



**Parklea & 4 others v Director of Public Prosecutions & another;  
Meriring & 2 others (Interested Parties) (Constitutional Petition  
E008 of 2021) [2022] KEHC 14250 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14250 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CONSTITUTIONAL PETITION E008 OF 2021  
RN NYAKUNDI, J  
OCTOBER 21, 2022**

**BETWEEN**

**MIKE PTOO PARKLEA ..... 1<sup>ST</sup> PETITIONER  
ALICE CHEPKOSGEI ..... 2<sup>ND</sup> PETITIONER  
JOSEPH LOLEMTUM TIMU ..... 3<sup>RD</sup> PETITIONER  
ELVIS ROTICH MWANGA ..... 4<sup>TH</sup> PETITIONER  
TITUS TOROITICH MAYTECH ..... 5<sup>TH</sup> PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT  
ETHICS AND ANTI-CORRUPTION COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SOLOMON MERIRING ..... INTERESTED PARTY  
MARGARET JESANG TUTOEK ..... INTERESTED PARTY  
LELIAN ENTERPRISES LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioners' who are all adult Kenyan citizens of sound mind originally commenced these proceedings by way of a Petition dated May 17, 2021. The petition is further supported by the affidavit of Dr Mike Ptoo Parklea, the 1<sup>st</sup> Petitioner sworn on an even date and a further affidavit dated July 2, 2021.



2. A replying affidavit sworn on June 14, 2021 by Joel Khisa, an investigator working with the 2<sup>nd</sup> Respondent was filed in response.

### **Petitioners' Case**

3. The Petitioners filed this petition against the Respondents, claiming that by introducing new charges against them which charges arise from the same transaction as those which they have already been charged with in Eldoret EACC No 2 of 2019, R v Dr Mike Ptoo Parklea & 4 Others, the Respondents breached their fundamental Rights and Freedoms guaranteed by the Constitution. As a result of the alleged violations, the Petitioners sought the following reliefs:
  - 1) A declaration that the actions of the Respondents to introduce new charges against the Petitioners in a separate file (which charges arise from the same set of facts and transactions) as those in which they have already been charged with in Eldoret EACC No 2 of 2019; Republic v Dr Mike Ptoo Parklea & 4 Others) – 2 years after the trial process has begun – is violation of the Petitioners' right to a fair trial in Article 50 (2) of the Constitution ( to have the trial begin and conclude without unreasonable delay).
  - 2) A declaration that the actions of the Respondents to introduce new charges against the Petitioners in a separate file (which charges arise from the same set of facts and transactions) as those in which they have already been charged with in Eldoret EACC No 2 of 2019; Republic v Dr Mike Ptoo Parklea & 4 Others) – is violation of the Petitioners' right to a fair trial in Article 50 (2) of the Constitution.
  - 3) A declaration that the actions of the Respondents to introduce new charges against the Petitioners in a separate file (which charges arise from the same set of facts and transactions) as those in which they have already been charged with in Eldoret EACC No 2 of 2019; Republic v Dr Mike Ptoo Parklea & 4 Others is a collateral attack of lawful court proceedings, heavily, prejudicial to the Petitioners and violations of their rights to a fair trial in Article 50 (2) of the Constitution.
  - 4) A declaration that the actions of the Respondents of charging the Petitioners in a new file on issues arising from cross-examination of witnesses in Eldoret EACC No 2 of 2019; Republic v Dr Mike Ptoo Parklea & 4 Others – issues of which the trial Magistrate is required to make a finding after completion of hearing, is a threatened violations of the provisions of Article 50 (2) of the Constitution which protects news offences the person has been acquitted or convicted.
  - 5) A declaration that the actions of the Respondents to introduce new charges against the Petitioners in a separate file (which charges arise from the same set of facts and transactions) as those in which they have already been charged with in Eldoret EACC No 2 of 2019; Republic v Dr Mike Ptoo Parklea & 4 Others) – is violation of the Petitioners' right to a fair trial in Article 47 (1) of the Constitution.
  - 6) An order of certiorari be issued to quash the charges against the Petitioners contained in the charge sheet dated May 10, 2021 and filed in Eldoret criminal registry on May 11, 2021 (Eldoret EACC No E003 of 2021; R v Solomon Merireng & 7 Others)
  - 7) An order of prohibition be issued to the Respondents to prohibit them from further investigating and charging the Petitioners on matters arising from Eldoret EACC No 2 of 2019; R Vs Dr Mike Ptoo Parklea & 4 Others.



