Case Number:	ACEC Miscellaneous E044 of 2021
Date Delivered:	24 Feb 2022
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Esther Nyambura Maina
Citation:	Nicholas Mwendwa Kithuku v Republic [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

HCACEC MISC NO. E044 OF 2021

NICHOLAS MWENDWA KITHUKU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Introduction

1. By the Notice of Motion dated 14th December 2021 which is brought under ***Sections 362, 364, 365 and 366 of the Criminal Procedure Code and Articles 47, 50, 159, 165(6) and (7) of the Constitution*** the applicant seeks the following orders:

"1.) **Spent**

2. THAT the Honourable Court be pleased to call for and examine the record of, and or proceedings, ruling and order of the subordinate court in Chief Magistrate's Anti-Corruption Court at Milimani, Case Number E026 of 2021, Republic Versus Nicholas Mwendwa Kithuku, for purposes of satisfying itself as to the constitutionality, correctness, legality or propriety of the ruling and findings as recorded on the 30th November 2021 in respect of an objection to the constitutionality and legality of the charge in order to vary, review, reverse and or set aside the said findings, ruling and or orders.

3. THAT the Honourable Court be pleased to call for and examine the record of, and or proceedings, ruling and order of the subordinate court in Chief Magistrate's Anti-Corruption Court at Milimani, Case Number E026 of 2021, Republic Versus Nicholas Mwendwa Kithuku, for purposes of satisfying itself as to the constitutionality, correctness, legality or propriety of the ruling and findings as recorded on the 30th November 2021 in respect of bond terms and conditions in order to vary, review, reverse and or set aside the said findings, ruling and or orders.

4. THAT the finding in the first of the twin rulings dated 30th November 2021, in the aforestated criminal case, to the effect that the Applicant's rights had not been violated; that the criminal proceedings did not amount to an abuse of the court process; that the Applicant should plead to the charge be reviewed, varied, altered and or set aside.

5. THAT the order in the aforestated criminal case that the Applicant be released on cash bail of Kshs. 10,000,000/= be reviewed, varied and or set aside and be substituted with a lesser and or reasonable cash bail.

6. THAT the order in the aforestated criminal case that the applicant be released on a bond of Kshs. 15,000,000/ = with two sureties of a similar amount, be reviewed, varied and or set aside and be substituted with a lesser and or reasonable bond term.

7. THAT the order in the aforestated criminal case, dated 30th November 2021, to the effect that the applicant is forbidden from accessing the offices of Football Kenya Federation be reviewed, varied and or set aside.

8. THAT the order in the aforestated criminal case dated 30th November 2021, that a gag order is hereby placed against the accused person forbidding him either by himself or through proxy, from discussing or publishing any matter relating to this case through any media platform whether on paper or electronically," be reviewed/ varied and or set aside.

9. Costs of the application be in the cause."

2. The application is premised on grounds that:

"a). Chief Magistrate's Anti-Corruption Court at Milimani, Case Number E026 of 2021, Republic Versus Nicholas Mwendwa Kithuku is scheduled for case management and or pre-trial directions on 20th December 2021. It is only just and fair that the issues raised in this application be determined on priority to any further proceedings in the criminal case.

b. The integrity of the criminal proceedings in the aforestated case has come into question. Therefore, it is in the best interest of justice and the rule of *law that the High Court exercises its supervisory jurisdiction to correct the said proceedings before the subordinate court.*

c. In its twin rulings dated 30th November 2021, the subordinate court overreached itself by issuing orders without jurisdiction and of a civil nature.

d. The trial court misinterpreted and wrongly applied the relevant law on sports and the constitution. Inter alia, the court held that under the Sports *Act, the Applicant is not entitled to a right to a fair administrative action.*

e. The bond terms and conditions are in clear conflict with the doctrine of presumption of innocence and in total disregard of the Judicial Guidelines on Bond/ Bail.

f. It amounts to an unfair trial for the Applicant to continue with a criminal trial, the basis of which is a charge he is unable to appreciate or answer to since the same is based on a Preliminary Report that has been illegally and unlawfully procured.

g. The facts of the case demonstrate grave violations of the criminal justice system from investigations, arrest, incarceration, detention and abuse of the court system, which cannot be divorced from the charges and or criminal proceedings. Accordingly, the criminal proceedings ought to be quashed.

h. The trial court has demonstrated bias in the said proceedings."

