



Mwangi v Director of Public Prosecutions & 3 others (Anti-Corruption and Economic Crime Petition E002 of 2022) [2022] KEHC 10997 (KLR) (Anti-Corruption and Economic Crimes) (30 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION E002 OF 2022
EN MAINA, J
JUNE 30, 2022
PETITION DISMISSED WITH COSTS TO THE 1ST RESPONDENT**

BETWEEN

GEOFFREY GITAU MWANGI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

CHIEF MAGISTRATE'S COURT MILIMANI LAW COURT. 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioner moved this court vide a petition dated February 1, 2022 supported by an affidavit sworn by the petitioner on even date.
2. Contemporaneous with the petition, the petitioner filed a notice of motion application under a certificate of urgency dated February 1, 2022 seeking an interlocutory stay of proceedings in Anti-Corruption Case No 48 of 2018 Republic v Simeon Lemminte Ole Kirgotty & 20 others pending the hearing and determination of the Petition. The notice of motion Application was however withdrawn during the virtual appearance of Counsel for the parties on February 21, 2022.



The Parties

3. The petitioner, Geoffrey Gitau Mwangi, describes himself as an adult of sound mind resident in Nairobi, who is acting in defence of the Constitution on his behalf and that of others.
4. The 1st respondent, the Director of Public Prosecutions, is a state officer and a public office established under article 157 of the Constitution of Kenya and governed by the Office of the Director of Public Prosecutions Act. The 1st respondent exercises state powers of prosecution including the powers to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.
5. The 2nd respondent, the Director of Criminal Investigations, is a state officer pursuant to article 243 of the Constitution.
6. The 3rd respondent, Chief Magistrate's Court Milimani Law Court, is a court established pursuant to the provisions of article 169 (1) (a) of the Constitution of Kenya and section 5 of the Magistrates' Courts Act, 2015.
7. The 4th respondent, the Honourable Attorney General is a state office established under article 156 of the Constitution of Kenya and is the principal legal advisor to the Government of Kenya.

Factual Background

8. The petitioner was charged alongside others with several counts of corruption related offences in Anti-Corruption Case No 48 of 2018 Republic v Simeon Lemminte Ole Kirgotty & 20 others. The charges, *inter alia*, allege fraudulent acquisition of public property worth Kshs 1,103,060,853.89 in relation to two tenders awarded by the NHIF to M/s Webtribe company Limited, to wit, tender No NHIF/018/2013-2014 for the provision of integrated revenue collection services and No RFP/SSSM No NHIF/001/2017-2018 for provision of an integrated revenue management system.
9. In the course of the proceedings however, the 1st respondent reviewed its decision to charge and terminated the charges against the 19th, 20th and 21st accused persons and indicated they would be turned into prosecution witnesses. Being aggrieved by that decision the petitioner filed this petition. The petition is expressed to be brought under articles 2, 3(1), 10, 19(11) and (2), 20, 22,23, 24,25,28,35(1) (a), 47(1)(2), 50(2) (b)(c) and (j), 73, 75, 159(1), 165(3) (b), 258(1) and 259(1) of the Constitution of Kenya and seeks the following reliefs:
 - i. A declaration be and is hereby issued that following the 1st respondent's decision to terminate the charge against the 19th, 20th and 21st accused persons in Anti-Corruption Case No 48 of 2018, Republic v Simeon Lemminte Ole Kirgotty & 20 others, and the 1st respondent having stated that he intends to call the said 19th, 20th and 21st accused persons as prosecution witnesses, the 1st respondent has a constitutional obligation to amend the charge sheet.
 - ii. A declaration be and is hereby issued that following the 1st respondent's decision to terminate the charge against the 19th, 20th and 21st accused persons in Anti-Corruption Case No 48 of 2018, Republic v Simeon Lemminte Ole Kirgotty & 20 others, and having found that the charge against the 19th, 20th and 21st accused persons is intimately connected to the charges preferred against the petitioner in count 1, count 3, count 8, count 9, count 10, count 11, count 12, and count 16 in Anti-Corruption Case No 48 of 2018, Republic



v Simeon Lemminte Ole Kirgotty & 20 others, the 1st respondent has a constitutional obligation to review the charges against the petitioner.

