



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC PETITION NO. E007 OF 2021

JOSPHAT KIPKOECH SIRMA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Josphat Kipkoech Sirma moved this court through a Petition dated 16th August 2021 which was filed contemporaneously with a Notice of Motion seeking conservatory orders but which was later withdrawn to expedite the hearing of the Petition. The Petitioner is a former employee of the Kenya Pipeline Company where he was the Chief Engineer Instrumentation and Control (I & C). His grievances arise from the institution of criminal proceedings against him by the State in **ACC No. 17 of 2020** after withdrawal of a civil asset recovery suit **HC ACEC Civil Suit No. 2 of 2017 Ethics and Anti-Corruption Commission vs Josphat Kipkoech Sirma & 4 Others** upon a consent for refund of the funds in issue which the Petitioner claims was duly paid and **ACC No. 22 of 2015** which was terminated under **Section 87(a)** of the **Criminal Procedure Code**.

2. The Petition which is expressed to be made under **Articles 2(1), 10,19(2) & (3), 20(2), 21(1), 22(1), 23(1), 25(a) and (c), 27(1) & (4), 28, 29, 47,48 50(1) and 165(6) & (7), 258 and 259** of the **Constitution**; the **Fair Administrative Action Act** and the **Anti-Corruption and Economic Crimes Act** seeks the following orders: -

“i. THAT a declaration be issued that the Petitioner’s rights under articles 25(a), 27(1), 28, 29(a)(b)(c)(d), 47(1) and 50(1) of the Constitution were violated.

ii. THAT a declaration be issued that the institution and continuation of proceedings in ACC No. 17 of 2020; R vs Josphat Kipkoech Sirma & 2 Others is illegal and unconstitutional.

iii. THAT the Respondents have violated the legitimate expectations of the Petitioner by charging him afresh despite having withdrawn the criminal case against him

iv. THAT an order of certiorari be issued to bring onto the Honourable Court for purposes of quashing, all charges and proceedings in ACC No. 17 of 2020; R vs Josphat Kipkoech Sirma & 2 Others.

v. THAT an order of prohibition be issued that the Respondents shall not charge the Petitioner on any material or alleged complaint relating to tender reference SU/QT/3097F/13.

vi. THAT an order or prohibition be issued, prohibiting the respondents from proceeding with investigations, summoning, prosecution or in any way harassing the Petitioner.

vii. THAT stay of proceedings in ACC 17 of 2020; R vs Josphat Kipkoech Sirma & 2 Others be issued pending the hearing and determination of this Petition**

viii. Costs be awarded to the Petitioner.”

3. The Petition is vehemently opposed. The 1st Respondent filed Grounds of Opposition dated 21st October 2021 while the 2nd Respondent filed a Replying Affidavit sworn by, Andrew Lekamparish on 4th October, 2021.

The Petitioner’s Case

4. The Petitioner’s case as can be discerned from the Factual Background set out in the Petition, the supporting affidavit, the annexures thereto and the written submissions of his Advocate is that in the year 2015 the Petitioner was charged at the Milimani Chief Magistrate’s court in **CMACC No. 22 of 2015 Republic v Josphat Kipkoech Sirma, Charles Tanui, Elias Maina Karumi, Ngatia Ndugu, Judy Wamaitha Thuo and Redline Limited**. He faced 3 counts the first two pertaining to making a false document and the third to abuse of office. However, on 24th October, 2017 the prosecution was terminated under **Section 87 (a) of the Criminal Procedure Code** on the ground that the Ethics & Anti-Corruption Commission upon whose investigations the charges were anchored. The 2nd Respondent, was not properly constituted. It is the Petitioner’s case that subsequently on 6th February 2017 the 2nd Respondent filed a suit HCACEC NO. 2 OF 2017 against him and his co-accused in this court for recovery of a sum of Euro 16,365,07/= on the ground that the payment of that sum to Redline Limited was founded on fraud and illegality. It is the Petitioner’s case that however the parties in the suit, including the 2nd Respondent negotiated the matter out of court and it was agreed that the money would be refunded on condition that the 2nd Respondent would terminate both the suit and the criminal case it had filed against the Petitioner and his Co-defendants. The Petitioner contends that thereafter a consent arrived at by the parties was recorded the said sum of Kshs.2,905,009 having been paid to the 2nd Respondent in full upon the understanding that both the civil matter and any other complaint would be withdrawn. The Petitioner avers that that notwithstanding three years later on 15th July, 2020 he was arrested and charged in CMACC No. 17 of 2020 with offences purportedly arising from the same transaction. It is his case that the subsequent prosecution is malicious as the Respondents herein were debarred from instituting any criminal proceedings relating to transactions pertaining to Tender Ref. No. 54/T/3097F/13 as all complaints thereto were settled through the consent in HCACEC No. 2 of 2017. The Petitioner also took issue with the fact that some of his co-accused in the earlier case, namely Ngatia Ndung’u, Judy Wamaitha Thuo and Redline limited were not charged in CMACC No. 17 of 2020 but were instead converted into witnesses. He contends that the move by the Respondents to charge him goes against any known canons of law as the Respondent is bound by **Section 56(B)(3) and (4) of the Ethics & Anti-Corruption Commission Act**. He avers that his continued prosecution in **ACC No. 17 of 2020** is founded on extraneous materials, factors and or intentions, is prejudicial and is a violation of his rights and freedoms. He contends that this is compounded by his dismissal; from the Kenya Pipeline Company in 2015 for reason of the same tender.