- 8) Others) – is an abuse of the 1<sup>st</sup> Respondent’s prosecutorial powers in Article 157 (6) of the Constitution.
4. The Petitioners’ case is that in 2019, they were charged in Eldoret EACC No 2 of 2019; R Vs Dr Mike Ptoo Parklea & 4 Others for the following offences: -
- a) Careless failure to comply with procurement law contrary to Section 45 (2) (b) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act No 3 of 2003.
  - b) Wilful failure to comply with the law and regulations applicable to management of public funds contrary to Section 45 (2) (b) as read with Section 48 of Anti-Corruption and Economic Crimes Act No 3 of 2003.
  - c) Wilful failure to comply with procurement procedures and guidelines contrary to Section 45(2) (b) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No 3 of 2003.
  - d) Uttering a false document contrary to Section 353 of the Penal Code as read with Section 349 of the Penal Code.
  - e) Making a false document contrary to Section 346 of the Penal Code as read with Section 349 of the Penal Code.
- All the charges arise from tender No WPC/T/001A/2017-2018 procurement of five thousand (5,000) bags of maize worth Kshs 18,000,000/=
5. On January 17, 2020, the Petitioners deposed that 1<sup>st</sup> & 2<sup>nd</sup> Respondents sought for an indefinite adjournment for purposes of amending the charges. The Court granted the Respondents three (3) months to conclude their investigations and amend the charges accordingly. After three (3) months the trial Magistrate decided to proceed with the hearing because corruption cases have immense public interest and need to be expedited. The Petitioners argue that subsequently, the trial commenced although after several delays by the 1<sup>st</sup> Respondent and so far, (13) prosecution witnesses have testified and the matter was scheduled for a further hearing on May 12, 2021.
6. However, the Petitioner contend that on May 9, 2021 they were arrested by the 2<sup>nd</sup> Respondent and take to the 2<sup>nd</sup> Respondent’s offices in Eldoret where they were told that there were being charged with additional offences. The Petitioners averred that on Monday, May 10, 2021 they were arraigned in Court alongside three others to take plea, but the 1<sup>st</sup> Respondent sought for an adjournment so that it could amend the charge sheet. Consequently, the Petitioners were on Tuesday, May 11, 2021 charged in Eldoret EACC No E003 of 2021; R v Solomon Merireng & 7 Others alongside three other persons with offences arising from the same set of facts which they have been charged with in Eldoret EACC No 2 of 2019; R v Dr Mike Ptoo Parklea & 4 Others. The Petitioners pleaded not guilty to the charges therein and 1<sup>st</sup> Respondent sought to have the two files consolidated for purposes of hearing.
7. The charges in Eldoret EACC No E003 of 2021; R v Solomon Merireng & 7 Others are as follows: -
- a) Conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003.
  - b) Abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003.
  - c) Engaging in fraudulent practice in a procurement proceeding contrary to Section 66(1) and (2) as read with Section 177 of the Public Procurement and Asset Disposal Act, 2015.



All charges arise from tender No WPC/T/001A/2017-2018 procurement of five thousand (5,000) bags of maize worth Kshs 18,000,000/=