3. The application is supported by the affidavit of Nicholas Mwendwa Kithuku sworn on 14th December 2021 and a supplementary affidavit sworn on 13th January 2022. The applicant deposes that he is the President of the Football Federation of Kenya (FKF). That on 8th November 2021 having learned of the report from the media he challenged the inspection of FKF and the implementation of the Preliminary Report of the Inspection Committee by filing ***HC Constitutional Petition No. E473 of 2021, Football Kenya Federation vs Cabinet Secretary for Sports, Culture and Heritage & 5 Others*** but while that case is still pending the Respondent elected to subject him to criminal proceedings which he contends are unfair and instituted in bad faith and in violation of the Bill of Rights.

4. The applicant deposes that on Friday 12th November 2021, officers from the Directorate of Criminal Investigations (DCI) arrested him and took him to their Kiambu Road Headquarters then booked him at Gigiri Police Station and detained him in the police cells for the weekend without giving him any reasons save for a reference by the police to the FKF Preliminary Report which he was not furnished with.

5. It is the applicant's case that from the recommendations of the Preliminary Report of the FKF Inspection Committee it was evident that the report was incomplete, inconclusive and speculative as it called for further investigations and a special audit so as to establish the extent to which misappropriation of funds at the FKF may have occurred with a view of prosecuting those who would be found culpable. He deposes that to date no further investigations or special audit has been conducted in line with the said recommendations.

6. The applicant deposes that on 15th November 2021, he was arraigned in court vide ***Misc Criminal Application No. E3965 of 2021 Republic vs Nicholas Mwendwa Kithuku*** where the 1st Respondent sought an order to detain him in police custody at Gigiri Police Station for 14 days to allow investigators time to complete investigations. The proposed charges to be preferred against him were Fraudulent Acquisition of Public Property contrary to ***Section 45(1)(a) as read with Section 48*** of the ***Anti-Corruption and Economic Crimes Act*** and Failure to comply with laws, procedures and guidelines relating to procurement and disposal of assets contrary to ***Section 45(2)(b)*** as read with ***Section 48*** of the ***Anti-Corruption and Economic Crimes Act***. The Applicant deposes that the trial magistrate declined to issue the custodial order and ruled that there were no compelling reasons advanced by the prosecution to continue detaining the applicant and that the DCI had acted in bad faith. The court released the applicant on bail terms and ordered the prosecution to prefer charges against him within 7 days failure to which the file would be closed. The applicant deposes that when the matter was mentioned on 25th November 2021 the Court closed the file and ordered that his cash bail be refunded forthwith. However, in an unexpected turn of events he was arrested the next day and taken to the DCI headquarters, booked at Gigiri Police Station for the weekend then arraigned in ***Milimani CMACC E026 of 2021*** to answer to four charges premised on the Preliminary Report of the FKF Inspection Committee. According to the applicant the particulars of the offences described the owner of the property in issue as FKF. He deposes that he objected to taking the plea for reasons that the charge sheet was defective, was based on a preliminary report and incomplete investigations, that his arrest and arraignment were in violation of ***Articles 47*** and ***50*** of the ***Constitution***, that the State acted in bad faith hence lowering the dignity of the court hence an abuse of the court process and that there was a constitutional petition ***HC Petition No. E473 of 2021, FKF & 2 Others vs Cabinet Secretary for Sports, Culture & Heritage & 5 Others*** was still pending. He deposes that the prosecution strongly opposed his objection hence the impugned ruling of 30th November 2021 in which the lower court dismissed his objection.

7. In this court the applicant challenges the legality and constitutional validity of the charges preferred against him and asserts that the trial court failed to correctly interpret and apply the law on Sports as well as the Constitution. With respect to the ruling on bail and bond terms, the applicant contends that the trial court failed to take into account his right to be presumed innocent until proven guilty and the primary consideration for granting bail and it made orders outside its jurisdiction by issuing remedies of a civil nature. He reiterates that the cash bail of Kshs. 10,000,000 and bond of Kshs. 15,000,000 is manifestly high, punitive and excessive in comparison to the charges against him. That moreover, in light of the chronology of events, the respondents are using the criminal process to intimidate and frustrate him into abandoning his position as FKF president and his pursuit of remedial action in the aforementioned High Court Petition.

