



Mutukaa & 4 others v County Assembly of Kitui & 2 others; Director of Criminal Investigations (Interested Party) (Constitutional Petition 16 of 2019) [2022] KEHC 12324 (KLR) (28 June 2022) (Judgment)

Neutral citation: [2022] KEHC 12324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CONSTITUTIONAL PETITION 16 OF 2019**

RK LIMO, J

JUNE 28, 2022

**IN THE MATTER OF ARTICLES 2,3,10,22,47,50,165,258 & 259 OF
THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF REPORT BY AD HOC COMMITTEE ON THE
INQUIRY INTO THE FIRE INCIDENT THAT OCCURRED ON THE
22ND JULY, 2019 AT THE KITUI COUNTY TREASURY OFFICES**

AND

IN THE MATTER OF PRINCIPLES OF NATURAL JUSTICE

BETWEEN

**JULIUS MUTUKAA 1ST PETITIONER
JOSEPH KITAKA NGULI 2ND PETITIONER
BONIFACE KILUVUTI MWEKE 3RD PETITIONER
GRADSTONE MUYANGA KITHOME 4TH PETITIONER
MULANDI MUTUA 5TH PETITIONER**

AND

**COUNTY ASSEMBLY OF KITUI 1ST RESPONDENT
CLERK OF COUNTY ASSEMBLY OF KITUI 2ND RESPONDENT
SPEAKER OF COUNTY ASSEMBLY OF KITUI 3RD RESPONDENT**

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS INTERESTED PARTY



JUDGMENT

1. Julius Mutukaa and 4 Others in this Petition have lodged this Constitutional Petition against the County Assembly of Kitui and 2 Others with the Director of Criminal Investigations as the Interested Party. The petitioners have invoked Articles 22,23 & 165 of *the Constitution* of Kenya and Rules 4,8,10 & 13 of *the Constitution* of Kenya (Protection of Rights & Fundamental Rights) Practice and Procedure Rules 2013 (Mutunga Rules) in seeking the following reliefs: -
 - a. A declaration that County Assembly of Kitui Ad hoc Committee on the inquiry into the fire incident that occurred on 22nd July, 2019 at Kitui County Treasury Offices contravened Articles 1,2,3,10, 47, 50, 118,125 and 157 of *the Constitution* of Kenya 2010.
 - b. An Order of certiorari to expunge from the report by Ad Hoc Committee on the inquiry into the fire incident that occurred on 22nd July, 2019 at Kitui County Treasury Office, the evidence of witness No. 6 and recommendation No. 12
 - c. An Order of general damages to each petitioner against the respondents for breach of their fundamental rights.
 - d. Cost of the Petition.
2. The background of this petition revolves around a fire incident that occurred on 22nd July 2019 where fire gutted down County Offices and in particular the office housing Kitui Treasury Office. The fire incident was suspected to have been deliberate and a foul play. The 1st Respondent moved quickly and formed an Ad hoc Committee of the house comprising seven members of County Assembly to inquire into the circumstances that caused the fire, the extent of the damage and other issues related to the incident.
3. Upon the conclusion of the inquiry, the Ad hoc Committee of the house in its report dated October 2019 made various recommendations including further investigations by investigative agencies of the following persons of interest.
 - i. Her Excellency the Governor Kitui County-Hon. Charity Ngilu
 - ii. Madam Mary Nguli-the then County Executive Committee Member Kitui County Treasury at the time of the fire incident.
 - iii. Mr. Enock Nguthu-The Chief Officer Finance Kitui County Treasury.
 - iv. Mr. Jacob kakundi the County Executive Committee Member Lands, Infrastructure and Urban Development.
 - v. Mr. Alex Kimanzi, the Acting County Secretary at the time.
 - vi. Mr. Julius Mutukaa-The proprietor Mwingi Teachers Training College (1st Petitioner herein).
 - vii. Mr. Boniface Mweke-Governor's body guard.
 - viii. Mr. Kimanzi-Driver.
 - ix. Mr. Joseph Kitaka Nguli (2nd Petitioner herein).
 - x. Mr. Moses Kuthamba Munyalo