8. The Petitioners deposed that upon scrutinizing the charges in Eldoret EACC No E003 of 2021; R v Solomon Merireng & 7 Others, they noticed that they arise from the same set of facts as in Eldoret EACC No 2 of 2019; R v Dr Mike Ptoo Parklea & 4 Others. The Petitioners contend that the charges are similar. The Petitioners also contend that the new charges in Eldoret EACC No E003 of 2021; R v Solomon Merireng & 7 Others are a reaction to issues emanating from the cross-examination of prosecution witnesses in Eldoret EACC No 2 of 2019; R v Dr Mike Ptoo Parklea & 4 Others.
9. The Petitioners principal complaint is that charging them in a separate file on issues arising from the trial in Eldoret EACC No 2 of 2019; R v Dr Mike Ptoo Parklea & 4 Others is a breach to their right to a fair trial as enshrined in Article 50 of the Constitution.
10. The Petitioners maintain that they were charged in 2019 and that they have a legitimate expectation that the trial will not impede once it had begun. The Petitioners also contend that the introduction of additional charges two years after the trial process begun is a violation of their right to a fair trial. The Petitioners also contend that charging them in a new file on issues arising from cross-examination of witnesses in Eldoret EACC No 2 of 2019; R v Dr Mike Ptoo Parklea & 4 Others is a collateral attack of lawful Court proceedings and prejudicial to them.
11. The Petitioners argue that the concept of consolidation of an active file, whose trial is ongoing with a new trial whose trial is yet to start is unknown in criminal law.
12. The Petitioners want their trial in Eldoret EACC No 2 of 2019; R VS Dr Mike Ptoo Parklea & 4 Others to proceed without interruptions, delays and frustrations by 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
13. The Petitioners want interim orders stopping all the charges in Eldoret EACC No E003 of 2021; R VS Solomon Merireng & 7 Others.
14. It is the Petitioners contention that the actions and omissions on the part of the Respondents were tantamount to a violation of the Petitioners' freedom and rights guaranteed under Articles 50 (2), 47(1) and 157(6)

## **2nd Respondent's Case**

15. The 2<sup>nd</sup> Respondents' case was made through the affidavit of Joel Khisa, an investigator with the 2<sup>nd</sup> Respondent herein.
16. The 2<sup>nd</sup> Respondent's case is that, it is empowered by law to investigate the conduct of any person and or body which in its opinion constitutes corruption or economic crime and unethical conduct pursuant to the provisions of Chapter Six of the Constitution of Kenya, the Anti-Corruption and Economic Crimes Act, the Ethics and Anti-Corruption Commission Act and the Leadership and Integrity Act. The 2<sup>nd</sup> Respondent's case is that pursuant to the provisions of Section 11(1) (d) of the Ethics and Anti-Corruption Act, it is mandate to investigate and recommend to the Director of Public Prosecutions, the prosecution of nay acts of corruption or violation of codes of ethics or other matters prescribed in the aforementioned Acts.
17. The 2<sup>nd</sup> Respondent deposed that on July 9, 2019 the Petitioners were charges before the Eldoret Chief Magistrate Court in Anti-Corruption No 2 of 2019 with various corruption offences relating to the procurement irregularities in tender No WPC/T/001A/2017-2018 for the supply and delivery of 5,000 bags of Whole Dry White Maize. The 2<sup>nd</sup> Respondent further averred that on July 15, 2019 the bail terms were and pre-trial directors and the matter was fixed for hearing on November 5, 2019.



