Robinson v Director of Public Prosecution (DPP) & another (Petition 425 of 2016) [2022] KEHC 12425 (KLR) (Constitutional and Human Rights) (27 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12425 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 425 OF 2016

HI ONG'UDI, J

JULY 27, 2022

BETWEEN

KIGEN ROBINSON ..... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION (DPP) ..... 1ST RESPONDENT

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

JUDGMENT

1. The petitioner filed the petition dated October 13, 2016. With leave of the court he filed an amended petition dated October 22, 2020 seeking the following reliefs:-

    a. A declaration that the recommendation of the 1st respondent contained in the letter dated August 12, 2016 is an abuse of the criminal justice process and contravention of the petitioner's constitutional rights to freedom and security of the person, right to freedom of movement and right to secure protection of the law under articles 27, 29, 47, 50 and 157(11) of the *Constitution*.

    b. A prohibition order to issue against the respondents, their agents, assigns or any person claiming through them to permanently restrain them from arresting, prosecuting or continuing any criminal charges against petitioner in relation to transactions leading to the transfer of shares in Arafco Agricultural Integration Company Limited which is a subject of inquiry file No 36 of 2016.

c. An order of certiorari, to bring into this court and quash the decision of the 1st respondent contained in the letter dated August 12, 2016 directing the arrest and charging of the petitioner.

d. Costs of the suit.

The Petitioner's Case

2. From the supporting affidavit a summary of his case is that, on October 11, 2016, he learnt of the 1st respondent's recommendation vide latter dated August 12, 2016 for charges of conspiracy to defraud and procuring execution of documents without a lawful authority to be preferred against him alongside his client. The said recommendation stemmed from services he offered while working as an associate in the firm of Ibrahim, Issack Advocates particularly in August 2010 when he acted for the director and former director of Arafco Agricultural Integration Company Limited.

3. According to him, the motivation to charge him was because of his involvement in the civil suit ELC No 218 of 2015 (civil suit), HCCC No 8 of 2016 Civil Application No 34 of 2016 Malindi wherein he was acting for the Managing Director of the company and restraining orders issued on December 1, 2015 in the ELC case.

4. He deponed that in February 2016, the officers of the 2nd respondent summoned him and other witnesses to record statements in response to allegations by the defendant in the civil suit. He understood the nature of the complaint as emanating from the transfer of shares from the documents presented to him by the defendant in the civil suit in the presence of all directors and former directors of the company who attested to that.

5. Acting under the instructions of a client he lodged a complaint before the 1st respondent vide letters dated March 16, 2016 and March 23, 2016 against the complainant seeking an investigation of the complainant for presenting documents which he now terms as " fake' to the petitioner's client in the presence of other witnesses. No investigations were initiated at all.

6. The defendant in the civil suit on April 7, 2016 filed a replying affidavit attaching a document examiner's report presumably given to him by the officers working under the 2nd respondent and the applicant's letter of complaint dated March 16, 2016, a clear confirmation of biasness and lack of impartiality of the 3rd respondent.

7. That it is the lack of impartiality in the investigation process that prompted the complaint on the instructions of his client to subject the known signature of the complainant to investigations. Upon subjection and comparison to private examination of his signature in his cheque leaf dated February 1, 2012 the report showed that they did not agree.

8. The basis of the recommendation of the 1st respondent were documents which were presented to his client and later presented by the client to the advocate to effect changes at the relevant register. He undertook the necessary diligence, and travelled all the way to Malindi, Galana, where the property was situated to verify if a plant had been erected and also ensured that there was quorum in the company to transact. If there was a failure to verify the attestation of the complainant's signature, then this was negligence which could only be subjected to a disciplinary process rather than a criminal prosecution.

9. He averred that his role in the transaction was only limited to preparation of various documents on the client's instructions and witnessing the client's signature. The defendant in the civil suit went with the documents to consult his lawyer and came back with executed documents. He was in no way part of any conspiracy to defraud the complainant. He was summoned by the officers at the department

of the Director of Criminal Investigations Department to appear on October 13, 2016. He filed this instant petition for purposes of preventing his arrest and charge in court as he was apprehensive that he would be charged.

10. He deponed that contrary to the provisions of article 157 (6) of *the Constitution* of Kenya, the 1st respondent proceeded to recommend prosecution against him. This was before considering the complaint of presentation of fake documents by the complainant to his clients in the presence of many eye witnesses. The respondent's decision to prosecute him was informed by ill will and the same was malafides and a bid to harass and intimidate him taking into account that this was purely a civil matter.