- xi. Mr. Grandstone Muyanga Kithome.
- xii. Mr. Mulandi Mutua
4. The Petitioners fault the report by Ad hoc Committee of the house mainly on grounds that the Ad hoc Committee failed to call them to give their side of the story prior to making their recommendations. In particular, the petitioners are unhappy with the recommendation made to the investigative agencies to take up the matter and bring to book persons found culpable of arson and other offences.
5. It is the Petitioners' case that the respondents violated their constitutional right to fair hearing, right to be informed of the charge and to adduce evidence and that the overall effect led them to being condemned, unheard before the recommendations were made.
6. They also fault the said report for including testimony of unnamed witness No. 6 who testified adversely against the current sitting Governor Kitui County.
7. In their written submissions through their learned counsel Kimanthi & Associates, the petitioners submit that the Ad hoc Committee went outside its scope as it was not tasked into looking into the guilt or innocence of any person and that the mandate is within power of court. They contend that the findings of the Ad hoc committee were null. They have relied on the case of *Phoenix EA Assurance Company Ltdvs S.M Thiga t/a Newspaper Service* [2019] eKLR where the Court of Appeal in allowing the appeal on the question of jurisdiction held that a matter filed before the magistrate court was not properly before the court as it was outside the pecuniary jurisdiction of the said court. The appellate court held that the only remedy in such a situation was to withdraw the suit and file it in the appropriate court because jurisdiction was everything.
8. The Petitioners also submit that they were not accorded an opportunity to present their side of the story before the committee retired to give its recommendations, as such their right to be heard was infringed upon.
9. On the Respondent's assertion that the identity of Witness No. 6 was withheld for security reasons, the Petitioners submit that the Respondents did not provide the court with information on any efforts taken to safeguard witness No. 6 and that in the end, the Respondents' actions went against the rules of natural justice.
10. They contend their right to fair administrative action as envisaged under Article 47 of *the Constitution* was infringed. In this regard, the Petitioners have relied on the South African case of *President of the Republic of South Africa and Others vs South African Rugby Football Union & Others* where the right to fair administrative action was upheld. They have also relied on a Court of Appeal decision in *Judicial Service Commission versus Mbalu Mutava & Anor* (2015) eKLR. Where the Court of Appeal was dealing about an inquiry conducted by Judicial Service Commission (JSC) on the conduct of a judge following a petition filed before commission on the same. The Court of Appeal found that the Judge was served with the charges leveled against him and was not therefore ambushed with information. Further, that he was accorded an opportunity to respond in writing, and was also heard viva voce. The Judge alleged that he was not allowed to cross examine witnesses during the inquiry but the appellate court held that failure to cross-examine witnesses could not be deemed to amount to procedural unfairness. The judges of the Court of Appeal also held that JSC had administrative discretion whether to call witnesses or to allow cross-examination of witnesses. The Court of Appeal further held that JSC was only carrying out investigations as part of a process whose end result did not lie with JSC and that it only a preliminary role which was only to establish a 'prima facie' case, or that a reasonable ground had been established for the removal of the Judge then pass the baton to the



tribunal which would then be required to conduct a full hearing, where cross-examination of witnesses was to be done.