5. In his submissions Learned Counsel for the Petitioner framed the issues for determination as follows:

i. Whether the 1st Respondent discriminated against the Petitioner

ii. Whether the 1st Respondent was bound by the recommendations of the 2nd Respondent to charge the Petitioner even after the matter was settled

iii. Whether the 2nd Respondent acted within the law by re-visiting an already settled anti-corruption matter

iv. Whether the concurrence of Criminal and Civil Proceedings is applicable in this matter

v. Whether the proceedings in ACC No. 17 of 2020 ought to be quashed and conservatory orders issued

6. Counsel then submitted that the fact that the three co-accused of the Petitioner in the initial criminal case have been turned into prosecution witnesses with no explanation yet they were accused of receiving payment for work not done is discriminatory against him and is in contravention of Article 27(1) of the Constitution which provides that every person is equal before the law and has the right to equal protection and benefit of the law. For this Counsel cited the case of **Jacqueline Okeyo Manani & 5 Others vs Attorney General & Another (2018) eKLR** in which the court held:

“29. The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.”

7. Counsel stated that in **CM ACC No. 22 of 2015**, the Petitioner was accused of abuse of office and conferring a benefit to Ngatia Ndung’u, Judy Wamaitha Thuo and Redline Limited for work that they did not do while in CM ACC 17 of 2020 arising from the same facts as the former case, the three have not been charged. Counsel argued that the preferential prosecution by the Respondents is in contravention of the principles of fair hearing guaranteed under **Article 50 of the Constitution** and that apart from the 1st Respondent’s statement that the decision to charge lies with them, no justification has been proffered as to why the three co-accused have not been charged alongside the Petitioner. To support his argument, Counsel cited the case of **George Joshua Okungu & another v Chief Magistrate’s Court Anti-Corruption Court At Nairobi & another [2014] eKLR** where the court held:-

“70. Where therefore the prosecution has been commenced or is being conducted in an arbitrary, discriminatory and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process. Similarly, where the prosecution strategy adopted is meant to selectively secure a conviction against the petitioner by ensuring that certain

individuals from whom the Petitioner derived his decision making power are unjustifiably shielded therefrom, it is our considered view that such prosecution will not pass either the Constitutional or Statutory tests decreed hereinabove. It is even worse where from the circumstances of the case, the same persons being shielded could have been potential witnesses for the Petitioner and who have, with a view to being rendered incompetent as the Petitioner's witnesses have been in a way enticed to be prosecution witnesses. That strategy, we hold, constitutes an unfair trial under Article 50 of the Constitution.

71. Here for example, the Petitioners contend that they took all the necessary steps to obtain the requisite legal advice and approvals or authorizations. To turn round and institute criminal prosecution against the Petitioners while making the very persons who authorized the Petitioner's action into prosecution witnesses, in our view, amounts to selective and discriminatory exercise of discretion. In such an event the Director of the Public Prosecution cannot be said to have been guided by the requirement to promote constitutionalism as mandated under the Constitution and the Office of the Director of Public Prosecutions Act.”

8. Counsel for the Petitioner beseeched this court to invoke its inherent jurisdiction to stay the proceedings against the Petitioner as the present prosecution amounts to unfair and inequitable administration of justice contrary to **Article 10(2)(b)** of the **Constitution**; a contravention of **Article 19(2)** on preservation of his dignity and promotion of social justice and a breach of **Article 20(2)** of the **Constitution** which provides that every person shall enjoy rights and fundamental freedoms to the greatest extent possible.

9. On the issue of whether the Office of the Director of Public Prosecutions acted within the law in re-arresting and charging the Petitioner Counsel submitted that the **Office of the Director of Public Prosecutions** fell afoul of the provisions of **Article 157(11)** of the Constitution which provides that that office shall have regard to the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Counsel stated that the 1st Respondent is intent on sustaining charges against the Petitioner at all costs an intent which he contended is driven by malice and unreasonableness warranting sanction by this court. To support this submission Counsel relied on the following dicta in the following cases:-

Njuguna S. Ndung'u vs Ethics & Anti-Corruption Commission & 3 Others (2014) Eklr.