18. The 2<sup>nd</sup> Respondent deposed that when the matter came up on November 5, 2019, the 1<sup>st</sup> Respondent in presence of the Petitioners informed the trial Court of the emergence of new evidence and sought leave for the 2<sup>nd</sup> Respondent to conduct further investigations which leave was granted.
19. The 2<sup>nd</sup> Respondent's case is that in the course of the further investigations, it was established that:
20. Based on the new evidence, the 2<sup>nd</sup> Respondent recommended additional charges in regards to tender No WPC/T/001A/2017-2018 for the supply and delivery of 5,000 bags of Whole Dry White Maize vide letter Ref EACC 6/27/2 VOL XVII (114) dated May 29, 2020. The 2<sup>nd</sup> Respondent contends that this was long before the commencement of the hearing in Anti-Corruption Case No 2 of 2019.
21. The 2<sup>nd</sup> Respondent argues that when the matter was listed for mention on October 6, 2019 to confirm direction on the further investigations, the Court was informed further directions in the matter were yet to issued by the DPP himself as required by the *Anti-Corruption and Economic Crimes Act*. However, despite the said fact the trial Court slated the matter for hearing on November 27, 2020.
22. The 2<sup>nd</sup> Respondent deposed that on November 27, 2020 hearing in ACC No 2 of 2019 commenced with three witnesses testifying. The matter subsequently proceeded for further hearing on January 8, 2021, January 29, 2021 and 19<sup>th</sup> March, and a total of thirteen (13) witnesses testified.
23. The 2<sup>nd</sup> Respondent argues that at all material times, the Petitioners were fully aware that the 2<sup>nd</sup> Respondent had requested for directions from the DPP as required by the law and was yet to receive the said directions.
24. The 2<sup>nd</sup> Respondent deposed that on April 13, 2021 it was able to finally received further directions from the 1<sup>st</sup> Respondent in regards to the further investigations it conducted in this matter. That pursuant to the directions issued on April 13, 2021, the 2<sup>nd</sup> Respondent on May 10, 2021 filed a new charge sheet in Anti-Corruption Case No E003 of 2021; R v Solomon Merireng & 7 Others, which constituted charges against the 5 accused persons in Anti-Corruption Case No 2 of 2019 and three additional persons; Solomon Merireng, Lelian enterprises Limited and Margaret Jesang Tuitoek.
25. The 2<sup>nd</sup> Respondent maintains that the offences preferred in Anti-Corruption Case No E003 of 2021; R v Solomon Merireng & 7 Others are in relation to the payment made in regards to tender No WPC/T/001A/2017-2018 for the supply and delivery of 5,000 bags of Whole Dry White Maize and not a Petitioners. The 2<sup>nd</sup> reaction to issues raised during cross-examination as alleged by the Respondent contends that the offences in ACC No E003 of 2021 are not the same as those in ACC No 2 of 2019, the 2<sup>nd</sup> Respondent argues that they are additional offences relating to the payment which was done contrary to the advice given by the 2<sup>nd</sup> Respondent to stop payment.
26. The 2<sup>nd</sup> Respondent argues that the same tender No WPC/T/001A/2017-2018 for the supply and delivery of 5,000 bags of Whole Dry White Maize is the subject in both matters.
27. The 2<sup>nd</sup> Respondent argues that Section 136 of the Criminal Procedure Code allows for joinder of persons accused of the same offence committed in the course of the same transaction or persons accused of different offences committed in the course of the same transaction.
28. The 2<sup>nd</sup> Respondent further argues that the witnesses set to testify in both cases are the same and the exhibits set to be produced in both cases are equally the same.
29. The 2<sup>nd</sup> Respondent also argues that Section 135(1) of the *Criminal Procedure Code* allows for joinder of counts where the charges are found on the same facts or form or are part of a series of offences of the same or a similar character as in the subject cases herein.



30. The 2<sup>nd</sup> Respondent maintains that filing and hearing of the suits herein separately will only amount to multiplicity of cases and an abuse of Court process.
31. According the 2<sup>nd</sup> Respondent, the consolidation of the two suits will not prejudicial to the Petitions since the aforementioned criminal offences were committed in the same transaction, involve the same subject matter and the witnesses are actually the same.
32. The 2<sup>nd</sup> Respondent maintains that in the event that the Petitioners are likely to suffer prejudice as a result of the intended consolidation the same is curable by recalling the witnesses under Section 214 (1) (ii).

### **2<sup>nd</sup> Interested Party's Case**

33. The 2<sup>nd</sup> interested party in her response to the petition dated December 8, 2021 adopted the affidavit of the 1<sup>st</sup> Petitioner, Dr Mike Ptoo Parklea filed in support of the petition.
34. The application was canvassed vide written submissions. The Petitioner filed their submission dated July 7, 2021 on July 12, 2021 whereas the 2<sup>nd</sup> Respondent filed its submissions dated September 7, 2021 on an even date. The 1<sup>st</sup> Respondent also filed written submissions on October 26, 2021. I have carefully read the said submissions and need not reproduce same here.