- iii. Consequent to (a) and (b) above, an order of mandamus be and is hereby issued compelling the 1st respondent to review the charges against the petitioner in count 1, count 3, count 8, count 9, count 10, count 11, count 12 and count 16 in Anti-Corruption Case No 48 of 2018, Republic v Simeon Lemminte Ole Kirgotty & 20 others within fourteen (14) days from the date of this judgment.
- iv. A further order be and is hereby issued that if the 1st respondent fails review the charges against the petitioner in count 1, count 3, count 8, count 9, count 10, count 11, count 12 and count 16 in Anti-Corruption Case No 48 of 2018, Republic v Simeon Lemminte Ole Kirgotty & 20 others within fourteen (14) days as directed in (c) above, the charges against the petitioner be deemed to have been terminated.
- v. In the alternative, to order (c) above, an order of *certiorari* do issue quashing the decision to charge the petitioner in Count 1, count 3, count 8, count 9, count 10, count 11, count 12 and count 16 in Anti-Corruption Case No 48 of 2018, Republic v Simeon Lemminte Ole Kirgotty & 20 others.”

The Petitioner’s Case

10. The grounds for the petition as can be discerned from the face of it and in the supporting affidavit are as follows:

- “ a. That the petitioner was charged alongside others in ACC No 48 of 2018 with eight (8) offences pertaining to a contract for provision of integrated revenue collection services (tender No. NHIF/018/2013-2014), and a contract for System Purchase for Provision of an Integrated Revenue Management System (RFP/SSSM No NHIF/001/2017-2018) awarded to M/S Webtribe Company Limited.
- b. That the contract for system purchase for provision of an integrated revenue management system (RFP/SSSM No NHIF/001/2017-2018) awarded to M/S Webtribe Company Limited through single sourcing was approved by the Public Procurement Regulatory Authority.
- c. That the said M/S Webtribe Company Limited was also a co-accused charged with the offence of fraudulent acquisition of public property. The particulars of the offence being that ‘Between August 15, 2014 and October 31, 2018 in Nairobi County within the Republic of Kenya, being the directors of Webtribe Limited and a Limited Liability Company respectively, fraudulently acquired public property to wit Kenya shillings one billion one hundred and three million, sixty thousand eight hundred and fifty-three and eighty-nine cents (Kshs 1,103,060,853.89) from the National Hospital Insurance Fund.’
- d. That, the 1st respondent reviewed its decision to charge M/S Webtribe Company Limited and its directors and has since terminated the charges levelled against them for reason that that M/S Webtribe Company Limited were innocent service providers bidding for work in the usual manner,



with a right to be paid, having provided the revenue collection services pursuant to the tender for integrated revenue collection services (tender No NHIF/018/2013-2014); and the 1st and 2nd respondents having found no evidence of inappropriate influence, unsolicited communication, corrupt or fraudulent practice, and/or collusion between the service provider and the line employees of the National Hospital Insurance Fund involved in the procurement planning and processing of the tender and contract for integrated revenue collection services (tender No NHIF/018/2013-2014).

- e. That, subsequently, the 1st respondent ought to have reviewed and amended the charge sheet to protect the integrity of the charges and the judicial process.
- f. That the 1st respondent having established that M/S Webtribe Company Limited was an innocent service provider and that no money was lost, the 1st respondent cannot lawfully continue with the prosecution of the charges against the petitioner insofar the charges relate to conferring a benefit to M/S Webtribe Company Limited.
- g. The petitioner is aggrieved that, in the circumstances of this case, pressing on with the charges against him without reviewing and/or amending the charge sheet raises serious constitutional questions deserving of attention by this court.
- h. That, the petitioner is aggrieved further that the failure to review and amend the charges in light of the changed circumstances, inadvertently amounts to approbating and reprobating the innocence of M/S Webtribe Company Limited, formerly the 21st accused person.
- i. That, the petitioner is apprehensive that the failure to amend the charge sheet to remove M/S Webtribe Company Limited from the list of accused persons while at the same time proposing to call M/S Webtribe Company Limited as witnesses undermines his constitutional right to fair trial.
- j. That, he has not been supplied by M/S Webtribe Company Limited's witness statements.”