“90. This Court appreciates the fact that in certain cases the contention by the Petitioner that criminal proceedings may be commenced with the aim of destroying people's careers or for the purposes of witch hunting is not altogether remote. Where the Court is convinced that that is the motive, the Court will not hesitate to bring such misconceived proceedings to an end. In Regina vs. Ittoshat [1970] 10 CRNS 385 at 389 it was held that:

“this Court not only has the right but a duty to protect citizens against harsh and unfair treatment. The duty of this Court is not only to see the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner.”

Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission & 3 others Consolidated Petitions No.153 & 369 of 2013

“43. 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. As Kuloba J., observed in Vincent Kibiego Saina v Attorney General, High Court Misc Civil Appl. No. 839 of 1999 (Unreported) at pages 20, 21, “If a criminal prosecution is seen as amounting to an abuse of the process of the court the court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court the court will unhesitatingly step in to stop it.”

10. Counsel asserted that even upon a report being made and a recommendation being forwarded to the Office of the Director of Public Prosecutions under **Section 35** of the **Anti-Corruption and Economic Crimes Act**, the **Office of the Director of Public Prosecutions** was under obligation to review those recommendations independently and can refuse to charge. Counsel asserted that in this case, the Office of the Director of Public Prosecutions was under an obligation not to charge the Petitioner as the issue had resolved with in **HC ACEC 2 of 2017**.

11. Counsel for the Petitioner also argued that the Respondents misapprehended the application of **Section 193A** of the **Criminal Procedure Code**. He submitted that **CM ACC No. 17 of 2020** which the Petitioner seeks to quash does not exist alongside any civil case as both **ACC No. 22 of 2015** and **HC ACEC No. 2 of 2017** which existed alongside each other are not in existence hence **Section 193A** is inapplicable to this case. Counsel submitted that this court has jurisdiction to grant order of certiorari and prohibition so as to maintain the rule of law and that this court also has jurisdiction to check any use of the judicial process for ulterior motive. To this end Counsel cited the case of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR**

“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.”

In **BEINOSI v WIYLEY 1973 SA 721 [SCA]** at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

.....

In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

“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 ...”

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

- (a) “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.**
- (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**
- (c) 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.**
- (d) (sic meaning not clear)**
- (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”**

12. Counsel for the Petitioner also cited the case of *Josephine Akoth Onyango vs Director of Public Prosecutions & 4 Others (2014) eKLR* in which the court stopped criminal proceedings as there was a civil matter that had already been settled. Counsel asserted that the Petitioner had a legitimate expectation that no future complaints would ensue post-settlement which expectation was violated. Counsel equated the consent filed on 18th March 2018 in **HC ACEC No. 2 of 2017** on 18th March, 2018 and subsequently registered in court to an undertaking under **Section 56B (3) and (4) of Anti-Corruption and Economic Crimes Act**. Counsel submitted that the assertion by the 1st Respondent that the consent only excluded Judy Thuo from criminal prosecution was erroneous as Redline Limited and Ngatia Ndung’u were also excluded. Counsel stated that the Petitioner is entitled to equal benefit under the law and **Section 56B** just like the other parties. He contended that the fact of Judy Thuo and Ngatia Ndungu who are the persons being shielded by the Respondents testifying against him will render the prosecution even more prejudicial to him as noted in the case of **George Joshua Okungu & Another v Chief Magistrate’s Court Anti-Corruption Court at Nairobi & another [2014] eKLR**. Counsel urged this court to halt the prosecution noting that the court not only had the power to do so but it has a duty to protect citizens against harsh and unfair treatment. Counsel contended that there is a clear case of unexplained discrimination against the Petitioner which makes it an unfair discrimination which will lead to unfair trial. Counsel contended that the 1st Respondent’s vow to sustain charges against the Petitioner at all costs is driven by malice and unreasonableness and is bereft of the interest of justice and it should be stopped.

13. Counsel submitted that it is an abuse of the process of court to mount a criminal prosecution for extraneous purposes such as is in this case and urged this court to stop the prosecution.

14. Counsel also submitted that the 1st & 2nd Respondent are bound by Article 10 of the Constitution. Counsel stated that the Petitioners right to fair trial has been trampled upon and it was within his right to come to this court as provided in **Article 258 of the Constitution**.

15. Counsel further submitted and cited several Articles of the Constitution and decided cases to support his submission that this court has the requisite jurisdiction to grant the orders sought.

16. Counsel also submitted that the Petitioner’s right to legitimate expectation was violated and reiterated that a consent having been recorded in court the Respondents are bound by **Section 56B (3) and (4) of the Anti-Corruption & Economic Crimes Act**. He urged this court to interpret that consent through the prism of **Article 259 (1) of the Constitution**. He disputed the 1st Respondent’s contention that the consent only excluded Judy Thuo stating that Ngatia Ndungu and Redline Limited were also excluded. He urged that the prosecution of the Petitioner is an extreme contravention of Article 48 and urged this court to allow this petition.