8. On the issue of violation of his right to fair administrative action guaranteed by article 47 of the Constitution the applicant asserts that the trial court erred in dismissing his argument that the charges against him flow from an unlawful Preliminary Inspection Report. He faulted the court for determining that ***Section 53*** of the ***Sports Act*** gives the Registrar discretion to determine whether to grant him a hearing. He contends that the magistrate's reasoning that the use of the word "may" in ***Section 53*** amounted to grant of absolute discretion was inaccurate. The applicant is of the view that in certain circumstances the word "may" means shall. He cited the case of ***Chadwick Okumu vs Capital Markets Authority (2018)eKLR*** in which the court while quoting the South Africa Supreme Court case of ***AAA Investments (Pty) Ltd vs Micro-Finance Regulatory Council & Another*** observed that:-

"….The majority in the Supreme Court of Appeal in South Africa, however, pointed out that the word may could simply signify an authorization to exercise a power coupled with a duty to use it if the requisite circumstances were present. Therefore, the word "may" may be construed in one of two ways:- either to give complete discretion, or simply to give authorization together with the duty to act where circumstances permit"

9. The applicant further averred that the facts surrounding the investigation, his arrest, the release and closure of his file, re-arrest and arraignment in court amounted to an abuse of court process. In support of this proposition he cited the following cases:

- **Joram Mwenda Guantai vs The Chief Magistrate Nairobi Civil Appeal No. 228 of 2003 (2007) eKLR in which the Court of Appeal citing the case of Bernard Mwikya Mulinge vs The Director of Public Prosecutions & 3 Others (2019) eKLR held as follows**:

"Equally so, the high Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power to secure fair treatment for all persons who are brought before court or to a subordinate court and to prevent an abuse of the process of the court."

- ***Kuria & 3 Others vs Attorney General (2002) eKLR***

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

- **Nthabiseng Pheko vs Ekurhuleni Metropolitan Municipality & Another CCT 19/11(75/2015) cited in the case of Kenya Human Rights Commission vs the Attorney General & Another (2018) eKLR**

"The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."

10. The applicant submitted that he complained before the trial court that he was neither shown a copy of the preliminary report nor told the reasons for his arrest as required under ***Article 49*** of the ***Constitution*****.** With respect to the charges against him he stated that he did not understand with clarity the particulars of the charge ***"acquiring "public property"*** being property of FKF ***which is a private entity***." He stated that secondly the figures appearing in the four counts were commensurate with those in the preliminary inspection report which inquiry was incomplete and that even the state was not clear as to the charges as the prosecution's position is that disclosure is a continuous process hence there is some evidence that they may not supply to the defence immediately and that they will seek leave of the court to do so.

11. In regard to bail/bond Counsel for the applicant submitted that in consideration of the monies allegedly stolen and the circumstances of this case, the cash bail of Kshs. 10 million and the bond of Kshs. 15 million were excessive, unreasonable and punitive. That ***Section 123(3)*** of the ***Criminal Procedure Code*** empowers the High Court to reduce such bail/bond. In support of his submissions, learned Counsel for the applicant cited the following cases:-

- ***Cyril Kipruto Serem vs Republic (2020)eKLR***

"Reasonable terms of Bail

3. With respect to a decision on bail, the court is required to observe the statutory injunction in section 123 (2) of the Criminal Procedure Code that "the amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive." The rationale for this rule is elaborated in the Kenya Judiciary's Criminal Procedure Benchbook, 2018 para. 109 at p.52 while dealing with minor offences, in terms that–

"109. Courts must ensure bail conditions are reasonable and not excessive, as this would lead to de facto imprisonment and amount to a violation of Article 49 (2). What is reasonable should be determined in light of the facts and circumstances of each case (R. v Taiko Kitende Muinya High at Nairobi Criminal Case No. 65 of 2010)."

- **Moses Kasaine Lenolkulal vs Republic (2019) eKLR**

"However, and regrettably so, Parliament does not seem to treat corruption offences with the seriousness they deserve- the penal consequences for the offences which the applicant faces are a fine not exceeding Kshs 1,000,000 or a term of imprisonment for ten years or both. The saving grace may be found in Section 48(2) which provides for a mandatory fine. Parliament urgently needs to look at the provisions of ACECA if any inroads against corruption are to be made in this country.

