



Onguru v Director of Public Prosecutions & another; Oloo & another (Interested Parties) (Constitutional Petition E003 of 2022) [2022] KEHC 17163 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEHC 17163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION E003 OF 2022
AC MRIMA, J
NOVEMBER 17, 2022**

BETWEEN

WILLIAM OCHANDA ONGURU PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

AND

ELIJAH AMOLLO OLOO INTERESTED PARTY

CHARLES ASIKOWA OKOLO INTERESTED PARTY

JUDGMENT

Introduction:

1. William Ochanda Onguru is the Petitioner in this matter. He is an Advocate of the High Court of Kenya having been admitted in 1992.
2. At all material times relevant to this suit, the Petitioner was practicing under the nature and style of Messrs. Ochanda Onguru & Company Advocates.
3. The Petitioner, during the course of duty, was introduced to Charles Asikowa Okolo, the 2nd Interested Party herein, by Elijah Amollo Oloo, the 1st Interested Party in this matter.
4. Thereafter, between 2011 and 2014, the Petitioner engaged in an Advocate-Client relationship with the 2nd Interested Party. He discharged his advocacy duties litigiously in several matters within Kisumu and Kitale towns.



5. It is during the course of the said official dealing that misunderstandings arose between the Petitioner and the 2nd Interested Party which culminated with a report being lodged with the police and subsequently criminal charges were preferred against the Petitioner by the 1st Respondent herein, the Director of Public Prosecution.
6. The Petitioner was, however, yet to be arraigned and charged before a Court of law before this Court, Hon. Kimaru, J (as he then was), issue a restraining order. Therefore, the obtaining position is that the Petitioner is yet to be formally charged before Court.
7. The Petition, which is subject of this judgment, therefore, challenged the propriety of the intended charges.
8. The Petition is vehemently opposed by the Respondents and the 2nd Interested Party, but is supported by the 1st Interested Party.

The Petition:

9. The Petitioner deposed that amongst the matters he handled on behalf of the 2nd Interested Party was Kitale HCCC No. 39 of 2011; Charles Asikowa Okolo vs. Nyamumbo Oonge, Agricultural Finance Corporation & Emkos Company Limited (hereinafter referred to as ‘HCCC No. 39 of 2011’).
10. Judgment in HCCC No. 39 of 2011 was rendered on 29th August, 2013 in favour of the 2nd Interested Party, then the Plaintiff. It was in the sum of Kshs. 7,360,000/= together with costs and interest from May 2005 until payment in full.
11. The Petitioner further deposed that during the execution process sometimes in 2014, the 2nd Interested Party instructed him to release the decretal sums he had then received as a stakeholder from the Judgment-Debtor to the 1st Interested Party for onward transmission to the 2nd Interested Party.
12. It was averred that the said instructions were verbally issued on several occasions. It was also averred that in some instances, the 2nd Interested Party instructed the Petitioner to disburse some funds to the 1st Interested Party’s company’s affiliate, Bakora Travellers Company Limited.
13. The Petitioner was seemingly uneasy with the verbal instructions by the 2nd Interested Party. In that regard, the Petitioner prevailed upon the 2nd Interested Party to jot those instructions to enable the Petitioner discharge his duties accordingly.
14. Subsequently, the Petitioner posited that on 14th September, 2015, while in the Petitioner’s Chambers, the 2nd Interested Party expressly authorized the Petitioner in writing, to release funds to the favour of the 1st Interested Party. The said authority was attested to by the 1st Interested Party and executed by the 2nd Interested Party. Following this agreement, the Petitioner disbursed a combined total of Kshs. 3,211,000.00 to the 1st Interested Party or its affiliate between 2014 and 2018.
15. The Petitioner stated that he later felt short-changed. Unbeknownst to him, the Interested Parties in December 2014 clandestinely appointed the firm of Messrs. Lumumba & Lumumba Advocates to take over the conduct of HCCC No. 39 of 2011, in his stead. He discovered this in November 2015 when he was informed of an alleged complaint lodged against him by the 1st Interested Party to the Advocates Complaints Commission.
16. Those actions prompted the Petitioner to file his Advocate-Client Bill of Costs in three (3) matters he was then handling on behalf of the 2nd Interested Party. He further took lien of the monies overtime received by him from the Judgment-Debtor to secure payment of his fees. It was his intention that