The 1st Respondent’s case

17. The 1st Respondent relied on a replying affidavit sworn on 18th August, 2021 by Faith Mwola, Senior Prosecution Counsel and on its Grounds of Opposition dated 21st October, 2021. The 1st Respondent sought to have the Petition dismissed on grounds that **Articles 157(6) and (10)** provide that the Director of Public Prosecutions exercises State powers of prosecution and does not require anybody’s consent or authority in the exercise of those powers. Learned Counsel for the 1st Respondent submitted that the decision to charge in cases investigated by the 2nd Respondent is based on sufficiency of evidence and that the decision to charge the Petitioner in **ACC No. 17 of 2020** was made based on the sufficiency of evidence with a realistic prospect of conviction. Counsel stated that the prosecution of the Petitioner was instituted with reasonable and probable cause devoid of malice and further that the 1st Respondent independently reviewed the evidence and concluded that there was incriminating evidence connecting the Petitioner to the offences for which he was charged. Counsel also averred that the prosecution of the Petitioner is in the public interest and that in making the decision to charge him the 1st Respondent has not abrogated, breached, infringed or violated any of his human and fundamental rights. Further, legitimate expectation is not a legal right and is

not in any case applicable to this case and further that in applying the evidential test and in line with the National Prosecution Policy, the 1st Respondent objectively assessed the totality of the evidence for and against the Petitioner before making the decision to charge. Counsel stated that either way the accuracy and correctness of the evidence can only be assessed and tested by the trial court as it is best equipped to deal with the quality and sufficiency of evidence. Counsel asserted that the Petitioner is guilty of material non-disclosure having previously filed similar applications and petitions which were dismissed and that some of the issues raised by the Petitioner in this petition amount to a defence which ought to be canvassed before the trial court. Further, that the Petitioner will not suffer any prejudice as he enjoys the presumption of innocence. Counsel asserted that this petition was merely brought to circumvent the trial process and it should be dismissed.

The 2nd Respondent's Case

18. The 2nd Respondent relied on a replying affidavit sworn by its Forensic Investigator Andrew Lekamparish on 4th October, 2021. The gist of the affidavit is that in his capacity as the Chief Engineer – Instrumentation and Control at the Kenya Pipeline Company the Petitioner caused loss of public funds; That the deponent was part of the team that conducted investigations into allegations of misappropriation of public funds by senior officials of the Kenya Pipeline Company in relation to tender No. SU/QT/3097F/13 for the supply of auto-transformers awarded to Redline Limited; That, investigations revealed that the transformers the subject of the tender though supplied, were never installed, tested and commissioned as per the tender award and that consequently, the payment of EURO 16,365.07 (Kshs. 1,832,887.84) to Redline Limited was illegal as no services were rendered to Kenya Pipeline Company and a report to that effect was forwarded to the Director of Public Prosecutions as provided in **Section 35 of Anti-Corruption and Economic Crimes Act**.

19. It is averred that the Petitioner's involvement in the tender caused him to be charged in **CM ACC No. 22 of 2015** with the offence of making a false document contrary to **Section 347(a)** as read with **Section 349** of the **Penal Code**, making a document without authority contrary to **Section 357(a)** of the **Penal Code**, wilful failure to comply with the law relating to procurement contrary to **Section 45(2) (b)** as read with **Section 48 of Anti-Corruption & Economic Crimes Act** and Abuse of Office contrary to **Section 48 of Anti-Corruption & Economic Crimes Act**. The 2nd Respondent avers that the case was however withdrawn under **Section 87(a) of the Criminal Procedure Code** in adherence to the Court of Appeal's decision in **Eng. Michael Sistu Mwaura Kamau vs EACC & Others Civil Appeal No. 102/2016** which held that the Commission was improperly constituted for lack of the requisite number of Commissioners. It is the 2nd Respondent's case that after the commission was properly constituted the allegations were investigated afresh culminating in **CC ACC 17/2020, Republic vs Charles Kiprotich Tanui & 2 Others**. The 2nd Respondent states that the institution of fresh charges was not barred by **Section 87(a) of the Criminal Procedure Code**.

20. In relation to the civil case **HC ACEC No. 2 of 2017** filed for the recovery of the EURO 16,365.07 (Kshs. 1,832,887.84) unlawfully paid to Redline Ltd the 2nd Respondent states that the out of court settlement was initiated by Judy Thuo, a director of Redline Limited which was named as the 4th Defendant; That on 2nd March 2018, the Commission entered into a consent with the said Judy Thuo which culminated in withdrawal of the suit against all the defendants and marking the matter as settled with no order as to costs. The 2nd Respondent states that there was no settlement on behalf of the Petitioner and that there was no Deed of Settlement entered into between the Commission and Redline Limited as envisaged in **section 56(B) and (4) of the Anti-Corruption & Economic Crimes Act**.

