**Maganjo v Office of the Director of Public Prosecutions & 4 others (Petition E3 of 2020) [2022] KEHC 288 (KLR) (20 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 288 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**PETITION E3 OF 2020**

**JM MATIVO, J**

**APRIL 20, 2022**

**BETWEEN**

**AUGUSTINE WACHIRA MAGANJO ..... PETITIONER**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT**

**INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE ..... 2ND RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT- (MOMBASA) ..... 3RD RESPONDENT**

**KENYA BUREAU OF STANDARDS ..... 4TH RESPONDENT**

**ATTORNEY GENERAL ..... 5TH RESPONDENT**

## JUDGMENT

1. The Petitioner, a mechanical engineer, was employed by the Kenya Bureau of Standards (KEBS) in 1998 as a Standards Officer 111. He rose to the position of quality assurance manager in 2008 based at the KEBS Mombasa Office, Coast Region. On 21st September 2020, he was charged jointly with others in Mombasa Magistrates Criminal Case Number 1425 of 2020, Republic v Geoffrey Ngari Wandeto & 4 others with the offences of conspiracy to defraud contrary to section 317 of the Penal Code,[1] false accounting by a public officer, contrary to section 331(1) as read with section 331(2) of the *Penal Code*, stealing contrary to section 281 of the Penal Code and abuse of office contrary to section 101 as read with section 102 (A) of the Penal Code. The Particulars of each count are enumerated in the Charge Sheet.

2. The other three co-accused persons namely; the 1st accused- Ngari Wandeto, the 2nd accused-Pauline Wamalwa Nafula, the 3rd accused- Martin Mswanya Nyakiamo and the 5th accused, Rose Wangui

[1] Cap 63, Laws of Kenya.

Gacheru were separately charged with the offence of abuse of office contrary to section 101 as read with section 102 (A) of the Penal Code. Additionally, the 5th accused, Rose Wangui Gacheru and the 3rd accused Martin Mswanya Nyakiamo were separately charged with the offence of neglect of official duty contrary to section 128 as read with section 36 of the Penal Code.

3. The Petitioner contends that he is a signatory to the operations account number 01001005109703 in the name of KEBS Coast Region held at the National Bank of Kenya, Nkrumah Road, Mombasa Branch, and, that the mere fact of being a signatory to the said account is the genesis of the criminal charges against him. He contends that the 2nd Respondent's recommendation to the 1st Respondent to charge him and the 2nd Respondent's decision to charge him are manifestly and patently malicious, full of spite and based on no evidence and actuated by ulterior motives other than the advancement of criminal justice and the rule of law. He avers that the charges are manifestly unreasonable to an extent that no reasonable police officer or prosecutor properly directing their mind to the facts would have recommended the charges.

4. He avers that he is not an accountant or a finance officer and he has never been the KEBS accountant, financial officer, a coast regional manager or an accounting officer at the material time and as a Quality Assurance Officer he examines, tests or comparative studies commodities, materials, substances, methods or procedures and issues product certification(s) under the applicable Regulations. He states that KEBS has an accounting department headed by the Regional Accountant (the 1st accused) who reports directly to the regional manager, Coast Region, Mombasa Office (the 3rd accused) and to the Finance and Accounting Department at the KEBS Headquarters, Nairobi.

5. The Petitioner states that the Operations Account holds funds for payment to suppliers and imprest for staff at KEBs, Coast Region, and the funds are authorized by KEBS Headquarters and sent to the said account. Further, the Revenue Account is for deposits of monies by KEBS customers and clients and it is operated from the headquarters. He states that the Regional Manager as the Accounting Officer at the Regional level is in charge of the revenue account and he directs the regional accountant on the management, administration and deposits to the said account. Further, the two are required to ensure that clients and customers payment to KEBS are deposited in the revenue account and to ensure that money in the revenue account is not used or utilized by them but is sent to the revenue account of the KEBS headquarters, Nairobi. He states that he does not manage, oversee or supervise the Regional Manager, the Regional Accountant or officers working under the Regional Accountant nor does he work under the Regional Accountant nor is he a signatory to the KEBS revenue account number 01003002830604.