11. The respondents opposed this petition vide written submissions dated 5th October, 2021 done through learned counsel Apollo Muinde & Partners. They submit that the 1st respondent has legal mandate under the County Government to Constitute Ad hoc committees as it deems fit and that the ad hoc committee to inquire into the cause of the fire was formed as such.
12. They submit that the respondents acted within the confines of the law in discharging their mandate and urge this court to exercise the doctrine of restraint because in their view the matters in issue fall within the administrative and scope of other constitutional bodies.
13. They contend that the Ad hoc committee's mandate was to investigate into the cause of the fire and that in the process of their investigation, they came across information connecting some persons to the fire incident and hence their recommendation for further investigation.
14. On failing to disclose the identity of Witness No. 6, the Respondents submit that the witness sought to have his identity protected for safety reasons. They have relied on *the Constitution* of Kenya 2010, the *Witness Protection Act* No. 16 of 2006 and the of *in the Matter of Application for Orders for Witness Protection* (2014) eKLR where the court found that withholding witnesses' personal details in a witness statement did not amount to contravention of the provisions of Article 50 (2) (j) of *the Constitution* of Kenya 2010.
15. On whether recommendation No. 12 made a finding of guilt on the part of the Petitioners, the Respondents submit that the Petitioners are jumping the gun as the ad hoc committee did not have powers to try criminal suspects. They submit that mandate is on the Office of the Director of Criminal Prosecutions. They aver that the committee only gave a recommendation to the investigative body. They have relied on the case of *Kenya Human Rights Commission versus Non-Governmental Organizations Coordination Board* (2016) eKLR which was a Petition that revolved around cancellation of the Petitioner's registration certificate by the Respondent. The court found that the decision by the Respondent to cancel the registration without giving the Petitioner an opportunity to be heard violated the Petitioner's rights under Article 47 as the Petitioner was not heard and he was also not given a reason for the impugned decision opinion
16. Analysis and determination
This court has in summary set out the petitioners' case as well that of the respondent. The issues for determination this petition are basically two: -
 - i. Whether the Ad hoc committee of the 1st Respondent acted lawfully within its mandate.
 - ii. Whether the recommendation made by the Ad hoc Committee infringed on Constitutional rights of the petitioners or any other person named in the report made by the 1st Respondent.
17. (i) Whether the Ad hoc Committee of the 1st Respondent acted lawfully within its scope and mandate.
Section 14(1) (b) of the County Government Act gives power to a County Assembly to establish committees for general or special purposes as the assembly finds it. The section provides:
"A county assembly
 - a. may make standing orders consistent with *the Constitution* and this Act regulating the procedure of the county assembly including, in particular, orders for the proper conduct of proceedings; and



- b. subject to standing orders made under paragraph (a), may establish committees in such manner and for such general or special purposes as it considers fit, and regulate the procedure of any committee so established.”

18. The committees created by Assemblies are creatures of the assembly and comprise the members of the Assembly. Their work is similar to those of committees of parliament and their scope is within the scope assigned to the County Assembly as stipulated under Article 185. Their roles are legislative as well as oversight. In their oversight roles they can carry out investigations or inquiries on issues regarding the County and the County executive. The Court of Appeal in Stephen Mringa Masano & 4 Others versus County Assembly Taita Taveta & 2 Others [2017] captures the roles played by County Assemblies well when it stated;

“Section 14(1) (b) of the County Government Act empowers the County Assembly to make standing orders consistent with the Constitution and the Act to regulate its procedure and to establish committees in such manner and for such general purposes as it considers fit. In that respect, the Assembly is not any different from the National Assembly or the Senate, which, by Article 124 of the Constitution are empowered to establish committees for the orderly discharge and conduct of their business. Consequently, a large part of the work of legislative bodies is undertaken in committees, while select committees undertake the work of the legislative institutions that require investigations and collection of evidence.” The court referenced, “Writing on Kenya’s Parliamentary Practice, which draws heavily from the Westminster model, H. B. Ndoria Gicheru, a long serving Clerk-Assistant in the National Assembly states as follows regarding select committees: and added

“All committees which are composed of a certain number of members may be appositely designated “select committees” as distinguished from those comprising the whole House. These Committees are used for two fundamentally different purposes; first, there are debating committees which supplement the House in its task of considering new legislation in detail; secondly, there are investigating committees appointed for tasks which the House itself is not suited to do, for example, the finding out of facts of a case, the examination of witnesses and sifting of evidence, and the drawing up of reasoned conclusions”.