11. In what was labelled as a summary of the petitioner’s submissions learned counsel for the petitioner framed three issues as follows: -

- a) The decision to charge lacks *prima facie* basis;
- b) The particulars of the offence, *prima facie*, lack of essential elements; and
- c) As a consequence of (a) and/or(b) above, the decision to charge has been made in error, in bad faith and contrary to the guiding legal principles outline in article 157 (11) of the Constitution.”

12. Counsel then proceeded to submit on each of the charges facing the petitioner and contending that the same do not disclose an offence urged that the decision to charge the petitioner was not anchored on the law and the Constitution; that in some of the counts the decision to charge the petitioner has the purpose and effect of contravening the guiding principles outline in article 157(11) of the Constitution. Counsel therefore invited this court to invoke its “supervisory and countervailing” powers under article 165(3)(d)(ii) to review and quash the decision to charge him.



13. In the substantive submissions however counsel begun by reiterating the earlier submissions in regard to each count but in paragraph 46 counsel stated that the petitioner had abandoned prayers (a), (b), (c) and (d) of the petition and seeks only prayer (e) of the petition. In that regard counsel framed the following issues for determination: -
- i. What are the guiding legal principles that distinguish procurement planning and processing from procurement contract implementation?
 - ii. Whether the instant Petition is concerned with the legality of the decision to charge or the sufficiency of the evidence intended to be produced by the Prosecution?
 - iii. Whether the charges against the petitioner lack legal substratum prima facie?
 - iv. Whether the decision to charge the petitioner is arbitrary, illegal, unlawful and therefore a contravention of article 157(11) of *the Constitution*?
 - v. What general principles should guide the honourable court in resolving the issues at hand?
 - vi. What are the appropriate remedies?"
14. Counsel submitted that the gravamen of the petitioner's grievance is that while the 1st and 2nd respondents acknowledge that M/s Webtribe Company Limited rightfully earned commission at the rate of 4% of the total revenue collected for National Hospital Insurance Fund, amounting to Kshs 1,103,060,853.89, the 1st and 2nd respondents are still hell bent on charging the petitioner with offences relating to authorizing irregular payments and conferring benefits to M/s Webtribe company limited. Counsel asserted that simply put, the petitioner protests at the absurdity of charging him for doing his job in which he defined as the right way.
15. Counsel further submitted that in so far as the charge of implementing a project without prior planning is concerned there was an approved procurement plan for the financial year 2013/14; there was a procurement plan for the provision of the integrated Revenue collection system; the procurement plan was initiated vide an internal memo form one Mr Gilbert Kamau and approved by the Chief Executive Officer, one Simeon Lemmint Ole Kirgotty; the petitioners engagement with the procurement was when he was appointed to the tender committee and that in the circumstances he cannot lawfully be accused of engaging in a project without prior planning for reason that he was neither the Chief Executive Officer nor was he required by law to be part of the planning process.
16. Counsel submitted that more importantly the petitioner is constrained to move this court for reason that he is genuinely apprehensive that the charges against him and his continued prosecution in Anti-Corruption Case No 48 of 2018 falls short of the evidentiary test and the public interest test. Counsel stated that the failure of the 1st respondent to recall the entire file in the aforesaid case following termination of the charges against M/s Webtribe for lack of evidence may only be explained in terms of anxiety over possible loss of public confidence in the 1st respondents ability to fight and slay the dragon of corruption; that recalling the file could potentially trigger unmitigated political backlash and hence the 1st respondent would rather press on with the charges.
17. Counsel contended that the petitioner has demonstrated that there is no *prima facie* basis for the charges and that he decision to charge was made in error, bad faith and in contravention of article 157(11) of the *Constitution* and that therefore this court should quash them.



18. Counsel urged this court to adopt a holistic/teleological and purposive reading of the Constitution and applicable laws in order to boost public confidence in the criminal justice process and to ensure that the prosecutorial power is not (mis)used for persecution or to pursue collateral purposes. Counsel urged this court to therefore allow the petition and grant prayer (e) thereof and award the costs of the petition to the petitioner.