11. Subsequently, on October 25, 2016, the 1st respondent wrote to the Director of Criminal Investigations calling for the police duplicate file for perusal and further action. There has been no further communication from the 1st respondent on whether he still intends to charge him.

12. On March 29, 2018, the 1st respondent wrote to the Director of Criminal Investigations informing the office that the evidence available pointed to a civil case. That notwithstanding, the Director of Criminal Investigation is yet to inform him of his next course of action. He avers that the decision of the Director of Criminal Investigations will affect his rights including the right to information, liberty, movement, due process and equality before the law.

The Respondents' case

13. The respondents did not file any response to the amended petition.

The Petitioner's Submissions

14. The petitioner filed submissions dated February 26, 2021. He argued that the respondents have not opposed the petition and as such, the facts remain uncontroverted. According to him, the recommendation and decision of the respondents was bad in law and contravened his constitutional rights since his only involvement in the transaction was as an advocate providing professional services. Being that the petition is not defended, the facts are uncontroverted and no prejudice would be caused if the orders sought are granted.

15. Relying on *Republic v Kikuyu Magistrates Court (Criminal Division) & 9 others Exparte Charles Mbugua Njuguna* [2016] eKLR, he argued that the court may be entitled to halt proceedings where the prosecution's only case against an advocate is that the advocate acted in a transaction the subject of a criminal complaint. He submitted that it is not the duty of a lawyer to verify authenticity of documents presented by a client as held in *Republic v DPP & 4 others Exparte Ashford Gerald Riungu* [2020] eKLR. Further relying on *Macharia & another vs AG & another* [2001] KLR 448 and *Akusala A Boniface v OCS Langata Police Station & others* Petition Number 351 of 2017 [2018] eKLR, he argued that this intended prosecution was commenced for ulterior motives and this court has jurisdiction to halt and declare a prosecution improper. That the role of an advocate is to represent a client who in turn will pay his/ her fees for the work and the court ought to safeguard the same.

16. Urging this court to allow the petition he argued that, the 1st respondent abused his powers donated under article 157(6) of the *Constitution* of Kenya by recommending his prosecution before considering the complaint of fake documents which had been forwarded to his client. That he further chose to close his eye to him and his client thereby limiting their right to natural justice and the ultimate right to be heard acting contrary to the provisions of the *Fair Administrative Actions Act*.

17. He submitted that he was not involved in the preparation of the documents giving rise to the intended prosecution. Also, that all parties appeared before the petitioner. This included the founding directors

of the company. It was by way of affidavits and in their respective statements which were the subject of the investigation. It showed that indeed the documents which were allegedly forged were presented to the petitioner's client by the complainant, and they were later presented to the petitioner for effecting change of share of ownership in the company registry. Hence, being charged by the 1st respondent not withstanding that position, confirmed malafides impartiality, and unreasonableness on the part of the respondents.

18. He submitted that on March 29, 2018, the 1st respondent indicated that the issues involved were civil in nature and there was no criminal action to be prosecuted. Five years down the line the respondents had not recalled their recommendation.

19. He argued that he has therefore proved that;

    i. the respondents were keen to infringe on his rights to a fair trial and to have a dispute determined before a fair tribunal as provided under article 50 of the *Constitution*;

    ii. the 1st respondent's conduct of sharing documents examiners report to the defendant in the civil suit was breach by a state agency and confirms that criminal investigations were commenced with a view to aid a party advance his interest in a civil suit and a confirmation of violation of the petitioner's rights to administrative action under article 47 of the *Constitution*.;

    iii. the respondents failure to consider his complaint of his letter dated March 23, 2016 and the failure to communicate the decision violated section 5 of the *Fair Administrative Action Act* by failing to consider all views in relation to the matter, right to a fair hearing under articles 50 and 47 of the *Constitution*;

    iv. the respondents failure to communicate their ultimate decision on whether they will discontinue the intended charges against the petitioner violated article 47 of the *Constitution* as read with section 4 of the *Fair Administrative Action Act*.

20. He argued that no prejudice will be suffered by the respondents as they have not participated in these proceedings. That he is prejudiced as nothing stops the respondents from continuing with their intended unlawful process to charge him. He therefore prayed that the prayers sought to be granted.

