



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

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

CONSTITUTIONAL PETITION NO. E231 OF 2021

-BETWEEN-

MOHAMMED EDIN ADAN.....PETITIONER

-VERSUS-

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. INSPECTOR GENERAL OF POLICE.....RESPONDENTS

JUDGMENT

Introduction:

1. The dispute subject of this judgment presents an opportunity to examine the balance that must be struck between the constitutional rights and fundamental freedoms of an arrested and accused person under Articles 19, 24, 27, 28 and 49 of the Constitution and the prosecutorial powers of the Director of Public Prosecutions under Article 157 of the Constitution as considered alongside the mandate of the police to investigate criminal offences under the Constitution and the law.

2. The Petition is opposed.

The Petition:

3. The Petitioner herein, *Mohammed Edin Adan*, filed the Petition dated 22nd June, 2021. It was supported by his Affidavit deposed to on the even date.

4. Simultaneously with the filing of the Petition was the Petitioner's application by way of a Notice of Motion (hereinafter referred to as '*the application*') dated 22nd June, 2021 brought under certificate of urgency and supported by the Affidavit of the Petitioner also deposed to on the even date.

5. The Petitioner averred that he was an employee of *Somali Bus Services Company Limited* (hereinafter referred to as '*the Company*') tasked with the responsibility of receiving parcels and goods for delivery to and from the North-Eastern region of Kenya

6. It was his case that on 7th April, 2021, he received three motor cycles among them, a *Bajaj Boxer* model of registration number

KMFN 639Q (hereinafter referred to as '*the motor cycle*') from the sender one *Hamisi Adan Hirbo* (hereinafter referred to as '*Hamisi*'). The instructions thereof were to deliver the motor cycle to one *Hassan Koise* (hereinafter referred to as '*Hassan*') in *Moyale County*.

7. The Petitioner pleaded that upon conducting due diligence on the ownership of the three motorcycles, he accepted them and were loaded onto the Company bus for delivery.

8. It was the Petitioner's further averment that as the bus was enroute to Moyale on the same day, it was impounded by the police on the basis that it had on board stolen goods. The Petitioner was led to Amana Petrol Station by the impounding police officers to explain how he received the motor cycle.

9. It was the Petitioner's case that he gave the police officers the contact details of Hamisi, the sender. However, the officers refused and or ignored his explanation and proceeded to detain him.

10. He averred that he was detained in a car, make Toyota Probox, and ferried around from 7pm until midnight of 8th April, 2021 before he was taken to Eastleigh North Police Post. He was later transferred to Pangani Police Station.

11. The Petitioner contended that he was illegally detained and was also not presented before a Court of law on the 7th and 8th April, 2021.

12. It was his case that he was eventually arraigned before Court on 9th April, 2021, which time was beyond the 24-hour period constitutionally provided for under *Article 49(1)(i) & (ii)* of the Constitution.

13. He pleaded that he was charged in *Makadara Law Courts Criminal Case No. E18 of 2021* (hereinafter '*the criminal case*') with the following 12 counts: -

Count I:

Stealing contrary to Section 268(2)(a) as read with section 278(A) of the Penal Code.

On the 5th day of April, 2021 at Mukuru Kwa Njenga in Embakasi East Sub-County within Nairobi County, jointly with others not before court, stole one Motor Cycle Registration Number KMFN 639Q make Bajaj Boxer blue in colour valued at ksh.110,890/- the property of KEMUNTO LILIAM NYAKUNDI

ALTERNATIVE CHARGE

Handling Stolen Goods Contrary To Section 322(1)(2) of the Penal Code

MOHAMED EDIN ADAN: On the 8th day of April, 2021, at Eastleigh area in Kamukunji Sub-County within Nairobi County, otherwise than in the course of stealing, dishonestly received or retained one motor cycle Registration Number KMFN 639Q make Bajaj Boxer Blue in colour, knowing or having reasons to believe it to be stolen good.

Count II

FORGERY, CONTRARY TO SECTION 345 AS READ WITH SECTION 349 OF THE PENAL CODE

MOHAMED EDIN ADAN: On the 8th day of April, 2021, at Eastleigh area in Kamukunji Sub-County within Nairobi County, with intent to deceive, forged a registration book. purporting to be a registration book of motor cycle Registration Number KMFN 639Q make Bajaj Boxer

Count III

Making a Document without Authority Contrary To Section 357(A) of the Penal Code

MOHAMED EDIN ADAN: *On the 8th day of April, 2021, at Eastleigh area in Kamukunji Sub-County within Nairobi County, with intent to deceive, without lawful authority, made a registration book, purporting it to be a registration book of motor cycle Registration Number KMFN 639Q make Bajaj Boxer*

Count IV

Uttering a False Document, Contrary To Section 353 of the Penal Code

MOHAMED EDIN ADAN: *On the 8th day of April, 2021, at Eastleigh area in Kamukunji Sub-County within Nairobi County, knowingly and fraudulently uttered a forged registration book purporting to be the registration book of motor cycle Registration KMFN 639Q make Bajaj Boxer*

Count V

Stealing Contrary to Section 268(2)(a) as Read With Section 278(A) of the Penal Code.

MOHAMED EDIN ADAN: *On the 6th day of April, 2021, at Mukuru Kayaba area in Embakasi East Sub-County within Nairobi County, jointly with others not before court, stole one motor cycle Registration Number KMFH 915J make Bajaj Boxer Red in colour valued at Kshs.121,400/= the property of YUVINALIS NYAOSI ONDIEKI*

ALTERNATIVE CHARGE

Handling Stolen Goods Contrary To Section 322(1)(2) of the Penal Code

MOHAMED EDIN ADAN: *On the 8th day of April, 2021, at Eastleigh area in Kamukunji Sub-County within Nairobi County, otherwise than in the course of stealing, dishonestly received or retained one motor cycle Registration Number KMFN 539 KMFH 915J make Bajaj Boxer Red in colour, knowing or having reasons to believe it to be stolen good.*

Count VI

FORGERY, CONTRARY TO SECTION 345 AS READ WITH SECTION 349 OF THE PENAL CODE

MOHAMED EDIN ADAN: *On the 8th day of April, 2021, at Eastleigh area in Kamukunji*

Sub-County within Nairobi County, with intent to deceive, forged a registration book

purporting to be a registration book of motor cycle Registration Number KMFH 915J make Bajaj Boxer

Count VII

Making a Document Without Authority Contrary to Section 357(A) of the Penal Code

MOHAMED EDIN ADAN: *On the 8th day of April, 2021, at Eastleigh area in Kamukunji Sub-County within Nairobi County, with intent to deceive, without lawful authority, made a registration book, purporting it to be a registration book of motor cycle Registration Number KMFH 915J make Bajaj Boxer.*

Count VIII

Uttering a False Document, Contrary To Section 353 of the Penal Code

MOHAMED EDIN ADAN: On the 8 day of April, 2021, at Eastleigh area in Kamukunji Sub-County within Nairobi County, knowingly and fraudulently uttered a forged registration book purporting to be the registration book of motor cycle Registration Number KMFH 915) make Bajaj Boxer

Count IX

Stealing Contrary to Section 268(2)(A) As Read with Section 278(a) of the Penal Code.