The Respondent's Case

19. The 2nd, 3rd and 4th respondents did not file any responses or submissions to the Petition neither did they participate in these proceedings.
20. 1st respondent opposed the petition through the replying affidavit sworn by Caroline Kimiri, Senior Prosecution Counsel on February 21, 2022 and the written submissions dated April 20, 2022.
21. The 1st respondent avers that the case against Ms Webtribe Limited was reviewed by the Director of Public Prosecutions in the exercise of his powers under article 157 of the Constitution and upon consideration of the evidence in totality and upon finding that no criminal culpability was established on their part; that subsequently on September 23, 2020, the case against Ms Webtribe was withdrawn under section 87 of the Criminal Procedure Code.
22. They 1st respondent contends that the prosecution was not obliged to amend the charge sheet as the review and ultimate withdrawal of the charges against Ms Webtribe Ltd did not affect the charges against the other accused persons. They aver that the charges against the petitioner are not dependent on the innocence or otherwise of Ms Webtribe; that the competence of the charges and the sufficiency of evidence to be produced by the prosecution evidence and admissibility thereof may only be determined by the trial court.
23. With respect to the particulars of the charges, the 1st respondent avers that the petitioner, as the General Manger Finance, made irregular payments of Kshs 49,513,440 to Ms Webtribe in a contract whose procurement was neither budgeted nor planned for by National Hospital Insurance Fund in total breach of the Public Procurement and Disposal of Assets, 2005 (repealed); that as a member of the Tender Committee for tender No NHIF/018/2013-2014, he awarded a tender to Ms Webtribe Ltd which entity had not met the criteria set out in the tender documents and that the entire procurement process was marred by irregularities. Further, that the petitioner as Chief Executive Officer (CEO) of National Hospital Insurance Fund in breach of the Public Procurement and Disposal of Assets Act 2005, extended expired contracts in tender No NHIF/018/2013-2014 thus conferring a benefit of Kshs 253, 905,580.20 to Ms Webtribe Ltd without a procurement process.
24. The 1st respondent states that the Petitioner has not demonstrated how the withdrawal of the charges against Ms Webtribe Ltd and its director amounts to an abuse of his right to a fair trial or how it is prejudicial to him. It is contended that the 1st and 2nd respondents have complied with the pre-trial directions given by the trial court; that it has not been demonstrated that the trial court is not in control of its proceedings and that there is no evidence that the continued prosecution of the Petitioner is an abuse of court process or an infringement of his fundamental rights.
25. The 1st respondent further avers that the issues in the petition are a matter of evidence whose veracity can only be weighed by the trial court; that the decision to charge was based on evidence and law and that the petitioner has not presented a *prima facie* case to warrant the declaratory orders, *mandamus*, stay and quashing of proceedings in ACC No 48 of 2018 and further that the petitioner has failed to demonstrate how the 1st respondent has not acted independently, or is capricious, abused the legal process or violated his rights.