### **Determination**

35. Having appreciated the pleadings of the respective Petitioners, the responses thereto, the submissions and decisions referred to, the following issues arise for determination: -
  - a) Whether the Respondents acted in contravention of the Constitution in recommending and prosecuting the Petitioners with related charges in separate cases.
  - b) Whether orders sought should be issued.
36. The Petitioners' apprehension in this petition is that, they have been subjected to double prosecution in two similar and related but separate criminal proceedings namely; ACC 2/2019 which is ongoing and ACC No E003/2021 which was later on filed. Their fear is drawn out of the fact that although separately charged, the charges are basically the same arising out of the same set of facts, circumstances and the evidence. The Petitioners main contention is that by introducing new charges against in them in a separate file, the Respondents have breached their right to a fair hearing as envisaged under Article 50 (2) of the Constitution of Kenya.
37. Am mindful of the declarations crafted by the petitioner pursuant to Article 23 of the Constitution. In the first instance the seminal petition entrenches itself on the aspect of unreasonable delays in prosecuting the petitioners and on commencement of the trial a belated amendments and introduction of new indictments were brought to their attention. This court recognises under Article 50(2)(E) of the Constitution petitioners have a right to have the trial begin and concluded without unreasonable delay. It is noteworthy to mention that unreasonable delays in criminal proceedings do prejudice an accused person. This may take the form of delays which could jeopardise the fairness of the trial itself or incidental costs to the prosecution and defence.
38. I further draw from the Constitution that the accused persons have certain fundamental rights namely the right to equality and freedom from discrimination in Article 27, right to human dignity in Article 28 and right to freedom and security of the person in article 29 and fair trial rights espoused in article 50. This court was therefore faced with a question whether the lapse of time to amend and introduce new charges against the petitioners did impact their fundamental rights. This is in particular as to the



lapse of time and the reasonable test of it. The court is under a duty to undertake an inquiry while bearing in mind the balancing act of the competing interests of the state to prefer charges against an accused person(s) and their rights as stated in Article 50 of the Constitution. The specific context I have in mind includes the nature of the prejudice to be suffered by the accused, the nature and complexity of the indictment, whether there has been systematic delay in prosecuting the accused persons and the reasonableness on the length of the delay. There is also the fact on this inquiry to establish whether there has been sufficient cause resulting in unreasonable delay.

39. Once the minimum demands of the rule of law are satisfied the implication of many aspects in the administration of justice depend on the specific tasks being undertaken by a particular tribunal, court or Constitutional organ. Therefore, what can be deprived from this discourse is that the delay per se by either the defence or the state cannot serve as a basis for the court to decide that the subsequent act by anyone of them occasioned an injustice or unfairness of the trial. In S-V- Shaik (2007) ZACC 19; 2008 92 SA 208 (CC); 2007 (12) BCLR 1360 (CC) the court held that 'The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires fairness to the public as represented by the State. It has to instil confidence in the criminal justice system'

In the administration of justice sovereignty is a principle that must be present to some extent for the state to exist and render their boundaries of the rule of law for the common good. In the interest of justice we as the state organs as prescribed in the Constitution function reasonably well notwithstanding their institutional deficiency, their capacity to act effectively and decisively should be generally be fostered and preserved by the court. It is at this point the account of sovereignty connects with other principles of Constitutionalism in our criminal justice system.

40. Pursuant to Article 79 of the Constitution, the office of the 2<sup>nd</sup> Respondent was created and the power to investigate and recommend prosecution bestowed upon it under Section 11 (1) (d) and 13 (2) of Ethics and Anti-Corruption Commission Act and Section 35 of Anti-Corruption and Economic Crimes Act. The 2<sup>nd</sup> Respondent is obligated to forward its recommendation to the DPP for prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the Act.
41. The 1<sup>st</sup> Respondent is equally conferred with constitutional authority under Article 157 (10) to act independently in making decisions as to who is to charge and who not to be charged. Both offices have their powers insulated by the Constitution and statute to act independently without subjecting themselves to anybody's directions or control, external factors or influence or even seek consent or authority from anybody. In the case in R v The Director of Public Prosecutions, Ex parte Patricia Manning and Elizabeth Melbourne [2001] QB 330, [2000] EWHC (QB) 'Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see for example, R v The Director of Public Prosecutions, Ex parte C [1995] Cr App R 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else. The Director and his officials will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of



the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. Decisions to initiate or to amend an indictment in the cause of the proceedings, or not to initiate or discontinue prosecutions may be based on judgments about the prospects of success on questions of law and fact. The DPP is empowered to make such judgments even though they may be wrong on the law or mistaken on the facts. Underlined emphasis mine.'