MOHAMED EDIN ADAN: On the 7th day of April, 2021, at Kingeero area in Kiambaa Sub County within Kiambu County, jointly with others not before court, stole one motor cycle Registration Number KMEX 846L make TVS Red in colour (fixed with a fake registration number KMFB 951L) valued at Kshs. 65,000/= the property of CHARLES GITONGA WAWERU

ALTERNATIVE CHARGE

Handling Stolen Goods Contrary to Section 322(1)(2) of the Penal Code

MOHAMED EDIN ADAN: On the 8th day of April, 2021, at Eastleigh area in Kamukunji Sub-County within Nairobi County, otherwise than in the course of stealing, dishonestly received or retained one motor cycle Registration KMEX 846L make TVS Red in colour (fixed with a fake registration number KMFB 9511), knowing or having reasons to believe it to be stolen good.

Count X

Forgery, Contrary To Section 345 as Read with Section 349 of the Penal Code

MOHAMED EDIN ADAN: On the 8th day of April, 2021, at Eastleigh area in Kamukunji Sub-County within Nairobi County, with intent to deceive, forged a registration book purporting to be a registration book of motor cycle Registration Number KMFB 951L make TVS.

Count XI

Making a Document without Authority Contrary To Section 357(A) of the Penal Code

MOHAMED EDIN ADAN: On the 8th day of April, 2021, at Eastleigh area in Kamukunji Sub-County within Nairobi County, with intent to deceive, without lawful authority, made a registration book, purporting it to be a registration book of motor cycle Registration Number KMFB 951L make TVS

Count XII

Uttering a False Document, Contrary To Section 353 of the Penal Code

MOHAMED EDIN ADAN: On the 8th day of April, 2021, at Eastleigh area in Kamukunji Sub-County within Nairobi County, knowingly and fraudulently uttered a forged registration book purporting to be the registration book of motor cycle Registration. Number KMFB 951L make TVS

14. On the foregoing, the Petitioner contended that his actions to receive and dispatch goods upon conducting due diligence could not amount to any criminal offence. In the premises, the prosecution was an abuse of prosecutorial powers and that his arrest and detention were unlawful and in violation of his constitutional rights.

15. In particular, the Petitioner contended that the Respondents' actions did not accord with Articles 10, 19, 20(2), 22, 23 24, 25 26, 27, 28, 47 and 49 of the Constitution that require observance of the rule of law, the enjoyment of rights and fundamental freedoms, fair trial, the right to life and the prohibition on anything that limits fundamental rights and freedoms.

16. It was his contention that the criminal justice system was being manipulated by the Respondents to achieve extraneous purposes. He stated that the prosecution was instigated to cover up the human rights violations including the unlawful detention.

17. The Petitioner further averred that the charges against him are baseless as they are not backed by any evidence and the general circumstances of the case.

18. On the basis of the above facts and contentions, the Petitioner sought conservatory orders *vide* the application restraining the Respondents from prosecuting him in the criminal case pending the hearing and determination of the application and the Petition. He also prayed for a conservatory order restraining the Respondents from conducting further investigations, recommending any more charges and against the commencement of the trial in the criminal case.

19. In the main, the Petitioner prayed for the following reliefs: -

1. A declaration be and is hereby issued that the investigations on the Petitioner by the Inspector of Police and or its agents and the DPP's institution of criminal proceedings against the petitioner in Makadara criminal case number E18 of 2021 – Republic -vs- Mohammed Edin Adan violates his constitutional rights, is an abuse of process of the court and therefore unlawful, null and void ab initio.

2. An order of certiorari be and is hereby issued to quash the entire charge sheet dated 9th April 2021 and proceeding against the Petitioner in Makadara Criminal Case number E18 of 2021 – Republic -vs- Mohammed Edin Adan.

3. An order of prohibition be and is hereby issued prohibiting the Respondents from proceeding with the prosecution of Makadara Criminal Case number E18 of 2021 – Republic -vs- Mohammed Edin Adan.

4. An order of prohibition be and is hereby issued against the IG and DPP from investigating, recommending the prosecution or commencing any prosecution of the Petitioner in respect of which Makadara Criminal Case number E18 of 2021 – Republic -vs- Mohammed Edin Adan was instituted; and

5. A declaration that the 2nd respondent through its agents violated the Petitioner's constitutional rights enshrined under Article 28, 27 and 49 of the Constitution of Kenya, 2010.

6. An order of compensation for violation of constitutional rights.

7. The cost of this this Petition be provided for.

8. Any other further orders that this honourable court deems fit and just to grant in the circumstances of the case.

9. Costs of this Petition.

20. The Petitioner filed written submissions dated 14th July, 2021. He referred to Article 10 of the Constitution and the Court of Appeal in *Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 Others* (2017 eKLR, on essential values of human rights, equality, freedom, democracy, social justice and the rule of law and submitted that the Respondents must execute their mandate as state organs within the confines of the Constitution.

21. The Petitioner relied on *Henry Aming'a Nyabere -vs- Director of Public Prosecutions & 2 Others; Sarah Joslyn & Another (Interested Parties)* (2021) eKLR to emphasize that the Court can review the DPP's decision for rationality and procedural infirmities, but cannot review them for merit.

22. In a bid to buttress the violation of his rights, the Petitioner submitted that the circumstances of his case were in line with the finding in *Satrose Ayuma & 11 Others -vs- Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others* (2013) eKLR where it was held that a person seeking redress of violation and or infringement of human rights and fundamental freedoms must prove existence of a right, its violation and the injury suffered as a result.

23. To demonstrate impropriety of his prosecution and violation of Article 27 of the Constitution that guarantees every person equal protection of the law, the Petitioner submitted that the investigating officer did not exercise due diligence to establish whether he was an employee of the Company. He submitted that he was only discharging his duties in good faith and the decision to prosecute denied him equal protection of the law and the recognition and promotion of social justice. It was his case that he verified the chassis numbers before accepting delivery of the motor cycles, a fact which was unrebutted by the prosecution.

24. On the foregoing, the Petitioner submitted that the charges could not be sustained. He contended that the investigators did not adduce any evidence of ownership of the motor cycle which conflicted with the information he gathered from Hamisi when he received the said goods in the ordinary course of business as parcels for delivery.

25. The Petitioner further submitted that he gave a reasonable explanation of how he came into possession of the stolen items and according to the finding in *Malingi -vs- Republic*, once a reasonable explanation has been made, a Court cannot proceed any further to infer guilt of the accused person.

26. In asserting his right to dignity, the Petitioner submitted that the fact that he was bundled into the boot of a Toyota Probox and moved along from 7pm on 7th April, 2021 until midnight, a period of over 6 hours, violated his right to dignity under Article 28 of the Constitution. He found support in the South African case of *S-vs- Makwanyane* (1995) ZACC 3 1995 (3) SA 391(CC) where it was observed: -

... Without dignity, human life is substantially diminished. The importance of dignity as a founding value of the Constitution cannot be overemphasized. Recognizing the right to dignity is an acknowledgment of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern.