1st Respondent's Submissions

21. The 1st respondent filed submissions dated March 14, 2022. He argued that the petition has no basis and has been overtaken by events. That the same should be dismissed for reasons that criminal complaint under inquiry file No 6 of 2016 and 36 of 2016 which led to the filing of petition No 425 of 2016 is so far withdrawn vide High Court Order at Malindi dated April 6, 2021. The orders sought if granted will be in vain as was held in the case of *Republic v Principal Secretary, Ministry of Defence Ex- Parte George Kariuki Waithaka* [2018] eKLR.

Analysis And Determination

22. Having carefully considered the petitioner's pleadings and both submissions I find the following issues to arise for determination: -

    i. What is the implication of failing to file a response to the petition?

    ii. Whether the reliefs sought should be granted

i. What Is The Implication Of Failing To File A Response To The Petition?

23. The petitioner submitted that since the respondents failed to respond to the petition, the facts remain uncontroverted and orders sought should be granted as no prejudice will be suffered by the respondents.

24. In *Philip Tirop Kitur v Attorney General* [2018] eKLR, while addressing the issue of the Attorney General failing to file a response to the petition therein, the court held:

> 11. Before addressing the above issues, I find it necessary to address the issue of the respondent's failure to file a replying affidavit to this petition and failure to call witnesses. The petitioners counsel citing Harun Thungu Wakaba v AG [1] argued that in absence of a replying affidavit, hence the petitioners averments remain uncontested. The respondents' counsel did not specifically address this issue.
>
> 12. It is common ground that the only evidence on record is the evidence tendered by the petitioner. Failure to file a replying affidavit or adduce evidence on the part of the respondent means that the evidence adduced by the petitioner is uncontroverted and therefore unchallenged.[2] In Interchemie EA Limited v Nakuru Veterinary Centre Limited [3] it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.
>
> 13. A similar position was held in the case of Trust Bank Limited v Paramount Universal Bank Limited & 2 others [4] that it
>
> > "is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."
>
> 14. The respondent in this case did not adduce evidence, but cross-examined the petitioner. The purpose of cross-examination is three-fold; (a) to elicit evidence in support of the party cross-examining; (b) to cast doubts on, or undermine the witness's evidence so as to weaken the opponent's case; (c) to undermine the witness's credibility; (d) to put the party's case and challenge disputed evidence. But once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. Thus, failure on the part of the respondent to adduce evidence or file response to the petition means that the petitioners case remains unchallenged.

25. In the case of *Peter O Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR Odero, J addressing a claim where the Attorney General as the respondent failed to file a replying affidavit stated:

> " As stated earlier the respondents did not file any replying affidavit to challenge and/or controvert the sworn averment by the petitioners that they were victims of the post-election violence. Ground of opposition which were filed are only deemed to address issues of law.

> They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (See Mereka & Co Advocates vs Unesco Co Ltd 2015 eKLR, Prof Olaka Onyango & 10 others v Hon Attorney General Constitution Petition No 8 of 2014 and Eliud Nyauma Omwoyo & 2 others v Kenyatta University). The respondents have failed to refute specifically the allegations in the petitioner's sworn affidavit in support. Failure to file a replying affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence."

26. In *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR, the court stated:-

> (34) The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants' claims?

27. The Supreme Court in the case of *Gideon Sitelu Konchellah v Julius Lekakony Ole Sunkuli & 2 others* [2018] eKLR held:

> A replying affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or list of authorities that may be subsequently filed.Absence of this foundational pleading, the replying affidavit, it follows that even the written submissions purportedly filed by the 1st respondent ... are of no effect.
>
> Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the court will as a matter of cause grant the sought orders. It behooves the court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted.

28. The court in *Alloys Otieno Aboka v Kenya National Highway Authority & 2 others* [2020] eKLR borrowing from the above case, held that;

> Similarly, with the absence of a replying affidavit, the written submissions of the Respondents herein are of no legal effect and the petition stands unopposed. This, however, does not discharge the court of its duty to determine whether the petition is meritorious and deserving of the orders sought.