Later on he adds:

“Committees exist not to take the initiative and rule the House, but to carry out the task imposed on them; they are creatures of the House with no independent existence. The House gives specific terms of reference which must be adhered to, and it may also issue an “instruction”, which is a motion directing the committee to do some particular thing within its orders of reference.....”

Without the committees therefore, it is patently clear that legislative bodies, like the County Assembly in question in this appeal, would be seriously hampered in the discharge of their constitutional mandates, as they would be required to do all their work in plenary, which is not practical.”

19. In the present case, it is not in dispute that a fire broke out on 22nd July 2019 which razed down the Kitui County Government Treasury Offices which is a Public Office. It is also not in dispute that Hon Peter Kilonzo, the leader of majority moved a motion before the county assembly on 23rd July 2019 in relation to the fire incident. Further, that the Speaker acceded to Hon Peter Kilonzo’s motion and, a debate ensued on the motion before the members recommended formulation of an Ad hoc committee



- to inquire into issues contained in the motion. On 24th July 2019, the Speaker made communication on the composition of the committee and tasked the committee to make an inquiry and report back to the house within 21 calendar days.
20. The Terms of reference or mandate of the Ad hoc Committee as contained in the report were as follows:
- - i. Inquire into the cause of the fire and action taken by the County Government in safeguarding vital information for the necessary action
 - ii. Inquire into the extent of the damage and whether the building was insured
 - iii. Inquire into whether there was a backup record of all the documents housed by the affected offices
 - iv. Inquire into whether all other county offices comply with the provisions of the *Occupational Safety and Health Act, 2007*
 - v. Recommend installation of security masts and CCTV cameras at all the premises hosting County Government Offices.
 - vi. Inquire into whether there was an aspect of negligence by the responsible officers and recommend necessary disciplinary action
 - vii. Inquire into any other relevant matter.
21. The mandate of the Ad hoc committee in my view was quite clear, it was required to find out among other things the cause of the fire, the extent of damage, inquire whether there was an aspect of negligence or any other relevant matter.
22. In the process of gathering information, the committee visited various offices to inquire whether all other county offices complied with the provisions of the *Occupational Safety and Health Act, 2007* and reported on the same.
23. The committee also received a report from Kenya Power Lighting Company (KPLC) dated 22nd July which concluded that the fire that gutted the building was not caused by an electric fault.
24. The committee also interviewed various witnesses who gave evidence on various issues pertaining to the mandate given to the committee. Among the witness was Witness No. 6 who in his testimony informed the committee that the fire incident was organized from Mwingi by the executive arm of the County Government of Kitui. He also in his testimony implicated named persons including some of the Petitioners herein and gave an account of the plans surrounding torching of the county treasury offices.
25. After hearing all the witnesses, the committee felt that in the fulfillment of their mandate, to make it was necessary, several recommendations which they did among them recommendation No. 12 which appears to have ruffled feathers because it prompted the petitioners to file this petition.
26. Recommendation No. 12 was to the effect that investigative agencies should take up the matter and bring to book any persons guilty of arson and any other offences including abuse of office, misappropriation of public funds etc. The committee also suggested several names including the names of the Petitioners as persons of interests who needed to be investigated further.
27. Following that background, the first issue raised by the Petitioner is on the jurisdiction of the committee. They allege that the committee went outside its scope when it purported to ‘investigate’



and find the Petitioners guilty of arson and further when it recommended further investigations of the Petitioners alongside other persons.

28. That contention in my considered view is misplaced, the mandate of the said committee was to investigate the cause of the fire. The issue of names popping out was incidental as it was only during the cause of inquiry that witnesses came forth and implicated some people in the Executive arm and some of the petitioners herein. The committee did not go out of its way to investigate them however, when the names were mentioned, the committee recommended for further investigation to be conducted by investigative agency. In my view there was nothing wrong there. The committee was within its right and scope to make the recommendation based on the information they had received. The question whether the respondents should have given a chance to the named persons to be heard prior to presenting the report in the next issue for determination.