27. To further buttress violation of the right to dignity, reliance was placed in *Azop -vs- President of the Republic of South Africa* (CCT 17/96), which was quoted with approval in *Lucy Wanjiku Mukaru (suing as the Representative of Mukaru Ng'ang'a deceased) -vs- Attorney General* (2018) eKLR where it was observed thus: -

... Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crime, nor the methods nor the culture which informed such investigations were easily open to public investigations, verification and correction.

28. On violation of an arrested person's rights as protected in Article 49 of the Constitution, the Petitioner submitted that the Respondents did not give reasons as to why he was not produced in Court on 8th April, 2021. To that end, support was found in *Lucy Wanjiku Mukaru* case (supra) where the Court stated that: -

...it cannot be denied that the deceased's rights and fundamental freedoms were violated when he was held in custody for three months without being produced in Court to be dealt with in accordance with the law. It is my finding that there was gross violation of the deceased's constitutional rights and fundamental freedoms for holding him beyond 24 hours and no justification was offered for it.

29. In praying that he is entitled to the prayers sought, the Petitioner stated that he had succeeded in demonstrating violation of rights and fundamental freedoms. He stated that the purpose of compensation is to return the party to the position prior to infringement or violation of the rights and freedoms.

The Responses:

30. In opposition to the Petition and the application, the Respondents filed joint Grounds of Opposition dated 1st July, 2021. They also relied on a Replying Affidavit sworn on 1st July 2021 by *No. 77932 PC John Ouma*. The deponent is the investigating officer in the criminal case.

31. It was their case that the 2nd Respondent acted within the confines of *Article 157* of Constitution and as such, the Petitioner had not demonstrated that the Respondents failed to act independently or acted capriciously, in bad faith or abused the process in a manner as to trigger the High Court's intervention.

32. In reference to Article 157(6) and (10) of the Constitution that allow the 1st Respondent to commence criminal proceedings without anyone's direction, it was submitted that the prayers sought for should not be granted as the same would deny the Respondents their statutory and constitutional mandate to investigate and prosecute a criminal matter as provided for under the Penal Code.

33. The Respondents stated further that Petition was filed in bad faith, misconceived, premature and an abuse of the court process and meant to derail and defeat the cause of justice.

34. It was its case that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court where the Petitioner is assured of fair trial and protection of the law.

35. In praying that the Petition be dismissed, the Respondents stated that the Petitioner had not demonstrated a *prima facie* arguable case on breach of any constitutional provision or fundamental and human rights or any other provision of the law against the Respondents.

36. It was deposed by the investigating officer that under Section 35 of the National Police Service Act, it was the lawful duty of the 2nd Respondent to conduct criminal investigations and such duty was not under the command or direction of any person.

37. On the facts of the matter, the investigating officer deposed that on 5th April, 2021, a lady by the name *Lillian Kemunto* reported to Kwa Njenga Police Station that her motor cycle registration No. *KMFH 915J* had been stolen. That on 6th April, 2021, another report was made at Villas Police Post by *Yuvinalis Nyaosi* that her motor cycle registration No. *KMEX 846L* had also been stolen.

38. It was his deposition that on 7th April, 2021, police officers from Eastleigh Police Station received information that the missing motor cycles had been spotted being loaded into a bus heading to Moyale. Acting on the information, the police officers from Eastleigh Police Station pursued the Bus and caught up with it at Amana Petrol Station where they demanded that all the motor cycles on board be offloaded from the bus.

39. He deposed that the driver of the bus informed the police that the said motor cycles had been sent by the Petitioner herein as a parcel and the said Petitioner had received the motor cycles from Hamisi for delivery to Hassan in Moyale County.

40. He also deposed that the police initiated investigations and at the end they had sufficient evidence to charge the Petitioner with various offences and as such forwarded the investigation file to the 1st Respondent for advice and direction.

41. He further deposed further that the 1st Respondent was satisfied that the evidence on record was sufficient and made the decision to charge the Petitioner. To that end, he deposed that the investigations against the Petitioner were not commenced maliciously.

42. It was deposed that the Petitioner has an opportunity to defend himself during trial and that his presumption of innocence would be upheld.

43. It was the Respondents' case that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court and as such the assertion by the Petitioner that his prosecution was instituted maliciously was baseless.

44. It was deposed that the Petition did not support this Court's intervention and as such ought to be dismissed.

45. The Respondents further opposed the Petition and application through joint written submissions dated 22nd July, 2021. It was submitted that there were two issues for determination being whether the Petitioner's rights have been violated and whether the Petitioner was entitled to the reliefs sought.

46. On the first issue, it was submitted that the Petitioner had failed to establish with precision how his fundamental rights and freedoms under *Articles 27,28 and 49* of the Constitution had been infringed upon as established in *Anarita Karimi Njeru - vs- The Republic* [1976-1980] KLR 1272.

47. In urging this Court not to allow the Petition, it was submitted that this Honourable Court should not be put in a position where it is concerned with the innocence or otherwise of the Petitioner as it is the responsibility of the criminal process which entails safeguards that will ensure that an accused person is afforded a fair trial as envisaged under Article 50 of the Constitution.

48. It was further submitted that the judicial system provides an avenue for an appeal where the accused is aggrieved by the decision in question and that there is an avenue for compensation by way of a claim for malicious prosecution. Therefore, the High Court ought not to transform itself into a trial court and examine minutely whether or not the prosecution/ intended prosecution is merited.

49. Reliance was placed in *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2018] eKLR* where the Court observed that: -

... Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process.

50. As regards the mandate of the 2nd Respondent it was submitted that Article 157 of the Constitution and Section 6 of the Office of the Director of Public Prosecutions Act allows the DPP to institute and undertake criminal proceedings against any person before any Court of law and does not require the consent of anyone. To buttress the point, the decision in *Hon. James Ondicho Gesami –vs- The Attorney General & Others*, Petition No. 376 of 2011, was relied upon where it was observed that: -

...The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges...In my view, requiring that the petitioner subjects himself to the normal criminal prosecution process mandated by law where he has all the safeguards guaranteed by the Constitution does not in any way amount to an attack on his human dignity in violation of his constitutional rights.

51. The Respondents submitted that the Petitioner had failed to prove that the decision by the 1st Respondent to institute criminal charges and to prosecute him was unconstitutional or that it infringed on any of his rights and/or fundamental freedoms. To that end, the Court was referred to *Diamond Hasham Lalji & Another –vs- Attorney General and 4 others* case (supra) where it was held that: -

...The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidentiary burden shifts to the DPP to justify the prosecutorial decision.

52. In defending the detention of more than 24 hours, the Respondent's submitted that the period in which the Petitioner was detained at the Police station before being arraigned in Court was reasonable in the circumstances. It was its case that the provisions of *Article 49 (1) (f)* of the Constitution are not absolute and, therefore, the incarceration was within the allowable limits provided by law.