29. The respondents in this case failed to file any responses to the petition. The question for this court to address at this point is whether this failure to file a response means that the orders sought by the petitioner should be granted automatically. Section 107 and 109 of the *Evidence Act* cap 80 Laws of Kenya provides as follows:-

> 107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

30. In the case of *Christian Juma Wabwire v Attorney General* [2019] eKLR the court held:

> 23. Section 107 of the *Evidence Act* provides, that he who alleges must prove. The petitioner failed to call evidence to prove his allegation. In the case of Lt. Cl Peter Ngari Kaguma and others vs AG, Constitutional Application No 128 of 2006 it was held:
>
> > "…. it is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses…… When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation… However, mere allegation of incarceration without providing evidence of the same does not at all assist the court. It was incumbent upon the petitioners to provide evidence of long incarceration beyond the allowed period and not to be presumptuous that the court knows what happened….."

31. In *Car Importers Association of Kenya v County Government of Mombasa* [2021] eKLR, the court held:

> 26. Similarly, in Phillip Tirop Kitur v Attorney General [2018] eKLR, the Court accepted the affidavit evidence, and ruled that in the absence of a replying affidavit or oral evidence from the Attorney General, the petitioner's evidence stood unchallenged. In addition, the High Court rejected the Attorney General's contention that the delay in filing the Petition had caused it prejudice, ruling that in the absence of a replying affidavit or oral evidence, the court had no facts upon which it could make such a finding. Therefore, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the petitioner's claims? The above question will be answered in the next issue.

32. From the authorities cited above it follows that the failure by the respondents to file a response to the petition renders their submissions to be of no effect and the petitioner's facts as alleged remain

uncontroverted and therefore admitted. However that position does not automatically mean that the orders sought by the petitioner have to be granted without proof. The petitioner still has the duty to prove his case.

ii. Whether The Orders Sought Should Be Granted

33. The petitioner submitted that the recommendation and decision of the respondents was bad in law and contravened his constitutional rights since his only involvement in the transaction was as an advocate providing professional services. He also argued that the court can halt proceedings when the prosecution's only case against an advocate is that the advocate acted in a transaction which is the subject of a criminal complaint.

34. According to him, it is not the duty of a lawyer to verify authenticity of documents presented. Further that the intended prosecution was commenced for ulterior motives which this court has jurisdiction to halt. He also faulted the 1st respondent for recommending his prosecution before considering the complaint of fake documents which had been forwarded to his client.

35. He denied any involvement in the preparation of the documents giving rise to the intended prosecution. He argued that charging him notwithstanding the position confirmed malafides and impartiality and unreasonableness on the part of the respondents. He referred to the 1st respondent's letter which stated that the issues raised were actually civil in nature. He referred to what is stated at paragraph 19 of this Judgement.

36. The respondent on the other hand submitted that the matter had been overtaken by events since the criminal matters had been withdrawn vide a court order.

37. In essence what the petitioner is seeking from this court, is for it to bar the respondents from arresting, charging and prosecuting him. Article 157(1) of the *Constitution* establishes the Office of the Director of Public Prosecutions. Article 157(6) of the *Constitution* and section 5(1) (a) (b) of the *Director of Public Prosecution Act* provides for the powers to institute and undertake criminal proceedings, take over and continue any criminal proceedings commenced in any court and discontinue any criminal proceedings at any stage before judgment is delivered.

38. Article 157(10) of the *Constitution* and section (6) of the O*ffice of the Director of the Public Prosecutions Act* prohibit any person or authority from controlling the Director of Public Prosecutions (DPP) while performing its mandate. Article 157(11) requires the DPP while discharging his mandate to have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process.

39. In emphasizing the mandate of the DPP the court in *Republic v DPP Exparte Victory Welding Works and another* High Court Misc No 249 of 2020 stated;

> " The law is that the court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for interfering with those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision-making process... It follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject

to control by the court based on the aforesaid principles of illegality, irrationality and procedural impropriety."

40. In *Mohamed Ali Swaleh v The Director of Public Prosecution & another* – Petition No 2 of 2017 it was held;

> " The decision whether or not to institute criminal proceedings is made based on the evidence collected. Once the investigations establish reasonable suspicion that a person committed a crime he ought to be charged in a court of law."

41. In *Republic v Director of Public Prosecution & 2 others Ex-parte Stephen Mwangi Macharia* [2014] eKLR the court stated:-

> " The general rule in these kinds of proceedings is that the court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under article 157 of *the Constitution*. Therefore, mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not, on its own and without more, a ground for halting such proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision-making process. An applicant who contends that he has a good defence in the criminal trial ought to be advised to raise the same in his defence before the criminal trial instead of invoking this court's jurisdiction with a view to having this court determine such an issue as long as the criminal process is being conducted bona fides and in a fair and lawful manner. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings."