The decisions of the DPP challenged in this petition were made consistent under the powers conferred by the Constitution and the formulation of the law in Section 214 of the Criminal Procedure Code. To strike out the criminal proceedings against the petitioners is a severe measure which cannot be countenanced by the Constitution.

42. Article 157(11) provides that in exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. From the aforementioned provision, it clear that as much as the DPP is mandated to commence criminal proceedings the same must be done in a manner that is consistent with the public interest or the interests of the administration of justice. He must therefore act with utmost fidelity to the law without abusing or misusing those powers to settle personal scores or simply act maliciously with the sole purpose of punishing somebody. The import of the petitioners evidence it's argued is the effect that the amendments are likely to occasion prejudice and unfairness to the defence. That the petitioners are entitled to a fair hearing on the aforesaid charges within the parameters of enabling statutes and Article 50 of the Constitution on right to a fair trial remains intact even with the amendments. The concept of the duty of a court to protect itself against the abuse of it's process gives rise to what is described as two fundamental policy considerations in our Constitution. The first is that of public interest in the administration of justice and the second is the court to protect it's ability to function so as not to erode public confidence by ensuring that oppression and injustice is prevented to guarantee the fundamental rights of all persons who appear before it.

43. Where there is proof of abuse of power by the commission or the DPP in exercise of their duties thereby acting in breach of any constitutional or statutory powers, it is the duty of the court to intervene and correct the situation by setting aside such actions or breaches. However, courts must act also with extreme caution not to unreasonably gag the operations of such independent state agencies or organs so as to give them room for effective operation

44. In the case of *ACEC Petition No 23 of 2018 Peter Nganga Mburu & 2 Others v DPP [2018] eKLR* where the Court held that:

' The DPP in directing that investigations be undertaken is not subject to the direction and control of any person, body or authority. If it is however shown that the decision made is against the tenets of the Constitution and has been made in bad faith the same shall be reviewed'.

45. In *Republic v Director of Public Prosecution & Another ex parte Patrick Ogola Onyango & 8 others* Onguto J stated as follows:

' 116. The courts' twin approach in ensuring that the discretion to prosecute is not abused if only to maintain public confidence in the criminal justice system and the same time balancing the public interest in seeing that criminals are brought to book has led to rather contradictory principles.



117. On the one hand the courts have consistently held that suspects investigated and charged before trial courts can only have their way before the trial court. It is stated that the trial court is the appropriate forum where evidence is to be tested and all defences raised: see the cases of *Thuita Mwangi & 2 Others vs The Ethics and Anti-Corruption Commission* Petition No 153 of 2013 [2014] eKLR and also *Republic v Commissioner of Police & Another Ex p Michael Monari & Another* [2012] eKLR where Warsame J (as he then was) stated as follows:

'The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene.'

46. It is worth noting that the Petitioners must also prove in the pleadings with precision that indeed a particular provision of the [Constitution](#) has been violated and the nature of the violation (See [Anarita Karimi Njeru vs R \(1979\) IKLR](#)).
47. According to the 2<sup>nd</sup> Respondent, in light of the emergence of new evidence the 1<sup>st</sup> Respondent sought for leave of Court to allow the 2<sup>nd</sup> Respondent carry out further investigations. Based on the new evidence, the Commission recommended additional charges in regards to the payment in tender No WPC/T/001A/2017-2018 for the supply and delivery of 5,000 bags of Whole Dry White Maize and on May 10, 2021, the 1<sup>st</sup> Respondent charged the Petitioners alongside three additional persons in ACC No E003 of 2021.
48. After having perused the two charge sheets, it is clear that the offences are wholly related in that they all arose out of the same transaction. The 2<sup>nd</sup> Respondent argues that ACC No E003 of 2021 relates to the payment in regards to tender No WPC/T/001A/2017-2018 for the supply and delivery of 5,000 bags of Whole Dry White Maize. The 2<sup>nd</sup> Respondent argues that hearing the two cases separately will only amount to multiplicity of suits and an abuse of Court process. The 2<sup>nd</sup> Respondent's case is that consolidation of the two suits will not be prejudicial the Petitioners since the aforementioned criminal offences were committed in the same transaction, involve the same subject matter and witnesses and the exhibits adduced will be same. I agree with the 2<sup>nd</sup> Respondents that to avoid a mistrial ACC No 2 of 2019 should be consolidated with ACC No E003 of 2019 or be heard concurrently.
49. In answer to this complaint by the petitioner I find refuge in the principles elucidated in [Josphat Karanja Muna v Republic \[2009\] eKLR](#) where the Appellant complained that he had not been given a chance to recall witnesses who had testified.