21. It is also the 2nd Respondent's case that **Section 193A** of the **Criminal Procedure Code** envisages concurrent civil and criminal proceedings and that outcomes of such proceedings are not dependent on one another. Further, that the consent entered into in **HCACEC No. 2 of 2017** was not an undertaking under **Section 56B(3) and (4)** of the **Anti-Corruption & Economic Crimes Act** as it did not satisfy the terms of such an undertaking in that it did not contain a full and true disclosure of all material facts of corrupt conduct by the Petitioner or any other party. That as such there is no evidence that the consent marking **HC ACEC Suit No. 2 of 2017** as settled did not discharge the Petitioner from criminal culpability or any subsequent criminal proceedings arising from the same transaction. The 2nd Respondent also averred that the refund of the money paid to Redline Limited did not compromise the Petitioner's corrupt conduct and the elements of the criminal case did not form part of the negotiations and therefore the case remained for determination before the trial court.

22. Learned Counsel for the 2nd Respondent framed its issues as follows:

“i. Whether the consent in ACEC Civil Suit No. 2 of 0217 was pursuant to Section 56B (3) and (4) of ACECA and its effect on the criminal proceedings against the Petitioner.

ii. Whether the Petitioner's rights under Articles 25(a), 27(1), 28, 29(a) (b) (c) (d), 47(1) and 50(1) of the Constitution were violated

iii. Whether the Petitioner can claim breach of Legitimate Expectation.

iv. Whether this is a fit and proper case for the Court to interfere with the mandate of the 1st Respondent to institute and conduct criminal proceedings.”

23. On the 1st issue Counsel submitted that the consent in the civil case was entered into on 2nd March 2018, long after the criminal case in ACC No. 22 of 2015 had been withdrawn under **Section 87(a)** of the **Criminal Procedure Code**; That there was no express or implied condition that the return of the monies by Redline Limited would terminate the criminal and civil cases against the parties with no further charges to be pursued in future. Counsel reiterated that the letter Ref EACC/NBI/LS 42-D dated 8th December 2017 relied on by the Petitioner reveals that the Commission intended to settle the suit on the terms which were recorded in court on 2nd March 2018 and the said terms expressly withdrew the civil suit against the Petitioner with no orders as to costs and did not mention criminal proceedings or charges. Counsel for the 2nd Respondent submitted that the Commission did not give an undertaking under **Section 56B(3) and (4)** of the **Anti-Corruption & Economic Crimes Act** as the consent recorded in court did not satisfy the requirements of such an undertaking as expressly provided in **Section 56B** of the **Anti-Corruption & Economic Crimes Act** which states:-

“56B. Out of court settlement

(1) In any matter where the Commission is mandated by this Act or any other law to institute civil proceedings or applications, it shall be lawful for the Commission to issue a notice or letter of demand to the person intended to be sued, and may, in such notice or letter, inform the person about the claim against him and further inform him that he could settle the claim within a specified time before the filing of court proceedings.

(2) The Commission may negotiate and enter a settlement with any person against whom the Commission intends to bring, or has actually brought, a civil claim or application in court.

(3) The Commission may tender an undertaking in writing not to institute criminal proceedings against a person who—

(a) has given a full and true disclosure of all material facts relating to past corrupt conduct and economic crime by himself or others; and

(b) has voluntarily paid, deposited or refunded all property he acquired through corruption or economic crime; and

(c) has paid for all losses occasioned by his corruption conduct to public property.

(4) A settlement or undertaking under this section shall be registered in court”

24. Counsel further submitted, that such an undertaking could not be made without the concurrence of the Office of the Director of Public Prosecutions which bears the exclusive mandate of prosecution under **Article 157** of the **Constitution** and that the Director of Public Prosecutions was neither a party to the civil suit nor part of the negotiations between the Commission and Redline Limited and in that regard, the consent could not and cannot be deemed to have had an effect on any future criminal proceedings against the Petitioner.

25. Counsel for the 2nd Respondent disputed the Petitioner’s allegations of violation of his rights under **Articles 25(a), 27(1), 28, 29(a)(b)(c) (d), 47(1) and 50(1)** of the **Constitution**. Counsel submitted that the power to withdraw charges under **Section 87(a)** of the **Criminal Procedure Code** is exercised in the interests of the administration of justice and to avoid abuse of the court process and that such withdrawal is not a bar to subsequent charges. Counsel cited the cases of **Republic vs Leonard Date Sekento (2019)eKLR** and **Geoffrey Muhuzani vs Director of Public Prosecutions (2016)eKLR** in support of that submission. The Commission reiterated that the initial criminal suit was withdrawn in compliance with the **Michael Sistu Mwaura case (supra)** hence the re-arrest and institution of charges against the Petitioner on the same set of facts is lawful and not an infringement on his rights.