53. To buttress the foregoing, reliance was placed on *Republic v Danford Kabage Mwangi [2016] eKLR* where the Court held that:

... My understanding of Section 49(1) (g) (h) is firstly that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application. Secondly, the only accused entitled to a right of an automatic bond or bail, are those charged with offences (which may be referred to as "petty offences") the punishment of which (if found guilty and convicted) is either a fine only, or imprisonment for a term of less than six months. Such offences are spread throughout the Penal Code, and other statutes containing penalty for breach thereof...

54. The Respondents submitted that sine the Petitioner was accused of stealing which offence attracted a term of 7 years' imprisonment on conviction, it was reasonable to hold the Petitioner for a few more hours since he had been arrested in the night and the offence he was being charged with was serious. Thus, the question of violation of Article 49 (1) (f) of the Constitution did not arise.

55. The Respondents contended that the limitation of the right of the Petitioner was reasonable and justifiable and in line with Article 24(1) of the Constitution.

56. It was their case that it is in the public interest that all complaints made to the 2nd Respondent are investigated and if sufficient evidence is obtained, criminal proceedings instituted by the 1st Respondent. Reference was made to *Republic –vs- Chief Magistrate Milimani & Another Ex-parte Tusker Mattresses Ltd & 3 others* [2013] eKLR where the Court expressed itself as follows: -

... The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial....

57. On the issue whether the Petitioner is entitled to the reliefs sought, it was submitted that the Petitioner failed to demonstrate the particulars of any violation of their constitutional rights as enshrined under the Constitution or that the Respondents have acted in excess of their mandate.

58. In urging the Court to allow the trial Court to proceed with the criminal case, the Supreme Court's decision in *Hussein Khalid and 16 others v Attorney General & 2 others* [2019] eKLR was quoted where it was observed that: -

[122] Consequently, without downplaying the Appellants' allegations of infringement, we find that they have recourse under Article 22 against the specific violations they may have undergone in the manner of their arrest, detention and arraignment. They may seek damages or other reliefs available to them. We do not think that such violations in themselves should warrant the vitiating of the trial processes. There exist constitutional safeguards that extend to the right to fair trial and the attendant mechanisms to protect the Appellants. We are persuaded by the holding in *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69 where it was stated that:

... The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence." [123] Consequently, we are not persuaded, just like the High Court and the Court of Appeal, that this is an instance where this Court should intervene in order to quash the proceedings before the trial Court. The criminal proceedings pending before the trial Court should be allowed to continue expeditiously given the amount of time it has taken.

59. On the aspect of damages, the Respondents relied on the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* Civil Appeal No. 98 of 2014 [2016] eKLR where it was stated that: -

... award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements.

60. In light of the foregoing, the Respondents urged that the Petition be dismissed with costs.

Issues for Determination:

61. By the agreement of the parties and the approval of this Court, the application was subsumed into the Petition.

62. From the material presented to this Court, I find two main issues are for consideration. They are: -

i. Whether the arrest and subsequent prosecution of the Petitioner violated Articles 19, 20(2), 22, 23, 24, 25 26, 27, 28, 47, 49 and 157(11) of the Constitution.

ii. Whether the reliefs sought are merited.

63. I will consider each issue separately.

Analysis and Determinations:

64. Before I consider the first issue, there is a preliminary issue which I must deal with. The issue was raised by the Respondents. It was contended that the Petition did not set out the alleged violations with precision. It was the Respondent's case that the Petition fell short of the threshold in *Anarita Karimi Njeru - vs- The Republic* [1976-1980] KLR 1272.

65. This Court has keenly studied the Petition and the Supporting Affidavit. The substratum of the Petitioner's case is on the manner in which he was handled and detained by the Police upon being suspected of having committed criminal offences and subsequently charged in Court.

66. The Petitioner asserted that his right to dignity and those of an arrested person were violated by being detained and ferried around in a car for 6 hours and for not been presented to Court within the constitutionally allowed 24-hour period. He set out the details of violations in paragraph 14 of the Petition.

67. In paragraph 18(j) and 19, the Petitioner set out how he was denied the equal protection of the law by being arraigned and prosecuted. He candidly described how the conduct of the Police was not in consonance with the entitlements under Article 27 of the Constitution.

68. In paragraph 18(g) the Petitioner further elaborated how rights and fundamental freedoms ought not to be limited. He went into the manner in which the actions of the 2nd Respondent were an abuse of their powers and how they limited his constitutionally guaranteed rights.

69. A look at the Petition through the prism of the *Anarita Karimi Njeru - vs- The Republic* case (supra) and the Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR, this Court finds and hold that the Petition has sufficient detail and was crafted with precision on the rights and fundamental freedoms allegedly violated as to call upon this Court to consider the Petition on merit.

70. I will now deal with the first main issue.

(a) Whether the arrest and subsequent prosecution of the Petitioner violated Articles 19, 20(2), 22, 23, 24, 25 26, 27, 28, 47, 49 and 157(11) the Constitution:

71. The resolution of this issue calls for a scrutiny of the legal regime giving the 1st and 2nd Respondents the mandate to investigate offences and to prosecute those culpable and whether they exercised those powers within the constitutional and legal limits.

72. I recently broadly discussed this issue in Nairobi High Court Constitutional Petition No. E033 of 2021 *Maura Muigana vs. Stellan Consult Limited & 2 Others* (unreported) and also in Nairobi High Court Constitutional Petition No. E216 of 2020 *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)* [2021] eKLR.

73. As part of the introduction of the subject in *Maura Muigana vs. Stellan Consult Limited & 2 Others* case (supra), I acknowledged the many writings by legal scholars and decisions by Courts and appreciated that whereas it would have been desirable to come up with all the marvellous work on the issue in a 'one-stop shop', that was a tall order given the time constraints and the need for expeditious disposal of cases. I, however, rendered a concise discussion on the subject.

74. I then traced the legal basis of the exercise of prosecutorial powers in Kenya to the Constitution and the law. **Article 157** of the Constitution establishes the Office of the Director of Public Prosecutions as under: -

1) *There is established the office of Director of Public Prosecutions.*

2) *The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.*

3) *The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High*

Court.

4) *The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.*

5) *The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.*

6) *The Director of Public Prosecutions shall exercise State powers of prosecution and may--*

a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

7) *If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.*

8) *The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.*

9) *The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.*

10) *The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.*

11) *In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.*

12) *Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.*

75. There is, as well, the **Office of Director of Public Prosecutions Act** No. 2 of 2013 (hereinafter referred to as '**the ODPP Act**'). It is an Act of Parliament aimed at giving effect to Articles 157 and 158 of the Constitution and other relevant Articles of the Constitution and for connected purposes. The ODPP Act provides in Section 4 the guiding principles in prosecution of cases as follows:

(4) In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) *the need to serve the cause of justice, prevent abuse of the legal process and public interest;*

(g) *protection of the sovereignty of the people;*

(h) *secure the observance of democratic values and principles; and*

(i) *promotion of constitutionalism.*

76. The ODPP Act, among other statutes, variously provide for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers by the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed.