' On non-compliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on September 29, 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only



took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non-compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant.'

50. From the standpoint of the constitutional protection of fundamental rights and freedoms the burden lay with the petitioners to demonstrate that during the amendments and introduction of new charges the Constitutional value of protecting their human rights has been infringed or threatened with a violation. What this means taken in context of the petition is that the presumption to Constitutionality applied to the amendments of the new charges. The question whether the action by the DPP in conjunction with the EACC proposed model of amendments was repugnant to the Constitution is emphatically not been discharged by the petitioners. The ultimate issue is whether the infringement is reasonable and demonstrably justified in a free and democratic society. The bottom line is this while remaining sensitive to the legal context upon which the Constitutional organs responsible in investigating and prosecuting criminal offences are mandated to operate it is incumbent to reinforce a rational inference from the evidence on the impugned decision by the respondents. In my considered opinion the factors generally relevant to determine the violation or infringement of the Constitution remains scanty. The nature and extent of the problem sought to be solved by this petition ought to be placed before the court by admissible evidence which the defence shall be at liberty to test within the parameters of the Evidence Act.
51. In my view the interests and rights protected by Article 50 are of a wider ambit than those enunciated in the instant petition. As such section 214 of the Criminal Procedure Code satisfies the essential requirements of fair trial rights and provides adequate safeguards to protect the rights of an accused person or persons.
52. There is nothing placed before this Court that suggests that the 1<sup>st</sup> Respondent, in exercising his discretion to prefer charges against the Petitioners in this matter, acted under the control of any person or body, or that he acted in a manner that was not consistent with the public interest or the interests of the administration of justice. There is no evidence also, in my view, to suggest that the actions of the 1<sup>st</sup> Respondent are inimical to the need to prevent and avoid abuse of the legal process. I do not see any malice, abuse of office nor ill motive in recommending the prosecution herein. The Respondents executed properly their mandate and the rest is for the trial Court to determine after hearing evidence from both sides.
53. The Petitioners have alleged the violation of Article 47(1), 50 (2) and 157 (6) of the Constitution by the Respondents for introducing new additional charges against them in ACC No E003 of 2021. The Petitioners argued that the new charges arise from the same set of facts and transactions as those which they have already been charged with in ACC No 2 of 2019.
54. The 2<sup>nd</sup> Respondent on hand has argued that, by charging the Petitioners with additional charges it was only acting within the confines of the law and in accordance with its stipulated mandated as provided for by both the Constitution and Statutes.



55. I have considered the arguments made by the Petitioners with respect to the alleged violation of their rights, and the response thereto. There is no basis for an allegation or finding that the Petitioners' rights were violated in any way.
56. On whether the orders sought should be issued. The grant of the said orders was dependent on the determination in their favour of the issues identified earlier. As the issues have all been answered in the negative, it follows that the petition fails, and the Petitioners are not entitled to the orders that they seek.
57. Accordingly, the petition is hereby dismissed with no order as to costs. The primary file on the indictment against the petitioners is hereby remitted to the Chief Magistrate's Court Eldoret for further directions and expeditious disposal of the criminal proceedings. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 21ST DAY OF OCTOBER, 2022.**

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**R. NYAKUNDI**

**JUDGE**