26. With regard to **Article 27** of the Constitution Counsel for the 2nd Respondent submitted that the current line-up of witnesses and recommendation of charges against the Petitioner resulted from a 2nd report submitted to the Director of Public Prosecutions on 11th December 2018 following further investigations by the 2nd Respondent. That in preferring fresh charges the Director of Public Prosecutions took into consideration the Commission’s findings including the fact that Redline Limited had refunded the money and therefore did not prefer charges against Redline and its Directors. Counsel for the Commission argued that the Director of Public Prosecutions’ exercise of discretion and decision not to charge was in furtherance of **Article 159(2)(c)** of the Constitution, which permits alternative forms of dispute resolution and the Director of Public Prosecutions’ Diversion Policy 2019 and the General Prosecution Guidelines on the Decision to Charge 2019. For this Counsel relied on the case **Republic v Director Public Prosecutions & another Exparte Justus Ongeru [2019] eKLR**.

27. Counsel stated that the Director of Public Prosecutions was justified decision was justified and was arrived at upon employing the two stage test provided for in the Office of the Director of Public Prosecutions Guidelines on the Decision to Charge 2019, to wit, the evidential test requiring prosecutors to objectively assess the totality of evidence for and against the suspect to establish a realistic prospect of conviction and the public interest test in consideration of the seriousness of the offence and the level of culpability including the suspect’s level of involvement. According to Counsel for the 2nd Respondent the refund of money by Redline Limited served public interest which factor was considered by the Director of Public Prosecutions as a better way of disposal of the case against the company as opposed to its prosecution. Counsel submitted that moreover, the Petitioner’s culpability was established as investigations revealed that he fabricated documents which included completion of documents and inspection reports purporting that all works had been completed contrary to the true position. Counsel asserted that the Petitioner abused his position as Chairperson of the Inspection & Acceptance Committee by causing the payments to be made hence occasioning loss of public revenue.

28. Counsel for the 2nd Respondent contended that the case of **George Joshua Okungu & Another vs Chief Magistrate’s Anticorruption Court at Nairobi & Another(supra)** is distinguishable from the Petitioner’s case in that there the office of the Director of Public Prosecutions exercised its prosecutorial powers selectively by levelling charges against the Petitioners while turning the persons who authorised the actions of those Petitioners into prosecution witnesses. Counsel stated that in this case the Petitioner was the person in a position of authority and that he abused his office by falsifying documents.

29. In relation to **Articles 47 and 50(1) of the Constitution** Counsel for the 2nd respondent argued that the Commission has an interest in this matter having investigated and recommended the arrest and the institution of charges against the Petitioner. Counsel stated that **Article 47** of the **Constitution** is inapplicable to criminal cases as criminal investigation cannot be deemed to be an administrative action within the realm of administrative law; that the enactment of the **Fair Administrative Action Act** did not amend criminal law statutes. To support this submission Counsel cited the cases of **George Taitumu vs Chief Magistrates Court, Kibera & 2 Others (2014) eKLR** and **Dry Associates vs Capital Markets Authority & Another (2012)eKLR**.

30. Counsel for the 2nd Respondent further stated that the arrest, detention and prosecution of the Petitioner is neither unlawful nor unprocedural and that the same cannot be deemed to be a violation of the Petitioner’s rights under **Articles 25(a), 28 and 29(a) (b) (c) and (d)**.

Counsel asserted that it is also in the public interest that crime is prosecuted and wrongdoers punished. That there is no evidence showing that in re-arresting the Petitioner and charging him afresh after being discharged under **Section 87(a)** of the **Criminal Procedure Code**, the **Director of Public Prosecutions** acted improperly, irrationally or ultra vires its mandate. Counsel for the 2nd Respondent averred that there is no substantive right mentioned by the Petitioner that was violated and cited the case of **Consortium for the Empowerment & Development of Marginalized Communities & 2 Others vs Chairman, the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 Others (2013)Eklr in support.**

31. In response to the Petitioner's claim that his right to legitimate expectation was violated Counsel for the 2nd Respondent contended that for that right to accrue, there must be a promise, representation or past practice to arouse expectation and the representation must be one which is competent and lawful for the decision maker to make. Counsel contended that the Petitioner cannot claim breach of legitimate expectation for two reasons; Firstly, there has never been any correspondence between the Petitioner and the Commission in relation to both the civil and criminal prosecution and therefore there was no promise made to the Petitioner to create a legitimate expectation. Secondly, the Commission does not have the mandate to institute, undertake or discontinue criminal proceedings hence it cannot make a representation of such a nature.

32. Counsel for the 2nd Respondent also submitted that this is not a fit and proper case to interfere with the powers of the Director of Public Prosecutions decision to charge and prosecute the Petitioner; That the consent in the civil case was entered into long after the withdrawal of the criminal case and consequently, the Petitioner's submission that the criminal proceedings were mounted to yield pressure to settle a civil matter is not factual and further, that the submission that the current criminal proceedings were instituted to achieve ulterior motives are also false and unsubstantiated. Counsel submitted that to succeed the Petitioner must show that the decision to prosecute is tainted with illegality, irrationality and procedural impropriety for certiorari and prohibition orders to issue. To this end Counsel cited the **Ugandan case of Pastoli vs Kabale District Local Government Council and Others (2008)2 EA 300** where **illegality** was defined as commission of an error of law in the decision making process; **irrationality** as such gross unreasonableness in decision making that no reasonable authority addressing itself to the facts and the law before it would have made such a decision; and **procedural impropriety** as failure to act fairly in decision making such as non-adherence to the rules of natural justice or non-observance of procedural rules laid down in statute or legislative instruments. Counsel for the 2nd Respondent concluded that the Petition is devoid of merit and it ought to be dismissed with costs.