Suffices to state that, this court does not find that the 1st respondent acted outside its mandate when it carried out its investigations or inquiries into the fire incident.

29. (ii) Whether the recommendation made by the Ad hoc Committee infringed on the Constitutional of the Petitioner or any other person named in the report.

The petitioners have raised issues with manner in which the respondents went about their duty and in particular making a report which adversely mentioned them and some other people without affording them an opportunity of being heard. The petitioners have on this score majorly base their contention on Articles 25 and 47 of *the Constitution*.

30. The provisions of Article 25 of *the Constitution* of Kenya 2010 is about the fundamental Rights and freedoms. Amongst the listed rights are right to a fair trial. The question of a fair trial in this instance is a bit remote because no one is on trial regarding that incident and the petitioners are not complaining about being subjected to an unfair trial.

31. The Petitioners have faulted the manner in which the Ad hoc committee went about its inquiry particularly that they were not accorded a chance to interrogate the evidence of Witness No. 6 which implicated them on the cause of the fire. The Petitioners have invoked the provisions of Article 50 (2) of *the Constitution* which provides;

Every accused person has the right to fair trial, which includes the right;
To be informed of the charge, with sufficient detail to answer it
To have adequate time and facilities to prepare a defence
To be present when being tried, unless the conduct of the accused person makes it is impossible for the trial to proceed
To be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence

32. This court finds that, as I have noted above, there is no suggestion that anyone had been subjected to any trial in regard to that fire incident. The provisions of article 25 and 50 cannot be invoked at this stage. The petitioners or anyone for that matter has not come out to state that they have been subjected to an unfair trial. The grievances expressed are therefore premature and speculative. I am not persuaded that the petitioners right to fair trial if at all has been infringed or are there threats of any infringements.

33. The position taken by this court is emboldened by the position taken by the court of Appeal when it faced with similar circumstances. As observed in the decision of Judicial Service Commission versus Mbalu Mutav & Anor. (Supra) cited incidentally by the petitioners, the respondents just like Judicial Service Commission in the above decision was only carrying out investigations as part of a process whose end result would lie with another institution(s) with a mandate to carry out further investigation and take appropriate action. The role played by respondent was a preliminary inquiry into the cause of the fire. By concluding that they were condemned unheard, the petitioners are overreaching and



putting the cart before the horse. The right to fair trial and/or the rights available to accused persons under Article 50(2) had not crystallized.

34. In the case of *County Assembly of Bungoma & 2 Others versus Stephen Nendela & 2 Others* [2017] eKLR-the Court of Appeal held:

“...We are unable, most respectfully, to subscribe to the same view. Whereas Section 40(4) of the Act provides that a County Executive Committee member, the subject of investigations by a select committee, “has the right to appear and be represented before the select committee”, that does not, in our view, translate or equate the nature of such proceedings to court proceedings for purposes of Article 50(2) of *the Constitution*. Neither is an executive committee member under such investigation in the same position as an “accused person” entitled to the same breadth of rights as an accused person under Article 50(2) of *the Constitution*.

In our view, the five-tiered process provided for under Section 40 of the Act that may lead to the removal of a member of executive committee, is tantamount to a disciplinary process in tandem with the oversight

role of the County Assembly. The select committee plays an investigative role in that process. It must however discharge that role fairly. As this Court observed in *Judicial Service Commission v Gladys Boss Shollei & another* (above):

“The invocation of Article 50 (2) (a)(b) & (c) of *the Constitution* was misplaced. In the context, it did not apply to the 1st Respondent who faced disciplinary proceedings and removal from office as Chief Registrar of the Judiciary. A careful perusal of *the Constitution* shows that Article 50(2)(a)(b) & (c) applies to criminal trials and not to civil litigation or disciplinary proceedings. That this is interpretation of the Article, it does not apply to disciplinary proceedings and the learned trial judge misdirected his mind in reaching the conclusion that it applied to the case before him. So too with regard to Article 25(c) relating to the constitutional right to fair trial, the learned trial judge failed to appreciate that the disciplinary proceedings were not a trial

35. On the question of fair administrative action, Article 47 of *the Constitution* of Kenya provides: -

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights *The Constitution* of Kenya 33 in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.”