26. In the written submissions, learned counsel for the 1st respondent highlighted three issues: whether the decision to charge the petitioner and the particulars of various counts against the petitioners lack prima facie evidential basis; and whether the 1st respondent properly exercised his constitutional powers to charge the Petitioner.
27. Counsel submitted that the procurement process in tender No NHIF/018/2013-2014 which led to the payment of Kshs 49,513,440/- to Ms Webtribe Limited was flawed from the onset because it was neither provided for in the procurement plan nor the annual budget for the financial year 2013/2014 but the petitioner despite having full knowledge and being aware of the flaw went ahead to authorize the said payment in his capacity as the General Manager – Finance. Counsel stated that the petitioner’s allegation that the duty to prepare procurement plans as well as the requisite budgets lies with the CEO is baseless as the petitioner had the duty to ensure that any payment made were supported by a procurement plan and budget. Counsel stated that contrary to the petitioner’s assertion that there was a budget the prosecution has tendered proof in the trial court that none existed counsel contended that the 1st respondent will further prove at the trial that the payments were made from monies budgeted for computer maintenance and that the National Hospital Insurance Fund Board which under section 6 of the *National Hospital Insurance Fund Act* is the custodian of all the assets of the fund was a stranger to the payments made by the petitioner in relation to the subject matter.
28. Counsel submitted that the petitioner also failed to review, verify and ascertain that the evaluation had been undertaken in accordance with the conditions in the tender documents and that therefore the decision to charge him in respect to count 3, was lawful and not malicious. Counsel stated that the tender award committee is not a rubber stamping authority of the recommendations of the Tender Evaluation Committee as under section 27(3) of the *Public Procurement and Disposal Act*, 2005 each member of the tender award committee is obligated to ensure the procurement process follows the law.
29. Counsel also submitted that the decision to charge the petitioner in counts 8, 9, 10, 11, 12 was merited and in accordance with the Director of Public Prosecution’s mandate under article 157 of the *Constitution*. Relying on the decision of the Court of Appeal in the case of *Meixner v Attorney General* [2005] 2 KLR 189. Counsel submitted that the petitioner has argued matters of evidence yet the trial court is best suited to try the quality and sufficiency of evidence. Counsel stated that the petitioner has not demonstrated that the 1st respondent acted without or in excess of its power or that it has infringed, violated that power.
30. Counsel urged this court to find that the petitioner has not placed before this court evidence to demonstrate that the criminal proceedings against him are an abuse of the court process or that his right to fair trial will be violated. Counsel asserted that the petitioner merely seeks to curtail the mandate of the criminal justice actors by attempting to circumvent the trial process against him without any justifiable reasons. Counsel urged this court to find that the petitioner is not deserving of the orders sought and to dismiss the petition.

Issue For Determination

31. I have carefully considered the pleadings, the rival submissions, the issues framed thereat, the cases cited and the law and in my view the issues can be condensed to:
 - i. Whether the 1st respondent’s decision to charge the petitioner in Anti-Corruption Case No 48 of 2018 Republic v Simeon Lemmint Ole Kirgotty & 20 others is in violation of the petitioner’s as to warrant an order of this court to halt the prosecution.



Analysis and Determination

Whether The 1st Respondent's Decision To Charge The Petitioner In Anti-corruption Case No 48 Of 2018 Republic V Simeon Lemminte Ole Kirgotty & 20 Others Is In Violation Of His Rights As To Warrant An Order Of This Court To Halt The Prosecution

32. It is trite that in a constitutional petition, the petitioner must set out with some degree of specificity the right infringed upon and demonstrated with evidence how it has been infringed. This was the holding of a three judge bench of this court in the case of *Amos Kiumo & 19 others v Cabinet Secretary, Ministry of Interior & Coordination of National Government & 8 others* [2014] eKLR where citing the case of *Anarita Karimi Njeru v AG (No 1)* 1979 KLR with approval it held: -

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed”

33. In this case, the petitioner sets out a number of articles of the *Constitution* and has stated how they have been violated and how perceives the injury to have been caused. What remains to be seen is whether he has proved the violation of the said rights to warrant grant of the orders sought – more particularly a review of the 1st respondent's decision to charge him in ACC No 48 of 2018, Republic v Simeon Lemminte Ole Kirgoty & 20 others.

34. The 1st respondent's mandate and powers of prosecution are constitutional functions derived from article 157 (6) of the *Constitution* and codified in the *Office of the Director of Public Prosecutions Act*, 2013. *The Constitution* guards the independence of the Office of the Director of Public Prosecutions and provides at article 157(10) that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions shall not be under the direction or control of any person or authority. Be that as it may it is trite and there is a long line of cases to that effect, that the power of the Director of Public Prosecutions is not absolute ad it is reviewable by this court even then the power of this court to do so is also limited.

35. In the case of *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR, cited by both counsel for the petitioner and the 1st respondent the Court of Appeal stated: -

“(33) From the foregoing, there cannot be any doubt that the prosecutorial discretion of DPP is not absolute. It is limited by article 157(11) which specifies the mandatory considerations that underlie the exercise of discretion; by the constitutional principles to which we have referred and by statute.

(34) It is also indubitable that the constitutional prosecutorial power of the Director of Public Prosecutions is reviewable by the High Court as article 165 (2) (d)(ii) of *the Constitution* ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by the Director of Public Prosecutions unless, it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under, the control and direction of



another person; failing to take into account public interest or interest of the administration of justice in all their manifestation; abusing the legal process and by acting in breach of fundamental rights and freedoms of an individual.