ANALYSIS AND DETERMINATION

33. I have carefully considered the Petition, the supporting affidavit, the annexures thereto, the responses by the Respondents, the rival submissions of learned Counsel for the parties, the cases cited thereat and the law. I find the following to be the issues arising for determination:

- i. What was the effect of the withdrawal of criminal charges in ACC No. 22 of 2015 under section 87(a) of the Criminal Procedure Code?
- ii. What was the effect and tenor of the consent recorded in ACEC Civil Suit No. 2 of 2017 against the Petitioner and all the other affected parties in regard to the institution of further proceedings against them?
- iii. Have the Petitioner's constitutional rights as enumerated been violated?
- iv. Is the Petitioner entitled to the orders sought?

Issue No.(i)

34. Section 87(a) of the Criminal Procedure Code provides as follows:

“87. In a trial before a subordinate court a public prosecutor may with the consent of the court or on the instruction or the Attorney General at any time before the judgment is pronounced withdraw from the prosecution of any person and upon withdrawal:-

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts,

(b) if it is made after the accused person is called upon to make his defence he shall be acquitted.”(emphasis mine).

35. It is expressly provided that a withdrawal which takes place before an accused person is put on their defence only gives rise to a discharge and that such a discharge is not a bar to subsequent proceedings against that accused person. I am therefore in agreement with the respondents that the 1st Respondent was entitled to bring fresh charges against the Petitioner given that the charges against him were withdrawn before he was called upon to enter his defence. In **George Taitumu v Chief Magistrates Court, Kibera & 2 others [2014] eKLR** the court held:

“The petitioner is apprehensive that having been discharged, he will be subjected to the same charges and may be tried upon the same facts in future proceedings. This argument implicates the provisions of Article 50(2) (o) which provides that a person shall, “not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted.” As the petitioner was neither acquitted nor convicted he cannot benefit from the benefit of this provision (See also Stanley Maina Mutuota and Others v Labour Commission and Others Nairobi Petition No. 313 of 2012 [2012]eKLR). It is therefore clear that the Constitution does not bar a subsequent trial on the same facts unless there is

an acquittal or conviction.”

What remains to be seen however is whether the subsequent prosecution of the Petitioner by the 1st Respondent at the behest of the 2nd Respondent was unfair, discriminatory and a violation of the Petitioner’s rights as alleged in this Petition.

Issue No. (ii)

36. The consent dated 2nd March 2018 in HC ACEC No. 2 of 2017 was in the following terms:

“1. THAT the suit has been compromised and is hereby marked as settled with no order as to costs.

2. THAT for purposes of clarity, the suit against the 1st, 2nd and 3rd Defendants is withdrawn with no orders as to costs”
(Emphasis mine)

The Petitioner was the 1st Defendant in **HCACEC No. 2 of 2017** and from the wording of the consent the case against him was withdrawn. The consent was however specific to the civil case and there was no mention of the criminal proceedings in **CMACC No. 22 of 2015**. It is also clear that the Criminal proceedings in **CMACC No. 22 of 2015** were terminated for reasons other than the consent reached in the civil case although the parties in both cases were the same. Indeed the Petitioner himself deposes that the prosecution was halted because the commission was not properly constituted at the time. It is therefore misleading for the Petitioner to allege that the consent in **HCACEC No. 2 of 2017** discharged or provided him with immunity from further criminal proceedings. I also agree with Counsel for the Respondents that the consent did not amount to an undertaking under **Section 56B** of the **Anti-Corruption & Economic Crimes Act** with the effect of barring any future criminal prosecution particularly, the Petitioner’s as it is clear from its terms that it only pertained to and affected the civil recovery proceedings and because it did not accord the terms of such an undertaking. If indeed the Judge intended to bar any subsequent prosecution of the Defendants therein nothing would have been easier than for the Judge to state so. Moreover this position was clarified in the 1st Respondent’s letter dated 11th June, 2021 to the Chief Magistrate annexed to the Petitioner’s supporting affidavit at pages 18 and 19. I accordingly find that issue No. (ii) must be determined in favour of the Respondents.

Issue No. (iii) Does the subsequent prosecution of the Petitioner in **CMACC No. 17 of 2017** amount to discrimination and hence a violation of his right guaranteed in **Article 27** of the **Constitution**.