14. At any rate, given the nature and circumstances of this case and the penalty provided in law, it is my view that the bond terms imposed on the applicant are excessive, and may well amount to a denial of bail. It has not been demonstrated that he is a flight

risk, and I note that the Prosecution did not oppose his application for b*ail. The applicant has also been barred from accessing County offices, so the apprehension that he may interfere with witnesses is not a consideration"*

12. The applicant concluded by submitting that the condition given by the court that he is forbidden from accessing the FKF offices, except with the leave of the court, is based on a misconception given that FKF is a private entity run in accordance with its own constitution and that the court acted in excess of its jurisdiction and stepped into the arena of the dispute between him and the Cabinet Secretary as to the legality of the disbandment of FKF and the appointment of a caretaker committee. Counsel contended that since the applicant is not a public officer, the prohibition from visiting his offices based on ***Sections 62 and 63*** of the ***Public Officer Ethics Act*** is erroneous.

13. The applicant also took issue with the gag order forbidding him from discussing matters in relation to the case which he deems an infringement of his right to freedom of expression and equal protection of the law. That the order touching on the running and management of FKF, the preliminary investigation report, FKF bank accounts and employees, management and running of football and matters relating to FIFA statutes is too wide. It is the applicant's case that if the order is not reviewed, he risks having his bail cancelled for violating the said condition.

14. The application is vehemently opposed. In the Grounds of Opposition dated 26th January 2022 the respondent states:

"1. THAT the application discloses no cause of action as against the State since the prayers number 3 to 8 of the Notice of Motion dated 14th December, 2021 were the exercise of the discretionally powers of the court.

2. THAT the trial court properly exercised its discretion when it took into account the appropriate principles or guidelines on bail and application of the national values and constitutional imperatives set out in Chapter 6 of the Constitution to arrive at the bail terms imposed.

3. THAT prayers number 3, 5 and 6 have been overtaken by events since the applicant's cash bail has since been substituted with a surety bond as security.

4. THAT prayer number 4 touches on the state powers of the Director of Public Prosecutions, under Article 157 (6) (a), "to 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 This prayer is unconstitutional and therefore null and void.

5. THAT no reasons have been advanced by the applicant to demonstrate that the bail conditions imposed were unconstitutional, unreasonable or unattainable."

15. Relying on the above grounds Counsel for the Respondent submitted that bond terms were imposed by the trial court on the date of the plea; That the trial court gave the Applicant two options a bond of Kshs. 15,000,000/- with two sureties of similar amount or in the alternative a cash bail of Kshs. 10,000,000/-. Counsel submitted that the ighH principles that govern bail and bond were laid down as follows in the case of ***Harish Mawjee & another v Republic [2020] eKLR***:-

"First of all, courts have sole discretion to give determinate bond terms and they can impose a combination of terms including supervision of accused released on bail if found necessary. Secondly, bond terms should not be arbitrary, but the court must consider the relevant factors affecting issuance of bond including penalty of offence and the accused ability to meet the bond terms. Thirdly, the bond terms should not be excessive or unreasonable. Fourthly, an accused has right to seek review of bond terms from trial court or high court or appeal."

16. It is the respondent's submission that the bail conditions were reasonable and sufficient in accordance with the law. Counsel cited ***Section 124 of the Criminal Procedure Code*** which states: -

"Before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer."

17. Counsel pointed out that the Applicant complied with the conditions of bond and hence prayers 3, 5 and 6 have been overtaken by events. Counsel relied on the case of **Harish Mawjee & another v Republic (supra)** where the court held that:-

"The application for review of bond terms should only be made where an accused person is unable to benefit from the imposed conditions. Their continued incarceration in custody despite being granted bail will be considered as a good ground to prove his inability to meet the bond terms".

Counsel for the respondent stated that the prayers by the applicant cannot hold as he is enjoying his freedom upon immediate release on cash bail which was later substituted with surety bond.

18. Counsel for the respondent further submitted that the Office of the Director of Public Prosecutions exercised its mandate under ***Article 157*** of the ***Constitution of Kenya, 2010*** *and* that in exercise of those powers, the DPP complied with ***Article 157(11)*** which states: -

"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".

It is Counsel's submission that in light of the foregoing the Office of the Director of Public Prosecutions followed and observed the rule of law and that moreover, the charges against the applicant were not actuated with ulterior or extraneous motives.