6. He also avers that it is the mandate of the Regional Accountant (the 1st accused) to manage the two accounts and to ensure that they comply with the legal and accounting procedures, which functions are not shared and he only signs cheques for suppliers/creditors and staff imprest which must be signed by two signatories. He states that he relies on the decisions of the Regional Accountant and the Regional Manager while signing the cheques nor has the 4th Respondent provided him with verification mechanisms for the operations account save for the cheques and the supporting documents availed to him.

7. The Petitioner also states that determining the lawfulness or otherwise of the payment is the mandate of the Regional Manager and the Accounting Department, that the prosecution witnesses and the accused persons have not adversely mentioned him and that the 1st and 2nd Respondents in their recommendations and decision to charge him have refused, ignored, failed or neglected to take into account the internal financial audit report by a one Dorothy Apondi, an Assistant Auditor, KEBS, who investigated the matter and recommended that the officer doing the bank reconciliation should

explain why the revenue deposited in the operation account did not reflect and ensure the amount is transferred to the revenue account. He averred that the 1st and 2nd Respondents have ignored the said report which found the 1st and 2nd accused culpable and both were subsequently suspended and interdicted.

8. He contends that he cannot access payment receipts, invoices, vouchers, financial statements and accounting statements, cheque books, financial statements and audit reports or any other accounting documents other than the imprest warrants, cheque warrants and approved cheque payments for his signature. Further, he avers that he has no right to access monies in deposit or withdraw monies from the operations account or the revenue account nor does he prepare, sign, issue or furnish any financial or accounting statements, or access the money, so charges against him are not based on any evidence. Additionally, he states that the prosecution witnesses have stated that in case of queries regarding financial impropriety, the responsible person is the regional accountant, and, one of his co-accused confessed in his statement.

9. He faults the 1st and 2nd Respondents for failing to take into account the prosecution and accused persons statements and the internal audit report which points to other persons. He avers that upon being arrested, he was held longer than the 24 hours and his arrest on a Friday was designed to evade the constitutional time frame for producing him in court. Lastly, he avers that the decision to charge him is illegal and a breach of Articles 73(2), 47(1), 10, 28, 29(f) and 25 (a) of the *Constitution*. As a consequence, at prayers (1) & (2) he urges this court to declare his arrest, pre-arraignment, investigation, recommendation to charge him and the decision to charge him offend his rights under Articles 25(c), 27(1), 28, 29(f), 47, 49, 50, 73(2), 75, and 157(11) of the Constitution. At prayers (3) and (4), he prays for certiorari to quash the 2nd Respondents recommendations to the 1st Respondent to charge him. He also prays for certiorari to quash the charge sheet and the ensuing proceedings.

10. Additionally, in prayers (5) and (6) he prays for prohibition to prohibit the 1st and 2nd Respondents or any of their officers from proceeding or recommending or commencing the prosecution in future in respect of the same facts. Prayer 7 of the Petition is overtaken by events. He also prays for an order of compensation against the 1st and 2nd Respondents for violating Articles 2(2), 3(1), 3(1), 10, 25(c), 27(1), 28, 29(f),47,49,50,73(2),75, 157(11) of the Constitution. Lastly, he prays for costs.

11. The 1st Respondent (the DPP) filed grounds of opposition dated 30th October 2020. Essentially, he states that the issues raised in this Petition are matters of facts which can be addressed by the trial court.

12. The 2nd,3rd and 5th Respondents filed grounds of opposition dated 2nd November 2020 stating that the issues raised in this case present a claim for malicious prosecution as opposed to a constitutional Petition; that the Petitioner is citing what ought to be his defence in the criminal trial; that the DPP's independence is provided under Article 157(10) of the Constitution; and, the allegation that the arrest on a Friday was malicious is an issue which ought to be proved by way of evidence.

13. The 1st, 2nd and 5th Respondents also filed the Replying affidavit of Sgt. Moses Otiu attached to the Directorate of Criminal Investigations, Nairobi dated 2nd March 2021. The crux of the affidavit is that the investigations in this case related to allegations that the 4th Respondents officials were diverting funds meant for revenue to the operations account which they withdrew illegally for their personal use.

