.P & Others*, AIR 2000 Sc 754.