77. *Article 239* of the Constitution provides for the national security organs. They include the National Police Service. The primary object of the national security organs and security system is to promote and guarantee national security in accordance with the principles mentioned in *Article 238(2)*.

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

(a) *strive for the highest standards of professionalism and discipline among its members;*

(b) *prevent corruption and promote and practice transparency and accountability;*

(c) *comply with constitutional standards of human rights and fundamental freedoms;*

(d) *train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and*

(e) *foster and promote relationships with the broader society.*

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

1. The Inspector General –

(a)

(b) ***shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.***

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

(a) *the investigation of any particular offence or offences;*

(b) *the enforcement of the law against any particular person or persons; or*

(c) *the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.*

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

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

The Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

81. The independence of the Inspector-General of Police is constitutionally-insulated from any form of interference or directional command. Apart from the Director of Public Prosecutions and only to the extent so provided, no other person, body or entity has the power to give any form of directives to the 2nd Respondent on how to discharge its functions. The position is further ring-fenced in that even the power donated to the Cabinet Secretary under Article 254(4) of the Constitution to issue any directives to the Inspector-General of Police is only limited to policy issues.

82. Pursuant to the provisions of Article 239(6) of the Constitution, The *National Police Service Act*, No. 11A of 2011 (hereinafter referred to as '**the Police Act**') was enacted on 30th August, 2011. It is an Act of Parliament to give effect to Articles 243, 244 and 245 of the Constitution; to provide for the operations of the National Police Service; and for connected purposes.

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

24. The Functions of the Kenya Police Service

The functions of the Kenya Police Service shall be the—

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

27. The Functions of the Administration Police Service

The functions of the Administration Police Service shall be the—

- (a) provision of assistance to the public when in need;*
- (b) maintenance of law and order;*

- (c) preservation of peace;*
- (d) protection of life and property;*
- (e) provision of border patrol and border security;*
- (f) provision of specialized stock theft prevention services;*
- (g) protection of Government property, vital installations and strategic points as may be directed by the Inspector-General;*
- (h) rendering of support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties;*
- (i) co-ordinating with complementing Government agencies in conflict management and peace building;*
- (j) apprehension of offenders;*
- (k) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.*

35. Functions of the Directorate

The Directorate shall —

- (a) collect and provide criminal intelligence;*
- (b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;*
- (c) maintain law and order;*
- (d) detect and prevent crime;*
- (e) apprehend offenders;*
- (f) maintain criminal records;*
- (g) conduct forensic analysis;*
- (h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;*
- (i) co-ordinate country Interpol Affairs;*
- (j) investigate any matter that may be referred to it by the Independent*
- (k) Police Oversight Authority; and perform any other function conferred on it by any other written law.*

84. Having set out the constitutional and statutory parameters within which the Respondents must exercise their powers, I will now look at some decisions which dealt with the various aspects of the scope and exercise of the said powers.

85. Recently, the Supreme Court in Petition No. 38 of 2019 *Cyrus Shakhhalanga Khwa Jirongo v Soy Developers Ltd & 9 others*

[2021] eKLR discussed some of the applicable parameters.

86. On whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the Director of Public Prosecutions contrary to the Constitution, the Supreme Court stated as follows: -

[79] The High Court in its finding, prohibited the Respondents from proceeding with any criminal proceedings against the Appellant in relation to the suit property or any subject matter and transaction connected to the suit property. The Court of Appeal reversed this judgment by holding that the High Court had interfered with the discretion given to the Director of Public Prosecutions (DPP) to initiate and conduct prosecution. Essentially, the Court of Appeal found that the High Court went against public interest in preventing investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property and that the learned Judge interfered with the prosecutorial mandate of the DPP to decide on whether to charge or not to charge an individual.

[80] The 5th, 6th and 7th Respondents on their part, maintain the position that the decision to commence investigations against the Appellant was consistent with the provisions of Article 157 of the Constitution and Section 6 of the Office of Director of Public Prosecutions Act. They also submitted that the decision to institute criminal proceedings by the DPP is discretionary and that such exercise of power is not subject to the direction or control by any authority as provided for under Article 157(10) of the Constitution.

[81] Under Article 157(6) of the Constitution, the DPP is mandated to institute and undertake criminal proceedings against any person before any Court. Article 157(6) provides as follows:

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”

Article 157(4) provides that:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

However, Article 157(11) stipulates that:

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

[82] Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of Article 157(11) have not been met, then the High Court under Article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.

*[83] In that regard, the Court of Appeal in the case of **Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 Others** [2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power and held that: -*

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among

*other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090.*

*It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v. R.*[2002] IEA 205. See also *Kuria & 3 Others V. Attorney General* [2002] 2KLR. (emphasis supplied)*

[84] Furthermore, the Supreme Court of India in **R.P. Kapur v State of Punjab** AIR 1960 SC 866 laid down guidelines to be considered by the Court on when the High Court may review prosecutorial powers. They are as follows:

(I) *Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or*

(II) *Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or*

(III) *Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or*

(IV) *Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.*

[85] *We are persuaded that this is a good guide in the interrogation of alleged abuse of prosecutorial powers and read alongside Article 157(11) of the Constitution, we have sufficiently expressed ourselves elsewhere in this Judgment to show that the unconstitutional continuance of the criminal proceedings against the Appellant amounts to abuse of Court process and that, balancing the scales of justice, the weight would favor the Appellant and not the Respondents.*

87. On public interest, the Supreme Court expressed itself as follows:

[86] *On public interest, what is in issue is a dispute arising from a commercial transaction 24 years ago where the complainants have not denied receiving part payment of the purchase price. There is hardly any public interest element in such a transaction save the wide interest of the law to apprehend criminals.*

[87] *The learned Judge of the High Court, in our view, was well within his mandate under Article 165(3)(d)(ii) as read with Article 157(11) of the Constitution to curtail the Appellant's prosecution and the DPP'S powers have not in any way been interfered with, outside the constitutional mandate conferred on the High Court.*

88. This Court also discussed the various principles and guidelines in **Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)** case (supra) as follows: -

91. Regarding the exercise of prosecutorial discretion by the Director of Public Prosecutions, the Court of Appeal in **Diamond Hasham Lalji & another v Attorney General & 4 others** [2018] eKLR stated as follows: -

[41] *Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the Courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in *Mohit v Director of Public Prosecutions of Mauritius* [2006] 5LRC 234:*

these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the

courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...

*In **Regina v. Director of Public Prosecutions ex-parte Manning and Another** [2001] QB 330, the English High Court said partly at para 23 page 344:*

At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.

Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.

[42] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.

*In **Ramahngam Ravinthram v Attorney General** (supra) the Court of Appeal of Singapore said at p. 10. Para 28:*

however, once the offender shows on the evidence before the court, that there is a prima facie breach of fundamental liberty (that the prosecution has a case to answer), the prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At this stage the prosecution will not be able to rely on its discretion under Article 35(8) of the Constitution without more, as a justification for its prosecutorial decision.