14. He averred that upon being posted to Mombasa in July 2018, a one Charles Musee, the Current Regional Manager, realized that the office was running into debt and it was unable to meet its financial obligations to its suppliers and creditors, so, he requested for an audit and a one Dorothy Apondi was tasked to audit and the audit unearthed two contradicting bank account statements for the operations account no. 01001005109703 bearing notable discrepancies as detailed in paragraphs 10 and 11 of the

affidavit. Additionally, for the period 1st July 2017 to 30th August 2018, a total of Kshs. 28,242,117.45 collected as revenue was missing having been diverted into the operations account. Also, the audit revealed that the 4th Respondent had lost colossal sums of money.

15. Further, he deposed those investigations by the Directorate of Criminal Investigations revealed that KEBS runs separate accounts, namely, accounts number 01003002830604 for revenue collection in which is for deposits are made directly by KEBS clients and account number 01003002830607 for client's cheque; and, operations account number 01001005109703 for remittances from the head office for running of the Mombasa office in which the Petitioner together with others were signatories.

16. He averred those investigations revealed that the amounts that had been lost were being diverted to the operations account so as to facilitate illegal withdrawals instead of being banked into the revenue account, and, to ascertain the extent of the loss, the Directorate of Criminal Investigations filed miscellaneous application number 1660 of 2019, Milimani and obtained an order dated 16th April 2019 to acquire cheque images and the cheques obtained had a handwritten account number 010010005109703 on the back confirming the account they were banked (and handwriting has since been determined to be that of Geoffrey Wandeto (Regional Accountant) and Pauline Wamalwa (Assistant Regional Accountant). The investigations also revealed that the Regional Accountant had acquired many rights some of them abbreviated as AP (Account Payable Supervisor), AR (Account Receivable Supervisor), EN (Electronic Transfers) FM (Financial Manager and PT (Budget Manager) which he used to interfere with transaction in the ACCPAC System.

17. Mr. Otiu averred that the Regional Accountant would issue credit notes effectively knocking down payments made and it would be as if the monies banked had not been banked and the monies would be withdrawn by means of cheques or imprest payments with fictious supporting documents. Also, there were a lot of miscellaneous substantial payments prepared and effected by the Regional Accountant without any supporting documents including a credit note with cheque number 9497 in which Kshs. 809,774/= was paid.

18. Additionally, the Regional Accountant would also use the supporting documents for more than 2 cheque withdrawals, a fault which was enabled by the regional's signatories Mr. Augustine Wachira, (the Petitioner herein) and Mr. Thomas Nyakiamo who did not do their due diligence of counter checking the documents before they sign the cheques. Also, entry 21/03/2018 of Kshs. 160,000/= paid by cheque number 9775 was re-used in another cheque number 9766, and it was determined that the signatories used to sign blank cheques and leave them with the Regional Accountant who would misuse them.

19. Further, he averred that the reconciliation officer Rose Wangui Gacheru failed in her mandate of verifying reconciliation reports sent to her, and, a bank employee would send bank statements to the Regional Accountant via his e-mail which he would illegally alter to cover his misdeeds. Additionally, the investigations found that all the revenue collected should have been deposited in the revenue account number 1003002830607. Further, the operations account was meant for remittances from the head office for running the outstation office. Also, the Petitioner is a mandatory signatory to the account.

20. On 26th October 2020, the court directed the Petitioner to file submissions within 14 days and the Respondents were granted a similar time frame. Further, the court ordered the status quo to be maintained. However, despite the above directions, the Petitioner did not file submissions and there was an unexplained period of inactivity. On 17th December 2021, I, on my own motion called for al inactive files and fixed this matter for mention on 15th February 2022. The Petitioner's counsel

informed the court that he did not file submissions and that he would rely on the grounds in support of the Petition.

21. The DPP relied on their written submissions dated 8th January 2021. It submitted that the Petition does not meet the tests in Anarita Karimi Njeru v Republic No. 1[2] and *Mumo Matemu v Trusted Society of Human Rights Alliance*[3] which are: - a Petitioner must set out the alleged violations with specificity and the particular Articles of the Constitution claimed to have been violated. On the alleged detention past 24-hours, the DPP submitted that the Petitioner was arraigned in court on the next available day. He submitted that upon being satisfied on the sufficiency of the evidence, he independently consented to the prosecution in conformity with Article 157 of the Constitution. Lastly, the issues raised in this Petition are matters to be handle by the trial court.