42. In *Jamal Shariff Swaleh v Director of Public Prosecution & 4 others* [2014] eKLR, the court stated:

> As a general rule the Director Public Prosecution has an absolute discretion in deciding whether or not to institute criminal proceedings and the courts will not ordinarily interfere with this discretion. This absolute discretion is enshrined in article 157 of the *Constitution* of Kenya 2010 which provides:
>
> > "The Director Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."

43. The grounds upon which the prosecution may be prohibited from prosecuting a case were considered in *Director of Public Prosecutions v Martin Maina & 4 others* [2017] eKLR, wherein the court cited, with approval, the decision by the Supreme Court of India in *State of Maharastra & others v Arun Gulab Gawali & others*, Criminal Appeal No 590 of 2007. The grounds are as follows:

> " (i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
>
> (ii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(iii) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(iv) Where the allegations constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fails to prove the charge."

44. The court went further to state that:-

> "The power of quashing criminal proceedings has to be exercised very sparingly with circumspection and that too in the rarest of rare cases."

45. In the case of *Jamal Shariff Swaleh v Director of Public Prosecution* (supra) the court also stated:

> It is only where there has been shown to be an abuse of court process or a breach of the *Constitution* that the courts will act to interfere with the discretion of the Director Public Prosecutions. In the case of Kenya Commercial Bank Limited & 2 others v Commissioner of Police and another, Nairobi Petition No 218 of 2011(unreported) Hon Majanja, J held that:
>
> > "The office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the *Constitution* and the bill of rights contained therein and in every case, the High Court as the custodian of the bill of rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the *Constitution*." [my emphasis].

46. In *Ahmed & another v DCI, Nyali Police Station & 2 others; Agango (Interested Party)* (Constitutional Petition E047 of 2021) [2021] KEHC 175 (KLR) (4 November 2021), Mativo J in a similar matter where the petitioner sought to stop the arrest and charging, held:

> 28. There is no doubt that courts have an overriding duty to promote justice and prevent injustice. Its trite that from this duty, there arises an inherent power to stop police investigations (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 with the prosecution that the court should not allow an investigator or prosecutor to proceed with what is, in all other respects, a perfectly supportable case.[19]Whether an investigation or a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case.
>
> 30. But what is more important is that it is not for this court to determine whether the evidence discloses an offence known to the law. That is a function statutorily and constitutionally vested in the DPP. Again, it is not a function of this court to determine the veracity or to weigh the strength of the evidence or the petitioners defence. That is a function for the trial court hearing the criminal case. This court can only intervene if there are cogent allegations of violation of 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 allegations cited by the petitioners do not pass this threshold. It is not enough to make empty allegation or recite articles of the *Constitution*. There must be clear evidence that the Respondents acted in total disregard of the law. The petitioners are inviting this court to determine the sufficiency of the evidence (which is constitutionally ordained to the DPP) or weigh the veracity of what ought to be his defence in the lower court which is not the function of this court but the trial court.

32. The inherent jurisdiction of the court to stop investigations or a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[21] 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. The provisions of the *Constitution* conferring powers upon the High Court to grant such remedies as conservatory orders are a device to advance justice and not to frustrate it.

47. As noted on the mandate of the DPP, it is not unfettered, and the court will not hesitate to act where the DPP has acted contrary to the law as elucidated in the cited authorities. But generally the court is required to restrain itself from usurping the mandate of the 1st respondent.

48. On the mandate of the 2nd respondent, Article 245 (1) of the *Constitution*, establishes the office of the Inspector- General of the National Police Service. Sub-article (4) provides for mandate and autonomy of the Inspector- General of Police with regards to, the investigation of any particular offence or offences, the enforcement of the law against any particular person or persons and the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. Article 157 (3) of the *Constitution*, empowers the DPP to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and he is required to comply.

49. Section 28 of the *National Police Service Act* establishes the Director of Criminal Investigation. Section 34 of the said *Act* provides for the functions of the Director and section 35 provides for the functions of the directorate among them, collecting and providing criminal intelligence; undertaking investigations on serious crimes; maintaining law and order; detecting and preventing crime; apprehending offenders; maintaining criminal records; conducting forensic analysis; executing the directions given to the Inspector General by the Director of Public Prosecution etc.