The Director of Public Prosecutions is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. (Matululu and anor v DPP [2002] 4 LRC 712). Further authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction.”

See also the case of Michael Sistu Mwaura Kamau & 12 others v Ethics and Anti-Corruption Commission and 4 others [2016] where a three judge bench of the High Court stated:-

“ 387. In our view, pursuant to article 157(10) and section 6 *ODPP Act*, the DPP is expected to make independent decisions in the exercise of his constitutional and legislative mandate and is not to be under the direction or control of any person or authority. In the exercise of his discretion, he ought to be guided only by the law and *the Constitution*. Therefore, whereas the discretion given to the DPP to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised, and where the court finds that the discretion is being abused or is being used to achieve some collateral purposes, the Court will not hesitate to bring such proceedings to a halt.” (Emphasis supplied)

36. The Supreme Court has in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR now settled the distinction between the jurisdiction of the High Court in judicial review and its jurisdiction when hearing constitutional petitioners where it stated: -

“ 107. The court when determining a constitutional petition is empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision. The essence of merit review is the power to substitute a decision which the court can do when determining a constitutional petition. Further the court is further empowered to grant not just judicial review orders but any other relief is deems fit to remedy any denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights.

108. We arrive at the inescapable conclusion that the High Court in determining a judicial review application, exercises only a fraction the jurisdiction it has to determine a constitutional petition. It therefore follows that a determination of a judicial review application cannot be termed as final determination of issues under a constitutional petition. The considerations are different, the orders the court may grant are more expanded under a constitutional petition and therefore the outcomes are different.

109. The court in hearing a constitutional petition may very well arrive at the same conclusion as the court hearing a judicial review application. However, the considerations right from the outset are different, the procedures are different,



the reliefs that the court may grant are different, the court will be playing fairly different roles.”

37. In the present case the petitioner contends that the offences with which he is charged have no basis in law and in fact. His learned counsel have submitted on each and every charge to show that he ought not to have been charged. On the other hand, counsel for the 1st respondent have done the same and sought to demonstrate that the decision to charge was arrived at based on the sufficiency of evidence. The petitioner is also aggrieved that the 1st respondent has failed to review the charges despite withdrawing charges against the company to which it is alleged he conferred a benefit. As was held in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport & Infrastructure & 3 others* (*supra*) I am enjoined to look beyond the procedural propriety of that decision and consider its merits.
38. Applying the principles in the case of *Diamond Hasham Lalji* (*supra*) to this case and noting the holding of the Supreme Court in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport & Infrastructure & 3 others* (*supra*) it is my finding that this is not a proper case for the review of the Director of Public Prosecution’s decision to charge. It is my finding that *prima facie* the 1st respondent has demonstrated that its decision to charge the petitioner is based on the sufficiency of evidence; that the decision was not instigated by any other motive than the interest of the public to punish corruption. The petitioner has not indeed demonstrated that there were other reasons that would warrant this court to come to the conclusion that the 1st respondent has abused its power. The withdrawal of the case against Webtribe Limited does not in my view demonstrate that his prosecution is intended to serve a collateral purpose. The evidential question raised by his advocate shall be determined by the trial court. In the case of *Uwe Meixner & another V AG* [2005] 2 KLR 189, the court held in this respect:
- “The criminal trial process is regulated by statutes, particularly, the *Criminal Procedure Code* and the *Evidence Act*. There are also constitutional safeguards stipulated in section 77 of the *Constitution* to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review Court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”
39. The trial court is the best suited to determine the issues of fact raised by counsel for the petitioner of course after hearing the evidence of the witnesses. The *Constitution* and the Criminal Procedure Code have provisions which jealously guard the right of an accused person to fair trial and the petitioner need not fear. It is my finding that he has not demonstrated that the decision to withdraw the charges against Webtribe amounted to an unfair discrimination or that indeed that decision is a violation of his rights or fundamental freedoms. Accordingly, I find no merit in the petition and the same is dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JUNE, 2022

EN MAINA

JUDGE