22. On behalf of the 2nd, 3rd and 5th Respondents, it was submitted that the Petition does not meet the tests in the Anarita Karimi Case(supra). They submitted that the Petitioner was arraigned in court as soon as it was practically possible, and, that the 2nd Respondent exercised its constitutional and statutory mandate. Reliance was placed on *Republic v Commissioner of Police ex parte Michael Monari*[4] which held that the police have a duty to investigate crime once reported.

23. Additionally, it was submitted that the Petitioner is simply pleading his defense in the criminal case and cited Republic v Commissioner of Police ex parte Michael Monari (supra) which held that it is not the duty of this court to delve into the merits of the case which is the function of the trial court.

24. Before addressing the issues raised in this case, I find it appropriate to address pertinent questions which cannot be ignored. One is the existence of another Petition allegedly filed by the Petitioner's co-accused person(s) in Nairobi challenging the same criminal trial. The existence of the said Petition was brought to the court's attention by counsel for the DPP who informed the court that the Petitioner's counsel has failed to disclose to the court the existence of another constitutional Petition filed in Nairobi by the Petitioner's co-accused person(s) in which stay orders had been issued staying the same criminal trial. The Petitioner's counsel confirmed the existence of the said Petition in which stay orders had been issued. However, the Parties did not disclose the case number to this court. Whereas every person has a constitutional right to approach a court of law and agitate his/her rights, in my view, it is improper for parties to mount and sustain two or more separate constitutional Petitions in different courts challenging the same criminal trial and substantially seeking similar reliefs.

25. Even assuming that none of the parties notified the other of its intention to file his/her suit, the moment the Petitioner learnt of the existence of the other suit(s), it was incumbent upon him to draw the court's attention to its existence and seek court's directions on the way forward or at the earliest opportunity apply for transfer of this suit to the other court for purposes of consolidation or even seek stay the later suit pending determination of the earlier one. As was held in *Korean United Church of Kenya & 3 Others v Seng Ha Sang*,[5] consolidation of suits is done for the purposes of achieving the overriding objective of expeditious and proportionate disposal of civil disputes. Consolidation saves costs, time and effort and makes the conduct of several actions more convenient by treating them as one action. The Petitioner had a duty to disclose the existence of the other Petition to this court at the earliest possible time.

2 {1979} 1 KLR 54.

3 {2013} e KLR.

4 {2012} e KLR.

5 {2014} e KLR.

26. The other important point is the Petitioner's failure to enjoin his co-accused persons to this Petition. From his averments, it is manifestly clear that he claims that his co-accused persons are culpable. He attempts to shift blame to them including mentioning their respective roles. He refers to an alleged confession by one of the co-accused persons and mentions how they have adversely been mentioned by witnesses(s) in their Witness Statements. By purporting to exonerate himself, and essentially shifting the blame to other persons who are not parties to this case, a key question arises, which is whether the persons adversely mentioned by the Petitioner are entitled to be accorded a hearing in this Petition and whether the orders sought herein will affect them in any way. Also relevant is the question whether by adversely implicating his co-accused persons, the proceedings in this case can be used as his evidence in the criminal trial and if so, will that be prejudicial to his co-accused persons.

27. In my view, having been adversely mentioned, its only logical that his co-accused are entitled to be heard in this case. Even if they are not adversely mentioned, the mere fact that the decision challenges the criminal trial in which they are the accused persons, they deserve to be heard in this case. They have a right to beard either in support of this Petition or in opposition to the same.

28. The question whether persons likely to be affected by a court judgment or order are entitled to be heard was aptly articulated by the Supreme Court of India in *Prabodh Verma v State of U.P.*[6] and *Tridip Kumar Dingal v State of W.B.*[7] The principles discernible from the said decisions are that a person or a body becomes a necessary party if he is entitled in law to defend the orders sought in a legal forum. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, because there would be violation of natural justice. This is because the principle of audi alteram partem has its own sanctity. That apart, a person or an authority must have a legal right or right in law to defend or assail. As was held in by the Supreme Court of India in *Canara Bank v Debasis Das*:[8]

> "Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

29. And again: -

> "Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be

6 {1984} 4 SCC 251.

7 {2009} 1 SCC 768.

8 {2003} 4 SCC 557.