*92. The High Court in **Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others** [2019] eKLR had the following to say about the role of the Director of Public Prosecutions in prosecuting criminal offences: -*

*25. It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this Court cannot shirk its constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that:*

*the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of **Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003** is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, **Constitution of the World**: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.*

*93. Long before the advent of the Constitution of Kenya, 2010 the High Court in **R vs. Attorney General exp Kipngeno arap Ngeny Civil Application No. 406 of 2001** expressed itself as follows: -*

... Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognized, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognized lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing

so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds....

94. It has also been well and rightly argued that, on the basis of public interest and upholding the rule of law, Courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. The Court of Appeal in **Diamond Hasham Laji & another v Attorney General & 4 others** (supra) stated as follows: -

The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, inter alia, that persons reasonably 'suspected of committing a crime are prosecuted and convicted, punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by state and citizens.

95. The Court of Appeal in **Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others** [2018] eKLR referred to the Supreme Court of India in *State of Maharashtra & Others v. Arun Gulab & Others*, Criminal Appeal No. 590 of 2007, where the Court stated:

The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./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 to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "Cr.P.C.") are a device to advance justice and not to frustrate it. 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 power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.

96. The High Court in **Bernard Mwikya Mulinge case** (supra) expressed itself as follows: -

14. As has been held time and time again the Court ought not to usurp the constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon.....

97. In **Meixner & Another vs. Attorney General** [2005] 2 KLR 189 the Court stated as follows: -

The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney

General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution....

98. **Mumbi Ngugi, J** (as she then was), in **Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others (2014) eKLR** stated that:

The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated...

99. In **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** the Court held that:

... the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene....

100. Recently, the High Court in **Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties) [2021] eKLR** dealt with several instances where a Court may intervene and stop a prosecution. They include where: -

- (i) *There is no ostensible complainant in respect to the complaint;*
- (ii) *The prosecution fails to avail witness statements and exhibits without any justification;*
- (iii) *There is selective charging of suspects; or*
- (iv) *An Advocate is unfairly targeted for rendering professional services in a matter.*

89. And, in **Maura Muigana vs. Stellan Consult Limited & 2 Others** case (supra), I further discussed the subject as follows: -

58. *I have also come across several other decisions on the subject. I will refer to only some few. In **Anthony Murimi Waigwe v Attorney General & 4 others [2020] eKLR**, the Court held that the Prosecutor has a duty to analyze the case before prosecuting it and it should let free those whom there is no prosecutable case against them. It expressed itself thus: -*

48. It is no doubt dear that under Article 157 (1) of the Constitution the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article 159 (2) of the Constitution is crying loudly every day, every hour that "justice shall be done to all, irrespective of status". Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.

49. *The Petitioner in support of interest of administration of justice dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction, In other words Public Prosecutors should ask themselves• would an impartial tribunal convict on the basis of the evidence available"*

50. *In the case of **Republic v. Director of Public Prosecution & Another ex parte Kamani**, Nairobi Judicial Review Application No. 78 of 2015 while quoting the case of **R vs. Attorney General ex Kipngeno Arap Ngeny** High Court Civil Application No. 406 of 2001; the Court held;*

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper ... there must be in existence material evidence on which the prosecution can say with certainty that it has a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and inactionable.

51. *In a democratic society like ours, no one should be charged without the authorities conducting proper investigation. The prosecutor on the other hand is under duty to consider both incriminating and exculpatory evidence. In the case of Republic v. Director of Public Prosecutions & Another ex parte Kaman/ Nairobi Judicial Review Application Nog 78 of 2015 (supra), the court expressed itself as follows:*

this court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of justice is a hallowed place and ought to be reserved for those matters in which the protagonists have a conviction stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the Office of the Director of Public Prosecutions Act to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a catwalk.

59. *In Meme -vs- Republic & Another (2004) eKLR the Court of Appeal discussed abuse of the Court process thus: -*

An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.

60. *In quashing a criminal prosecution on the basis of abuse of Court process, the Court in Peter George Anthony Costa v. Attorney General & Another Nairobi Petition No. 83/2010 expressed itself thus:-*

The process of the Court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or of oppression in the process of litigation. It follows that where there is an abuse of the court process there is a breach of the petitioner's fundamental rights as the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.

61. *Still on abuse of Court process in using Court to settle personal scores, the Court in Rosemary Wanja Mwangi & 2 Others V Attorney General & 2 Others, Mumbi J (as she then was) stated that: -*

The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.

62. *On the need for a Prosecutor to act within the law, the Court in Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others stated that: -*

The discretionary power vested in the Director of Public Prosecution is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably within the law and to promote the policies and objects of the law which are set out in Section 4 of the Office of Director of Public Prosecution Act. These objects are as follows: the diversity of the people of Kenya; impartiality and gender equity; the rules of natural justice, promotion of public confidence in the integrity of the office; the need to discharge the functions of the office on behalf of the people of Kenya, the need to serve the cause of justice; prevent abuse of legal process and public interest, protection of the sovereignty of the people; secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.

63. *In Republic v. Commissioner of Co-operatives ex parte Kirinyaga Tea Growers Cooperative Savings & Credit Society Ltd CA*

39/97 119991 EALR 245 the Court of Appeal warned against the improper use of power in the following words: -

...it is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allowed anyone on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith....

64. The above position was amplified in Nairobi High Court Miscellaneous Application No. 1769 of 2003 **Republic vs. Ministry of Planning and Another ex-parte Professor Mwangi Kaimenyi**, where it was held:

So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power, The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner.

65. The need for Courts to act with deference and accord constitutional and legal entities to discharge their mandates was revisited in **Paul Ng'ang'a Nyaga vs Attorney General & 3 Others** (2013) eKLR, where it was held that: -

.... this Court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of the Constitution.

66. I believe I have said enough on the general exercise of prosecutorial powers and for the purposes of this case. I will now look at what Legal Scholars and Courts have rendered on concurrent civil and criminal proceedings.

90. In the same case, **Maura Muigana vs. Stellan Consult Limited & 2 Others** case (supra), I also dealt with the issue of abuse of Court process. This is what I stated: -

67. The subject of abuse of Court process was discussed by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others** Civil Appeal No. 25 of 2002 [2009] KLR 229, as follows: -

The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

68. The Court of Appeal went on and stated as follows: -

*In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice...We approve and adopt the principles so ably expressed by both Lord Roskil and Lord Templeman in the case of **ASHMORE v CORP OF LLOYDS** [1992] 2 All E.R 486 at page 488 where Lord Roskil states:*

It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues.

Unless a trial is on discernable issues it would be farcical to waste judicial time on it.