36. To decipher the implication in the context of this petition, it is useful to look at what constitutes “fair administrative action.”

Section 2 of the Fair Administrative Act, 2015 defines “administrative action” to include,

- i. the powers, functions and duties exercised by authorities or quasi-Judicial tribunals or
- ii. any act, omission or decision of any person body or authority that affects the legal rights or interests of any person to whom such action relates.”



37. The petitioners have faulted the manner in which the respondents went about their work and the recommendation No. 12 made after the conclusion of their work. They have submitted and rightly so, that when an Ad hoc committee of the County Assembly sits for an inquiry it becomes a quasi-judicial body clothed with powers like ordinary courts when summoning witnesses. However, the contention by the petitioners that a pillar of natural justice which is according them an opportunity to be heard before being condemned, was not adhered by the respondent is a bit flawed. The reasons for my findings are as follows: -
- i. None of petitioners or anyone appearing in the report is an accused person. They are not on trial. Going by the decision in the case of County Assembly of Bungoma versus 2 Others (Supra), it is a misdirection on the part of the petitioners to invoke the provisions of Article 25 and 50 of *the Constitution*. The work of the Ad hoc Committee was an inquisitorial one. The report made was not final. It did not render a conviction or sanction against the Petitioners.
 - ii. Secondly, and more importantly, the mandate of the Ad hoc Committee as per the terms of reference was inter alia inquire into the cause of the fire and the action taken by the County Government to safeguard vital information and extent of damage.

The inquisitorial role given to the Ad hoc Committee was not specifically directed against any individual. If it was directed to a specific individual then the provisions of Article 47 and indeed Section 4 of the Administration Action Act could have kicked in but that was not the case.
38. The impugned report did not find the petitioners guilty of arson. In its conclusion as per the report the committee stated;
- “In conclusion, the committee notes that the matter under inquiry is highly likely an act of arson which conclusion is buttressed by the Kenya Power report that ruled out electrical fault as the cause of the fire. The committee therefore urges relevant investigative agencies to expedite investigations into the matter to ensure that appropriate action is taken against the perpetrators.”
39. The mandate of the Ad hoc Committee did not involve taking the Petitioners through an administrative process. Its mandate was to investigate the cause of the fire and having received a report from KPLC indicating that the fire was not caused by an electric fault and further information that possibly implicated the Petitioners to arson, it was within its mandate to refer the matter for further investigations because arson in itself is criminal in nature and there are bodies charged with statutory and Constitutional mandate to deal with such.
- There was no need for the respondents to invite the petitioners for a hearing or to give them an opportunity to cross examine the witness because for one, no one was on trial and secondly, the committee would have been going outside its mandate.
40. The Petitioners have faulted the manner in which the Ad Hoc committee treated Witness No. 6 even insinuating that it is possible that there was no such witness and that the witness could have been a creation of the committee.
41. On their part, the Respondent submitted that concealing of identity of the witness was within the law and that the witness himself made a request to the committee to have his identity protected. This was indicated before his evidence was taken.
42. Article 195 of *the Constitution* clothes a county assembly or any of its committees with power to summon witnesses as follows;