> in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance...."

30. The notion of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision-making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

31. Importantly, the Constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[9] Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.[10]

32. The above excerpts state the basic principle behind the doctrine of natural justice, that is, no order should be passed behind the back of a person who is to be adversely affected by the order. The Supreme Court of India put it succinctly in *J.S. Yadav v State of U.P. & Anr*[11] thus:

> "No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the... Code of Civil Procedure... provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail..."

33. I am alive to the fact that before me is a constitutional Petition governed by The *Constitution of Kenya (Protection on of Rights and Fundamental Freedoms) Practice and Procedure Rules,* 2013.[12] Rule 5 (b) provides that a Petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every proceeding deal with the matter in dispute.

9 Kioa v West (1985), Mason J.

10 See *Onyango v. Attorney General*, ***Nyarangi, JA*** asserted at *page 459 that:-"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."* At *page 460* the learned judge added:-*"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at." And in Mbaki & others v. Macharia & Another, at page 210, the Court stated as follows:- "The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."*

11 {2011} 6 SCC 570, at Paragraph **31.**

12 L.N. No. 117 of 28 June 2013.

34. The decisions cited above are graphically clear on who are necessary parties. All the accused persons in the criminal trial are necessary parties in these proceedings. They have a legal and legitimate expectation to be heard before any orders seeking to upset the prosecution are granted. It cannot be assumed that they will all be happy with the orders sought. A court ought not to decide a case without the persons who would be vitally affected by its judgment being before it as respondents or as interested parties.

35. The practice of accused persons filing parallel proceedings in different courts seeking to stay, quash or stop a criminal prosecution without enjoining their co-accused persons or the complainants should be disfavored. Such a practice should be loathed because it is a recipe for manipulation particularly by those who try several forums hoping to increase their chances of obtaining a favorable order in one of them to scuttle the criminal prosecution. Such a practice wastes valuable judicial time and where it happens courts should be vigilant and either at the earliest opportunity order the other co-accused persons and the complainant to be enjoined or transfer the suits to the other court for consolidation. A court should not stop there. It should interrogate the question whether the filing of multiple suits was intentional abuse of court process, and if it so finds, strike out the proceedings suo motto. The practice also vexes the prosecution with multiple suits challenging the same proceedings. Our Constitution widely opened the doors of justice like the Reitz Hotel. But those who walk through it, must do so with clean hands so that the pure stream of justice is allowed to flow freely and unpolluted. Even worse is the danger of courts rendering conflicting decisions or pending cases being rendered res judicata.

36. I will now proceed to address the Petition on merits. The Petitioner challenges the decision to arrest him and the recommendation by the police to the DPP to prosecute him in MSA CMC CR CASE No. 1425 of 2020. Article 245 (4) of the Constitution provides that "...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..."

37. The above provisions are meant to guarantee the independence of the National Police Service in the performance of its functions provided at section 24 of the *National Police Service Act*[13] which include:- (e) investigation of crimes; (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.

38. The functions of the Directorate of Criminal Investigations are provided at section 35 of the *National Police Service Act*[14]. They include—undertaking investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others; maintaining law and order; detecting and preventing crime; apprehend offenders; and performing any other function conferred on it by any other written law.

39. A reading of the above provisions leaves no doubt that the police are legally obligated, once they witness or are informed of a crime, to investigate the offence. The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. These obligations arise from the Constitution and are affirmed by the *National Police Service Act*. In terms of the above provisions, the functions of the police are to investigate crimes. Any other answer would give rise to indignation.

40. It is beyond peradventure that investigation of crime(s) is a solemn duty imposed by law on the police. The duty of an investigating officer is not merely to bolster up a prosecution case with such evidence

[13] Act No. 11A of 2011.

[14] Act No. 11A of 2011.

as may enable the courts to record convictions but to bring out the real unvarnished truth. A police's position is different from that of ordinary citizens in that they cannot simply walk away from a criminal offence that has been reported to them or has been brought to their attention. As was stated in *S v Williams and Others*: -[15]

> " Although mere failure to report the crime to the authorities would not render a member of the public guilty of being an accessory after the fact of that crime ... a police officer is in a different position as it is his legal duty to bring criminals to book."