69. In *Nairobi Civil Appeal No. 70 of 2017 Pratulchandra Bharmal v Chief Magistrate Kibera & 3 others* [2020] eKLR, the Court of Appeal further rendered itself as follows: -

20. In answering whether there was abuse of power, the Judge too discussed at length the safeguards that exist under criminal law in regard to an accused person to ensure a fair trial which is also a guaranteed right enshrined in the Constitution. He also appreciated that **Section 193 A of the Criminal Procedure Code**, allows concurrent litigation of civil and criminal proceedings arising from the same issues but cautioned that the prerogative of the police to investigate crime must be exercised according to the laws of the land and in good faith. What we understand the Judge to be saying in this regard is that the mere fact that leave was granted to the appellant to institute private criminal prosecution, this ipso facto did not mean that the 2nd respondent would not get a fair trial because the principles of a fair trial are well ingrained in law and practice. Having said that, the Judge went further to infer the unique circumstances prevailing in this matter, and posited that, if the private prosecution were to proceed, it would amount to an abuse of process. He pointed out and rightly so in our view, that if both the civil and the private criminal prosecution cases which were all centred on the **Bakarania** agreement were to proceed for hearing in both courts, there was a likelihood of the two processes giving rise to two different outcomes as there were also two sets of evidence in form of document examiners' reports. To us this was not a merit determination but a commentary on the process. We do not also see any contradictions as the Judge was restating the well-established principles of a fair trial.

21. Was there abuse of process to warrant an order prohibiting the criminal charge" In *Jago v District Court (NSW) 168 LLR 23, 87 ALR 57*) Brennan, J. said in part at p. 47-48: -

An abuse of process occurs when the process of court is put in motion for purposes which in the eye of the law, it is not intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in a conduct which amounts to an offence and on that account is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process.

*We are aware that the categories of abuse of process are not limited. Whether or not an abuse of power of criminal process has occurred ultimately depends on the circumstances of each case. One of the important factors at common law which underlie a prosecutorial decision is whether the available evidence discloses a realistic prospect of a conviction. In *Walton v Gardener* [1993] 177 CLR 378, the High Court of Australia said at para 23 –*

The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all categories of cases in which the process and procedures of the court which exist to administer justice with fairness and impartiality may be converted into instruments of injustice and unfairness. Thus, it has long been established that regardless of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be seen clearly to be foredoomed to fail..., if that court is in all circumstances of the particular case a clearly inappropriate forum to entertain them..., if, notwithstanding that circumstances do not give rise to an estoppel their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a case which has already been disposed of by earlier proceedings.

21. It is not lost to us that both the appellant and 2nd respondents are siblings; they have been involved in a dispute over the suit property for a long time; the appellant is the one who filed a civil suit, a defence was filed and when the civil suit was still pending, he instituted a private criminal prosecution. At the backdrop of all this, even the appellant's complaint against the 2nd respondent was subjected to police investigations and the DPP directed the police file be closed. **We are on our part persuaded that in the circumstances of this matter, an order of prohibition was justified to protect the court process from being used to settle a civil dispute which was pending and that allowing the criminal process was likely to embarrass the courts.** To us, this order was appropriate as the Judge had to navigate carefully so as not to make far reaching pronouncements that would embarrass the pending civil trial.

83. The High Court in *Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No.*

363 of 2009 stated as follows with respect to the Court's power to prevent abuse of its process: -

*This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. **In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing.** Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it. (emphasis added).*

84. From the foregoing, it is the case that the subject of abuse of Court process is wide and whether there is an abuse of the due process depends on the circumstances of a case.

85. As I come to the end of the second issue, I must state that I have deliberately endeavored the above somehow elaborate discussion covering the general exercise of prosecutorial powers, the concurrent civil and criminal proceedings under Section 193A of the CPC and the subject of abuse of Court process so as to lay a sound basis for consideration of the main issue in this matter which is whether the prosecution facing the Petitioner herein should be stopped since the dispute is civil in nature and the criminal case amounts to an abuse of Court process.

86. That consideration is the gist of the next issue.

87. From the foregoing, it comes to the fore that there are instances where a Court ought to exercise its discretion and stop a prosecution. Such instances, **include**, and where it is demonstrated that: -

- (i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;
- (ii) Where the quashing of the impugned proceedings would secure the ends of justice;
- (iii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
- (iv) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged;
- (v) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.
- (vi) The prosecution is not in public interest;
- (vii) The prosecution is not in the interests of the administration of justice;
- (viii) The prosecution is oppressive, vexatious and an abuse of the court process;
- (ix) The prosecution amounts to a breach of rights and fundamental freedoms;
- (x) The investigation and prosecution amounts to abuse of power and discretion and is aimed at achieving an ulterior or improper motive;

(xi) *The investigation and the prosecution are tainted with illegality, irrationality and procedural impropriety;*

(xii) *The investigation and prosecution is in gross contravention of the Constitution and the law;*

91. Having set out the parameters for the exercise of prosecutorial and police powers, I will now interrogate whether the 1st and 2nd Respondents actions were within the Constitution and the law.

92. I will ascertain, of particular importance, whether there were complainants and criminal wrongs were committed in the circumstances of this case. I will also consider whether 1st Respondent acted properly in sanctioning the criminal prosecution.

93. Section 2 of the **Criminal Procedure Code**, Cap. 75 of the Laws of Kenya defines a 'complaint' as follows: -

an allegation that some person known or unknown has committed or is guilty of an offence.

94. The **Black's Law Dictionary** 10th Edition defines a 'complainant' as follows: -

The party who brings a legal complaint against another.

95. An 'offence' is defined under the **Office of the Director of Public Prosecutions Act**, No. 2 of 2013 to mean: -

an act, attempt or omission punishable by law.

96. It is not in contest that some people lodged complaints in various police stations regarding theft of their motor cycles. The people, who are now the complainants in the criminal case, are Lillian Kemunto Nyakundi, Yuvinalis Nyaosi Ondieki and Charles Gitonga Waweru.

97. It is further not contested that theft is one of the criminal wrongs associated with property.

98. It is also not in dispute that the Petitioner was in a way involved in the process that resulted in the conveying and recovery of the stolen motor cycles of which the losses had been reported to the police stations. To that end, therefore, there were valid complaints, complainants and a suspect.

99. Given the circumstances of this case, it is the Petitioner who is placed at the centre of the stolen property. In fact, according to the Replying Affidavit by the investigating officer, the Petitioner failed to adduce any evidence to confirm that he had received the motor cycles from Hamisi and that they were destined to Hassan in Moyale as he alleged. To the police, the Petitioner was only being evasive and appeared to be aware of more than what he said, hence the need for further interrogation.

100. It is possible that the Petitioner may have been involved and forms part of the larger theft syndicate or that he innocently dealt with the property in the course of duty. Either way, it is the trial court which will determine as much.

101. At the moment it is the Petitioner who is to account for the lost and found motor cycles. More relevant to this case is the fact that it is highly probable, but subject to evidence at the trial Court, that the *doctrine of recent possession* may be applicable against the Petitioner.

102. The Court of Appeal in **Eric Otieno Arum v Republic** KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR discussed the doctrine of recent possession in the following manner: -

... In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

103. I must reiterate that even with the evidence of the person who sent the motor cycles from Nairobi and the intended recipient at Moyale, prosecution evidence may also reveal that the Petitioner is part of the scheme.

104. I have carefully studied the charge sheet. It contains offences known in law. Finding guidance from *Glinsk v McIver* [1962] AC 726 where Lord Devlin held that ‘... *reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction....*’ I hereby find and hold that, preliminarily, the matter avails a reasonable and probable cause of the Petitioner’s culpability.