- (i) A county assembly or any of its committees has power to summon any person to appear before it for the purpose of giving evidence or providing information.
- For the purposes of clause (1), an assembly has the same powers as the High Court to;
- a. enforce the attendance of witnesses and examining them on oath, affirmation or otherwise.
 - b. compel the production of documents; and
 - c. issue a commission or request to examine witnesses abroad.
43. Section 24 of the *Witness Protection Act* provides for protection identity of participant not to be disclosed in legal proceedings as follows;
- “If, in any proceedings in a court, tribunal or commission of inquiry, the identity of a participant is in issue or may be disclosed, the court, tribunal or commission shall, unless it considers that the interests of justice require otherwise;
- a. hold that part of the proceedings which relates to the identity of the participant in private; and
 - b. make such order relating to the suppression of publication of evidence given before the court, tribunal or commission as, in its opinion, will ensure that the identity of the participant is not disclosed.”
44. The committee was not required to demonstrate the actions it took to protect Witness No.6 provided that in their opinion the safety of the witness was an issue. The witness gave adverse evidence touching on big shots in the County Government. Therefore, his/her apprehension concerning his/her safety was well founded.
45. The committee in my view was well intended and acted in good faith by shielding the particular witness because the said witness could be of some interest to some other investigative agencies if they had plans to carry out some investigations with a view to take appropriate legal actions. If at the end of the investigations the Petitioners or any other person is found answerable or culpable then the agency can take any action deemed appropriate without any interference.
46. The respondents have urged this court to exercise the doctrine of restraint in the work it carried out and I find the invitation well founded. The Supreme Court in the Advisory Opinion No. 2 of 2013 in the matter of the *Speaker of the Senate and Another* [2013], eKLR, gave an opinion in paragraphs 61 and 62. I find relevant in the circumstances obtaining here when it stated
- “This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.”
47. The Ad hoc Committee in my view executed its statutory mandate to protect the interests of the public and by doing so did not infringe on the Constitutional rights of the petitioners to a fair hearing to justify intervention by this Constitution. They will have their day if the investigations to be carried out comes to that end.
48. The ad hoc committee made a recommendation to investigative bodies to take up the matter with a view of bringing to book any individuals who were found culpable of causing the fire at the County treasury offices.



49. The investigative body in question being the Director of Criminal Investigations is provided for Section 28 of the [National Police Service Act](#), No. 11 of 2011 which provides:

“There is established the Directorate of Criminal Investigations which shall be under the direction, command and control of the Inspector-General.”

50. The functions of the Directorate of Criminal Investigations are provided for in Section 35 of the said Act;

“The Directorate shall—

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

51. The office of the Director of Criminal Investigation and that of Office of the Director of Public Prosecution are Independent Offices and operate independently without any directions from anyone. They should be allowed to carry out their mandate without undue interference or intervention by anyone. A court can only be called to intervene where the agency acts ultra vires or are in breach of [the Constitution](#).

52. It is quite evidence therefore that, despite the recommendations made by the Ad hoc Committee, the decision to conduct further investigations or prosecute does not lie with the house but rather, the Director of Criminal Investigation which has the mandate to investigate and based on the investigations, the Office of the Director of Public Prosecution on the other hand maintains the prosecutorial mandate which mandate can only be stopped in exceptional circumstances where it shown there is breach of [the Constitution](#) particularly Article 157(ii) of [the Constitution](#). That situation has not been established in this instance.

53. The Ad hoc Committee was mandated to carry out an investigative role and its decision was not final. Then from the Court of Appeal I have cited above, indicate that at such a preliminary stage, the committee was not required to call the Petitioners and make the process a hearing to determine



their guilt or innocence. Its purpose was a fact-finding mission to the cause of fires that occurred in the county and establish whether there was any foul play behind the same. In the event investigations conducted by investigative bodies find the Petitioners culpable, they will have the opportunity to defend themselves.

54. In my view, where a statutory or a constitutional body is conducting its affairs within its statutory duties, it should be allowed to proceed because it is in public interest to do so. Those bodies are established in the first place to protect the interest of the Public and to serve the public. To tie their hands unnecessarily would be against the interest of the public. As observed above this court pursuant to Article 165 (3) of *the Constitution* of Kenya can only intervene where there is breach or where such bodies act beyond their scope.

I am not persuaded by the petitioners that there is any basis for this court to intervene or interfere with the process of the 1st Respondent or that of the Interested Party.

In the premises, I find no merit in this petition. The same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KITUI THIS 28TH DAY OF JUNE, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