Analysis

19. In the proceedings culminating in the ruling dated 30th November, 2021 the applicant had challenged the validity of the charges against him, his bail/bond terms which he wanted reduced, the gag order prohibiting him from discussing matters touching on the lower court case and the order barring him from accessing FKF offices except with the leave of the court. **The issue for determination is whether that ruling was incorrect, improper/ illegal and irregular hence deserving revision by this court pursuant to its supervisory jurisdiction as invoked by the applicant.**

20. The supervisory jurisdiction of the High court is donated by ***Articles 165(6) and (7) of the Constitution*** which states:-

".....

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

It is clear from the above provisions that the exercise of the supervisory jurisdiction of this court is discretionary.

21. The circumstances under which this court can exercise that supervisory jurisdiction are qualified. In the case of ***Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others [2020] eKLR,*** Mwongo J. stated as follows:

"Supervisory Jurisdiction and its application in the circumstances of the case:

150. The question that now needs an answer is: under what circumstances can the High Court in a criminal matter call up the record of proceedings of a criminal case and intervene in exercise of its constitutional Supervisory Jurisdiction" I can readily identify the following as situations which would merit the court's intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations:

a) Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;

b) Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;

c) Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.

d) In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring "the fair administration of justice"; This list showing rationale for intervention is of course not exhaustive.

151. Where, or if, it is intended to exercise Supervisory Jurisdiction under the Constitution, I think the following safeguards should be observed:

i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court's independence in the conduct and management of its proceedings

ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question

iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;

iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;

v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice...."

I agree with the above analysis and findings of Mwongo J.

22. The revisional jurisdiction of this court under ***Sections 362*** and ***364*** of the ***Criminal Procedure Code*** is also exercised within defined limits as was stated in the case of ***Republic v Milka Jerobon Chumba (2017) eKLR*** where the court stated**:-**

"The jurisdiction of the High court on revision is not unlimited. Section 362 and section 364 of the Civil Procedure Code when read together leave no doubt that the court can only exercise its revisionary jurisdiction if it is satisfied that there was an illegality, incorrectness, irregularity, mistake or impropriety in the decision, sentence or order sought to be reviewed."

In other words the jurisdiction should not be exercised so as to merely substitute the finding, order or decision of the trial court. This court must give reference to the decision, order or findings of the trial court and only interfere if the same is tainted by an illegality, irregularity, mistake or impropriety.

23. The validity or otherwise of criminal charges lies squarely with the trial court as provided in ***Section 89(5) of the Criminal Procedure Code*** which states: -

***"89*(5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order."**

24. A reading of the trial court's ruling reveals that the trial court considered the applicant's argument that the charges against him

were based on a Preliminary Inspection Report and that he was not given a right to be heard as required under ***Section 52*** and ***53*** of the ***Sports Act.*** The court's ruling was that the issues of that report were not before it and that the same should have been litigated under the Sports Disputes Tribunal which provides a mechanism for resolution of such disputes but which the Applicant had not exhausted. The court then held:-

"In any event the matter before this court is of a criminal nature brought under the ACECA. Whether or not the particulars of the alleged inspection report form the basis of the criminal charges against the accused is a matter that this court is not seized with. Furthermore, the DPP is empowered under Section 5(1) (b) to 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

….It is neither here nor there that the charges before the court emanated from the report. Section 26 of the ODPP Act envisages that charges presented before the court are as a result of a thorough investigation and not mere hearsay. Whether or not the said investigations were thorough is a matter only to be determined during trial and not on an application."

The court also held:

"I have had the opportunity to peruse the amended constitutional Petition E473 of 2021 amended on 22nd November 2021 and noted that it is challenging the inspection of Football Kenya Federation. It is my considered finding that this is insufficient to challenge the legality or otherwise of the criminal charges before this Court. In Alfred Lumiti Lusiba Vs. Pethad Pank Shantilal & 2 Others (2010) eKLR the court held that both a civil and criminal jurisdiction can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse the due process of the court in whatever manner.

The defence has failed to demonstrate to the court that the charges against the accused are being used to perpetuate an ulterior motive.

On the issue of abuse of court process the Court in Satya Bhama Gandhi v Director of Prosecutions & 3 others [2018] eKLR stated that the doctrine of abuse of process, based upon the inherent authority of every court to control its process and those persons who come before it, is a power incidental and necessary to the exercise of substantive jurisdiction. That power, together with rules of court and statutory provisions, enables the court to dismiss or strike claims which are frivolous and vexatious. In addition, it may be exercised to discipline litigants and lawyers guilty of misconduct.