105. Having said so, I will now consider whether the Petitioner’s rights, fundamental freedoms and the Constitution were in any way infringed.

106. I have hereinabove discussed at length the circumstances under which the police and the prosecutor may be lawfully stopped from discharging their duties.

107. The Petitioner contended that Articles 19, 20(2), 22, 23, 24, 25 26, 27, 28, 47 and 49 the Constitution were variously contravened. Article 19 provides the foundation and purpose of recognizing and protecting the Bill of Rights. Article 20(2) reassures the enjoyment of the rights and fundamental freedoms to every person. Article 22 is on the enforcement of the Bill of Rights. Article 23 is on the authority of the Court to uphold and enforce the Bill of Rights. Articles 24 and 25 provide for the limitation of rights and fundamental freedoms.

108. Article 26 of the Constitution is on the right to life. I will consider that right alongside the right to dignity under Article 28 of the Constitution due to the concurrence of the facts in support of the allegations of breach thereof. The Petitioner contended that his rights to life and dignity were infringed in that he was bundled into a boot of a Probox car and taken round from 7pm to midnight before he was later booked into Eastleigh police station.

109. According to the investigating officer, when the Petitioner was arrested with the subject motor cycles, he was led to Eastleigh Police Station and the motor cycles were towed thereto. Having denied the Petitioner’s allegation, the Petitioner did not adduce any evidence to show that indeed a non-police vehicle was used during his arrest and even if that was the case, how that infringed his rights, fundamental freedoms or the Constitution.

110. The practice and procedure in constitutional Petitions is provided for under *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as ‘*the Mutunga Rules*’).

111. *Rule 20(1)* of the Mutunga Rules is on the manner in which constitutional Petitions ought to be heard. Such Petitions may be heard by way of *affidavits* or *written submissions* or *oral evidence*. *Rule 20(3)* of the Mutunga Rules provide that a Court may upon application or on its own motion direct that the Petition or part thereof be heard by oral evidence. *Rule 20(4)* and *(5)* of the *Mutunga Rules* provide for the summoning and examination of witnesses.

112. The conduct of constitutional Petitions is also guided by various laws. For instance, the Evidence Act applies to matters generally relating to evidence. The Evidence Act is clear on its application to constitutional Petitions and affidavits in *Section 2* thereof. The provision provides as follows: -

(1) This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi’s Court, but not to proceedings before an arbitrator.

(2) Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.

113. *Sections 107(1), (2)* and *109* of the Evidence Act are on the burden of proof. They state as follows:

107(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

114. The burden of proof on a Petitioner in a constitutional Petition was addressed by the Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*** as follows: -

Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic. (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

115. Turning back to this matter, apart from not availing any further evidence in proof of the manner in which the Petitioner was allegedly handled upon arrest, the Petitioner did not even opt to cross-examine the investigating officer on the contents of his affidavit. As such, the allegation that the Petitioner was ill-treated upon his arrest in a manner that infringed his rights to life and dignity remain unproved and is hereby dismissed.

116. The Petitioner also pleaded that his right under Article 27 of the Constitution was infringed. The provision entitles one to the right to equal protection and equal benefit of the law as well as the freedom from discrimination.

117. In paragraph 18(j) of the Petition, the Petitioner pleaded that the right under Article 27 of the Constitution was infringed in that he was told that he was a ‘*small man*’ and that there is nothing he can do to the police officers. He further claimed discrimination on the basis of social status, lack of education and financial status.

118. As the Petition was vehemently resisted, it was incumbent upon the Petitioner to prove all the allegations against the Respondents. In this scenario, the Petitioner did not prove who said the words to the effect that he was a small person and incapable of doing anything. There was also no evidence on discrimination or at all. By and large, the Petitioner averred, but did not attain the evidential bar in proof of the allegations. The contention that Article 27 of the Constitution was infringed also fails.

119. Article 47 of the Constitution provides for one’s right to fair administrative actions. Again, in the matter, the Petitioner did not demonstrate how the right accrued and the manner in which it was infringed. He only restated the provisions thereof. As such, the contention was not proved.

120. There was also the contention of breach of Article 49 of the Constitution to the extent that the Petitioner was not produced before Court within 24 hours of his arrest. The Petitioner contended that he was arrested at around 7pm on 7th April, 2021 and that he was arraigned before Court on 9th April, 2021.

121. Article 49(1)(f) of the Constitution provides as follows: -

(1) An arrested person has the right—

(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;

122. From the above provision, given that the Petitioner was arrested at 7pm on 7th April, 2021, he was to be availed before Court by 7pm on 8th April, 2021. The Magistrate's Court usually operate within the official working hours unless otherwise allowed by the order of the Hon. Chief Justice. In this case, the 24 hours' period within which the Petitioner was to be produced before Court ended at 7pm on 8th April, 2021 which time was outside the ordinary Court hours. In that case, the Petitioner had to be produced by the end of the next Court day which was the 9th April, 2021.

123. The Petitioner pleaded that he was arraigned before Court on 9th April, 2021. This Court, therefore, finds and hold that the provisions of Article 49(1)(f) of the Constitution were not infringed and the contention, likewise, fails.

124. Having dealt with whether the various rights and fundamental freedoms were infringed, I will now ascertain whether the Director of Public Prosecutions acted in contravention of Article 157(11) of the Constitution.

125. Article 157(11) calls upon the Director of Public Prosecutions while exercising the powers conferred by the Constitution to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

126. The investigating officer deponed at length the manner in which he carried out the investigations. He recorded statements from witnesses and in the end he forwarded the matter for consideration and recommendation of the Director of Public Prosecutions.

127. The Director of Public Prosecutions reviewed the evidence and was satisfied that there was reasonable and probable cause of the Petitioner's culpability. It was recommended that the Petitioner be charged.

128. The Petitioner was not contended with the decision that he be charged. According to him, he was an innocent courier and ought not to have been charged. Whereas the Petitioner may be right, the prosecution may also be right in connecting him with the offences. It all depends on the available evidence. That evidence will have to be tested before the appropriate trial court.

129. In the unique circumstances of this matter, this Court finds and hold that the Petitioner has failed to demonstrate how the prosecution is not in public interest, how the interests of the administration of justice were curtailed and the manner in which the need to prevent and avoid abuse of the legal process was abused.

130. As re-affirmed in various decisions above, where the police and Director of Public Prosecutions have acted within the Constitution and the law, a prosecution ought not to be interfered with and instead, the Petitioner should challenge the evidence before the trial Court. That is the position in this matter.

131. Having so found, the first issue is, hence, answered in the negative.

132. With the finding that the Petitioner's rights and fundamental freedoms were not infringed and that the police and the Director of Public Prosecutions have so far acted within the Constitution and the law, the consideration of the second issue does not arise.

Disposition:

133. Flowing from the foregoing, the Petition and the application are not merited. They are hereby dismissed with costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JANUARY, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Aluka, Learned Counsel for the Petitioner.

Miss. Arunga, Learned Counsel instructed by the Honourable Director of Public Prosecutions for the Respondents.

Elizabeth Wanjohi – Court Assistant.



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