50. In the case of *Dr Alfred N Mutua v The Ethics and Anti- Corruption Commission & others*, Misc Application No 30 of 2016, the court held as follows-

> "Is threat of arrest or arrest with reasons given a violation or threatened violation of fundamental rights and freedoms? We think not. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation arrest and prosecution might ensue..."

51. In *Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another* [2019] eKLR the court stated:-

> "67. Therefore, the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. The mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, adopting an equivocal approach to investigations by deliberately denying a suspect an opportunity to put forward his version before a person is arraigned in court surely amounts to maladministration of justice. Similarly, where exculpatory evidence is presented to the police in the course of investigation and for some reasons known to them they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power."

Also see *Republic v The Commissioner of Police & Director of Public Prosecution, Exparte Michael Monari & another* Misc Application No 68 of 2011

52. What is evident from the cited provisions of the law and the cases, is that similarly, the mandate of the 2nd respondent is not subject to anyone's control and should not be interfered with unless there is reasonable cause to do so.

53. The petitioner in this case, has not met the threshold to warrant this court to interfere with the mandate of the respondents. Borrowing from the above cited cases, the respondents should be left to undertake their constitutional mandate. Furthermore, in its submissions the respondents submitted that the inquiries related to the criminal complaint had already been withdrawn. It means that this matter has been overtaken by events and the orders of the court cannot be granted in vain. The petitioner did not rebut this.

54. Concerning the prayers sought, article 23 of the *Constitution* provides for the prayers that can be granted by this court. The petitioner has sought the following prayers:-

> a. A declaration that the recommendation of the 1st respondent contained in the letter dated August 12, 2016 is an abuse of the criminal Justice process and contravention of the petitioner's constitutional rights to freedom and security of the person, right to freedom of movement and right to secure protection of the law under articles 27, 29, 47, 50 and 157(11) of the *Constitution*.

b. A prohibition order to issue against the respondents, their agents, assigns or any person claiming through them to permanently restrain them from arresting, prosecuting or continuing any criminal charges against petitioner in relation to transactions leading to the transfer of shares in Arafco Agricultural Integration Company Limited which is a subject of inquiry file No 36 of 2016.

c. An order of certiorari, to bring into this court and quash the decision of the 1st respondent contained in the letter dated August 12, 2016 directing the arrest and charging of the petitioner.

d. Costs of the suit.

55. Having determined that the petitioner has not demonstrated how the constitutional provisions will be violated or have been violated and that the court should not interfere with the mandate of the respondents unless there is strong reason to, prayer (a) cannot be granted. He has not demonstrated that the respondents acted outside their constitutional mandate or made a case to warrant the intervention of this Court on the mandate of the respondents.

56. Prayers (b) and (c) are on prohibition and certiorari orders. These were discussed in the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR. The court stated;

> "...that now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition of certiorari. These remedies are only available against public bodies such as the Council in this case. What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury's Law of England, 4th Edition, Vol 1 at pg 37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.

57. In *Joram Mwenda Guantai v The Chief Magistrate*, Nairobi [2007] eKLR, the Court of Appeal held:-

> "It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. See Kenya National Examinations Council v Republic Ex-parte GG Njoroge & 9 others 1996 LLR 483 (CAK See also Halsbury's Laws of England 4th Edition Vol 1 p 37 para 128.

> Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. It was succinctly put in Stanley Munga Githunguri v Republic [1985] KLR 91 that if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious the Judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court. This dictum is now an everyday edict in our courts and we are indeed surprised that the learned judge was shy to so declare."

58. The prayers sought cannot be granted because as indicated by the respondents the criminal complaints have so far been withdrawn. What the petitioner is asking for goes against the rationale for issuing prohibition orders and certiorari orders. They have been overtaken by events hence issuing them will be an exercise in futility.

59. On the issue of costs, rule 26 (1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, provides that the award of costs is at the discretion of the court. Sub rule (2) provides that in exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms. In the circumstances I will not award any costs.

60. The upshot is that this petition lacks merit and is dismissed. Each party to bear its own costs.

Orders accordingly.

DELIVERED VIRTUALLY SIGNED AND DATED THIS 27TH DAY OF JULY 2022 IN OPEN COURT AT MILIMANI NAIROBI.

HI ONG'UDI

JUDGE OF THE HIGH COURT