It was upon the defence to show the court that by bringing the charges against the accused before court, the Director of Public Prosecutions action was either frivolous, vexatious or the same amounted to a misconduct. Unfortunately, none of this has been demonstrated"

25. The principles that guide a court when called upon to interfere with the decision of the Director of Public Prosecutions to charge a suspect were discussed in the case of **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR** where the Court of Appeal stated: -

"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…"

26. In the case of ***Kipoki Oreu Tasur v Inspector General of Police & 5 Others [2014] eKLR Mumbi J***, as she then was, observed 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." (Emphasis mine)

27. It is also trite that in considering an application challenging the DPP's decision to charge this court must be careful not to delve into the merits of the case before the trial court as that is the province of that court - see the case of ***Thuita Mwangi & 2 others v The Ethics & Anti-Corruption Commission [2013] eKLR where Majanja J stated***:-

"While these arguments are forceful, attractive and cogent, I am afraid that the High Court at this point is not the right forum to tender the justifications concerning the subject transaction let alone test the nature and veracity of these allegations. In Meixner & Another v Attorney General (Supra), the Court held that:

"It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

28. Similarly, in ***Beatrice Ngonyo Kamau & 2 Others v Commissioner of Police and the Director of Criminal Investigations Department & Another Petition 251 of 2012 [2013] eKLR,*** *Lenaola J, captured this balance as follows;*

"[22]. The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial."

29. It is clear from the above decisions that the issue of whether the decision to charge the Applicant was based on a Preliminary Report perse is neither here nor there as what the Applicant was required to prove in order for this court to halt the prosecution is that the decision is based on malice or on an ulterior motive, or other extraneous reasons. I have perused the grounds on the face of the application and the affidavits in support of the application and my finding is that no such ulterior motive or malice or extraneous reasons have been demonstrated; that, this court is merely being asked to determine firstly, whether the charges preferred against the Applicant disclose an offence(s) which as I have stated would be tantamount to usurping the jurisdiction of the trial court and secondly, to go into the merits of those charges which as we have seen, it ought not to do at this stage. In other words it is my finding that the Applicant has not demonstrated that the ruling of the court is tainted with illegality, irregularity, mistake or impropriety as would warrant this court to interfere. It is to be borne in mind that an application for revision is different from an appeal because in an appeal the appellate court is required to determine the merits of the decision, order or finding.

30. On the issue of bail/bond it is my finding that while this court has jurisdiction under ***Section 123 (3)*** of the ***Criminal Procedure Code*** to reduce the bail/bond granted by a trial court the prayers relating to this issue have been overtaken by events as the accused person met the said conditions and is now out on bond. Nothing however prevents the Applicant from seeking a review of the bond terms before the trial court if need be.

31. In regard to the condition that the Applicant must not step foot in the offices of FKF except with the leave of the trial court a reading of the court record reveals that the same was imposed taking into account that being the president of FKF there was a likelihood that he could interfere with witnesses and with evidence. As such I see no illegality, irregularity, mistake or impropriety in the order. In any event the applicant, should he feel strongly that he requires to access the offices, can always seek leave of the court.

32. In regard to the gag order it is always the case that a matter before a court of law ought not to be tried in the court of public opinion. This is so as to guarantee the sanctity and integrity of the proceedings before that court and the dignity of the court itself. The gag order granted by the court was specific to discussion of matters in the case before the court but not to matters football generally and in my view that is not a violation of the applicant's freedom of expression. While I am alive to the dicta in the case of ***Kiambu County Public Service Board & Others v Karungo Wa Thangwa [2016] eKLR*** and in the case of ***GNK v USA-Africa Management Co Ltd & another [2016] eKLR "that gagging orders cannot be entertained in the Constitutional dispensation we are in and that courts are manned by well-trained judges and magistrates who are capable of rising above the cacophony of public debate to render objective and just decisions based on the facts before the court and the applicable law***" I am of the view that each case must be decided on its own merits and that in this case the gag order was necessary for the integrity of the

proceedings in the trial court and for the proper administration of justice. That order like any other is however subject to review by the trial court should the same be abused by the party that obtained it.

33. In light of the foregoing it is my finding that the application before me lacks merit and it is dismissed.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2022

E. N. MAINA

JUDGE