41. The legislative intent in that the investigating officer records statements of persons acquainted with the facts of the case promptly to preserve the best evidence and to check any manipulation on the part of witnesses. It is the duty of the investigating officer to take into possession any document which has a bearing on the case. The reason for such a necessity is that such document may have effect on the culpability or innocence of the accused. It is the duty of the investigating officers to ensure that the law is observed not only in letters but in spirit during the investigations and arrest and to ensure that they observe the provisions of law scrupulously and do not exceed their powers. It is the duty of the police to investigate the case with utmost impartiality and fairness, both to the suspect as well as to the aggrieved person. If the police adopt an impartial attitude, it will further the cause of justice. If police adopt partial attitude and in conducting investigation malice is apparently reflected, then this will be a ground for the court to intrude.

42. The power of this court to stop or quash police investigations on a suspected offender must be exercised sparingly and with circumspection and in the rarest of rare cases and the court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the court do not confer an arbitrary jurisdiction on the court to act according to its whims or caprice. The power to quash arrest or investigations is immense since it amounts to exonerating a suspect before the decision to charge is made. Such power must be exercised with extreme care and caution. It is a power, which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution. These exceptional circumstances are absent in this case.

43. The Petitioner invites this court to fault the decision by the Police to recommend to the DPP to prosecute him. He also urges the court to fault the DPP's decision to prosecute him. He invites the court to stop, quash the decision to prosecute him and the charge sheet and or prohibit the prosecution. He seeks to halt the criminal proceedings against him. For starters, the process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. The DPP must consider whether to— request the police to investigate the case further; or, whether to institute a prosecution; or, whether to decline to prosecute. The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole.

44. In order to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, the DPP must be independent. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. In the words of John Kelly TD, the prosecution system "should not only be impartial

[15] 1998 (2) SACR 191 (SCA), citing Booysen, Justice, in S v Barnes and Another 1990 (2) SACR 485 (N).

but should be seen to be so and that it should not only be free from outside influence but should be manifestly so."[16]

45. A key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. It is for the DPP to determine that the evidence presented is sufficient to justify a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused.

46. It is also true that the decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the accused and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.

47. When evaluating the evidence regard should be had to the following matters:- (a) Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute?(b) If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?(c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?(d) Does a witness have a motive for telling less than the whole truth? (e)Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute. (f). whether the alleged offence is of considerable public concern and (g) the necessity to maintain public confidence.

48. As a matter of practical reality, the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. No evidence has been tendered to show that the DPP abused his discretion or powers under the Constitution. The court is inclined to respect the decision by the DPP to prosecute or decline to prosecute where he reasonably believes that an offense known to the law has not been committed. It is a constitutional imperative that the Constitutional independence of the DPP and the National Police Service must be respected. For the court to intervene, there must be clear evidence of breach of the Constitution or breach of duty to act on the part of the DPP or the police or abuse of discretion.

49. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of a citizens' fundamental rights. Abuse of process has been defined as something so unfair and wrong

[16] http://www.paclii.org/fj/other/prosecutors-handbook.pdf.

with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.[17]

50. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[18] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution. The high court will only prohibit or quash prosecutions in cases where it would be impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[19]

51. The enquiry is whether there has been an irregularity or an illegality that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. [20] The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, mandamus or permanent stay of proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceedings ought to be quashed. The saving High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice.

52. The High Court's inherent powers to quash, stay or prohibit criminal proceedings are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India[21] held that 'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.' The Supreme Court of India delineated the law in the following terms: -"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings...The power of judicial review is discretionary, however, it must be exercised to prevent the

17 *Hui Chi-Ming vs R* {1992} 1 A.C. 34, PC.

18 See *Attorney General's Reference (No 1 of 1990)* [1992] Q.B. 630, CA; *Attorney General's Reference (No 2 of 2001)* [2004] 2 A.C. 72, HL.

19 *See Bennett v Horseferry Road Magistrates' Court and Another [1993] 3 All E.R. 138, 151, HL; see also R v Methyr Tydfil Magistrates' Court and Day ex parte DPP [1989] Crim. L. R. 148.*

20 Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), Shabalala & 5 others vs A.G of Transvaal & Another CCT/23/94.