37. The Petitioner has submitted extensively on violation of **Article 27** of the Constitution. That article states: -

“27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

Counsel for the Petitioner cited the case of *Jacqueline Okeyo Manani (supra)* where the court stated that discrimination will be deemed to arise where equal classes of people are subjected to different treatment without objective or reasonable justification. The Petitioner has pleaded discrimination on the ground that some of the persons he was previously charged with are not accused persons in the current criminal case facing him. However in the case of *Republic v Director of Public Prosecutions & another Ex parte Justus Ongera [supra]* it was held that:-

“79. The commission has no control over what the Director of Public Prosecutions does. Equally, the Director of Public Prosecutions has powers to decide on who to charge based on the evidence at hand. He cannot be directed on who to charge and who not to charge. In fact, the Director of Public Prosecutions can recommend or discontinue prosecution if he finds it necessary. As to whether the person charged is guilty or not, it is for the court to decide upon conducting full trial.

80. It is common knowledge that the Director of Public Prosecutions can drop charges against a suspect or an accused person

or an accomplice and treat such person as a witness against the person charged although an accomplice. It matters not whether the one treated as a witness is culpable like the one charged. However the DPP must justify the reasons for dropping charges against some suspect or suspects facing similar allegations without appearing to discriminate the one charged.

81. Therefore, it is a fallacy for the ex parte applicant to claim that, by absolving some suspects from prosecution and recommending his prosecution together with another was discriminatory. He cannot work under direction not even from the court on who to charge save where there is discrimination without justification. In this case the Director of Public Prosecution dropped charges on account that the executive tender committee was misled by the recommendation of the ex parte applicant and one Annette Mwangi. Prima facie, this can be a justification sufficient enough to absolve those that the Director of Public Prosecutions finds are not culpable from the evidence at hand.” (emphasis mine).

38. I associate myself with the above holding and also agree with the 2nd respondent that in the *George Joshua Okungu case (supra)* discriminatory and selective prosecution was evident as the witnesses against the Petitioners in that case were persons who worked with them and who were in authority over them and who authorised and were signatories to the transactions that were the basis of the criminal charges levelled against the Petitioners. In this case the Petitioner was the person in authority and he had acted independently. The persons who were excluded from the prosecution were not his co-workers and neither did they authorise or act with him in the preparation of the documents that put him into focus in the case he faces. He was solely responsible for drawing up the documents and did not take instructions from the persons who he alleges are being shielded by the Respondents. While it is alleged that he abused his office by fabricating documents in furtherance of an offence, his then co-accused now turned prosecution witnesses were unlawful beneficiaries of public funds allegedly arising from his conduct. Therefore, this is a classic case of accomplice turned witness and I find that the 1st Respondent was within his right to turn them into witnesses and hence no discrimination is demonstrated.

39. The Petitioner also alleges violation of **Articles 19(2) and 20(2) Article 25(a) Article 28, 29(a) – (d) and Article 58(c)**. As was held in the case of *Anarita Karimi Njeru v Republic [1979] eKLR* violation of constitutional provisions must be pleaded with a reasonable degree of precision and the manner in which the provisions are alleged to be infringed must then be demonstrated through evidence. I associate myself fully with the holding of the court in the case of *Christian Juma Wabwire v Attorney General [2019] eKLR*, where the Judge relying on the decision in *Lt. Col Peter Ngari Kagume and 7 others v AG, Constitutional Application No. 128 of 2006* where it was held that:-

“It is incumbent upon the Petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The Petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the court is deal to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation... However, mere allegation of incarceration without providing evidence of the same does not at all assist the court. It was incumbent upon the Petitioners to provide evidence of long incarceration beyond the allowed period and not to be presumptuous that the court knows what happened.....”

40. This was also the holding of the court and I also agree in the case of *Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR* where the court stated:

“Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any.”.....

“Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd:-*

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.”

41. In the present case other than citing the provisions of the Constitution the Petitioner did not adduce evidence to prove how those Articles were violated by the subsequent prosecution. The circumstances of his case are distinguishable from those in the cases he has cited. In the case of *Njuguna S. Ndung’u vs Ethics & Anticorruption Commission (EACC) and 3 Others (supra)* and in the case of *Thuita Mwangi Case* for instance the courts were emphatic that the court can stop a criminal prosecution for being an abuse of process, if it is actuated by malice, witch-hunting, with the aim of destroying careers or for any other reasons other than honest law enforcement. However, it is my finding that the Petitioner has not in any way demonstrated that the criminal proceedings against him are an abuse of the court process or that they are actuated by any reason other than public interest. I am also not persuaded that his legitimate expectation was violated because as I have demonstrated there was no promise or undertaking that it would be immune to subsequent criminal prosecution following the consent recorded in **HC ACEC No 2 of 2017**.

Conclusion

42. In light of the foregoing it is my finding that the Petition lacks merit and it is accordingly dismissed with costs to the Respondents.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2022

E.N. MAINA

JUDGE

In the presence of:-

Mr. Gachaga for the Petitioner

Ms Wangia for the 1st Respondent

Ms Kibogy for the 2nd Respondent

Sharon Potishoi – Court Assistant