21 See *Maharashtra vs Arun Gulab Gawali*.

miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers."[22]

53. The Petitioner presented a detailed account of his duties and responsibilities and purported to shift blame to his co-accused persons. But that is how far it goes. The law is that it is not for this court to determine the veracity or to weigh the strength of the evidence or accused persons' defence. That is a function for the trial court hearing the criminal trial. This court can only intervene if there are cogent and proven allegations of violation of the Constitution or constitutional Rights or threat to violation of the Rights or in clear circumstances where it is evident that the accused will not be afforded a fair trial or the right to a Fair Trial has been infringed or threatened or where the prosecution is commenced without a factual basis. The detailed version tendered before this court by the Petitioner trying to explain his innocence is a misdirected invitation to this court to perform the functions of the trial court.

54. The allegation that he was held longer that 24 hours after arrest is a matter of evidence and so is the claim for damages. They can best be established in a substantive Petition. However, the fact that the Petitioner was arrested on a Friday and presented to court on Monday, the earliest working day, extinguishes his claim that he was held in contravention to the Constitution. The allegation that the arrest of a Friday was a scheme to evade the stringent time lines is a matter of evidence, perhaps in a substantive Petition. The mere enumeration of Articles of the Constitution without tendering evidence on how each and every Article has been impinged does not suffice nor can it meet the tests in the Anarita case.

55. The Petitioner prays for a writ of certiorari. Certiorari is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed – that is to say, it is declared completely invalid, so that no one need respect it. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. The material presented before this court does not show that the decisions to arrest, forward the file to the ODPP and the DPP's decision to investigate or the charge sheet are all or any one of them is tainted with illegality or procedural impropriety to warrant the writ of certiorari.

56. The Petitioner also seeks an order of Prohibition. The writ of Prohibition arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. A writ of prohibition cannot issue in the circumstances because it has not been shown that the Respondent exceeded his powers.

57. Grant or refusal to grant judicial review orders entails exercise of judicial discretion. The court can even decline to grant the orders even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

58. The objective of penal law and the societal interest in setting the criminal law in motion against the offenders with reasonable expedition ought not to be frustrated by unnecessarily stopping criminal trials. The court must bear in mind the immeasurable adverse effect of delay in determining criminal

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

trials on the society at large. The fear of law and the faith in the criminal justice system is eroded irretrievably if courts without any good reasons unleash orders stopping lawful court processes thereby effectively exonerating accused persons before trial.

59. Where stay orders are merited and granted pending hearing of the Petition, the issuing court must ensure that the substantive suit is heard and determined within the shortest time possible to eliminate the danger of perpetual stay orders which serve the purpose of unfairly delaying criminal trials. In fact, I dare say that "interim stay orders" pending hearing of the main suit issued by our superior courts staying criminal trials have become an extreme example of the slowing the criminal justice process to the extent of subverting the same justice system the orders seek to protect. It unfolds the apparent apathy on the part of all those concerned with administration of criminal justice which may erode the public confidence the judiciary as a whole.

60. Public interest demands that the criminal cases especially those related to serious crimes, corruption, abuse of office and public funds be concluded within a reasonable time so that those guilty are punished. Further, from the point of view of the accused persons, the right to speedy trial is a fundamental right. The public get frustrated in the system if at every stage there is delay and the process of justice is not allowed to take its normal course, more so, when deliberate attempts are made to subvert and delay the process.

61. Further, with the long passage of time, whatever evidence is there, it will vanish or eclipse. Oral evidence which in most of the cases is vital to the prosecution, will take a devious or distorted course. Hostile witnesses and witnesses with faded memories will be writ large in the system, with the long passage of time resulting in low rate of convictions and even implication of innocent accused persons.

62. Arising from my discussions on each and every issue discussed above and the conclusions arrived at, I find and hold that the Petitioner has not demonstrated that the prosecution lacks factual basis or is an abuse of court process or there are any grounds at all to merit any of the orders sought. Accordingly, I dismiss the Petition dated 15th October 2020 with no orders as to costs and direct that Mombasa Criminal Case No. 1425 of 2020, Republic v Augustine Wachira Maganjo & 4 others proceeds to hearing and determination.

Orders accordingly

**SIGNED, DATED DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF APRIL 2022**

**JOHN MATIVO**

**JUDGE**