- once the Bills of Costs were assessed, he would offset any monies owed as his legal fees and reimburse any surplus therefrom.
17. The complaint filed against the Petitioner was forwarded to the Advocates Disciplinary Tribunal (hereinafter referred to as “the Tribunal”). Consequently, in March 2015 the Petitioner was summoned in Disciplinary Tribunal Case Number 133 of 2017 (hereinafter referred to as ‘the Tribunal case’) for a mention. He discovered that while perusing the complaint, the same had been filed by the 1st Interested Party, who described that he was filing the complaint in his capacity as the son of the 2nd Interested Party.
 18. Meanwhile, the 2nd Interested Party in April 2019 visited the Petitioner’s Chambers accompanied by Christopher Okolo. The Petitioner was instructed, vide a letter dated 08th April, 2019, to halt any further payments to the 1st Interested Party. This letter was prepared by the said Christopher Okolo and copied to the Tribunal, requesting a stay of the Tribunal proceedings.
 19. During the course of that meeting, the Petitioner was informed that the Interested Parties had fallen out. The 2nd Interested Party further disclosed that the 1st Interested Party knavishly lodged the complaint at the Tribunal without the 2nd Interested Party’s approval. He then guised himself as the Decree-Holder in HCCC No. 39 of 2011.
 20. The Petitioner thereafter, and with incredulity, informed that on 27th July, 2021 at noon, he received a requisition from the DCI Trans Nzoia summoning him. He attended their offices on 3rd August, 2021. The outcome of the meeting directed the Petitioner to forward Kshs. 3,000,000.00 to the 2nd Interested Party. He confirmed to have actioned in the affirmative. Later on, judgment was entered in the Tribunal case on 16th August, 2021 in favour of the complainant.
 21. The Petitioner further posited that the 2nd Interested Party on 17th September, 2021 filed an application in the Tribunal case seeking substitution as the rightful complainant. He accused the Petitioner of colluding with the 1st Interested Party to defraud him. That application was allowed on 7th February, 2022 paving way for sentencing and mitigation.
 22. While all this was transpiring, the Petitioner alleged that he discovered that the 2nd Respondent drew charges against him vide its letter dated 23rd March, 2022. It was the 1st Respondent’s intention to have the Petitioner apprehended and charged with Conspiracy to commit a felony contrary to Section 393 of the Penal Code and Stealing by agent contrary to Section 268 (1) as read together with Section 282 (b) of the Penal Code.
 23. The Petitioner in toto, denied the allegations premised by the 2nd Interested Party. He challenged that no documentary evidence was placed before this Court to support any allegations made against him. He maintained that he has up to date released Kshs. 6,211,000.00 to the Interested Parties. The balance of the funds continues to be withheld in compliance with the decision of the Tribunal to wit granted him leave to retain any balance as his taxed costs once all the three (3) Bills of Costs were assessed.
 24. The Petitioner now approached this Court in view of the foregoing. He was emphatic that the actions of his adversaries are met with ulterior impetus with a view to punishing him for acting at the behest of the 2nd Interested Party.
 25. He added that the Respondents were using their powers unfairly to arm twist him. He maintained that he had a reserved right to retain the 2nd Interested Party’s funds as lien to recover his fees. That, he would only discharge any surplus once all his bills of costs have been taxed.
 26. The Petitioner cited breaches of the following provisions of *the Constitution*: -



1. Article 29(a) for being arraigned in Court without just cause;
 2. Article 47 since the 1st Respondent's decision to charge the Petitioner is unlawful by dint of Section 80 of the Advocates Act. He adds that the decision is unreasonable and unprocedural.
 3. He is apprehensive that Article 48 will be breached if the current Petition is not heard and determined before effectuation of his contingent arrest.
27. It is on the basis of the foregoing that the Petitioner sought the following reliefs: -
1. A declaration by this Honourable Court that the intended arrest, arraignment and prosecution of the Petitioner in relation to his representation of the 2nd Interested Party in court as per the 1st Respondent's decision to charge contained in the 1st Respondent's letter dated 23/03/2022 to the 2nd Respondent is an infringement and affront to the Constitution of Kenya and an infringement of the Petitioner's rights under Articles 29(a), 47 and 48 of the Constitution of Kenya;
 2. An order of prohibition to prohibit the 1st and 2nd Respondents and prevent them from arresting, arraigning and/or prosecuting the Petitioner in any Court pursuant to the decision to charge contained in the 1st Respondent's letter dated 23/03/2022 and in respect of his representation of the 2nd Interested Party in Court.
 3. Costs and interests.
28. Given that the rest of the parties opposed the Petition, the Court will now consider their respective responses.

The Respondents' case:

29. The Respondents filed a joint Affidavit in Reply on 12th May, 2022. In it, they disclosed that on 25th October, 2005, the 2nd Interested Party purchased 39 acres on L.R. No. 88994/20 Saboti Farm from Benjamin Nyamumbo Oonga for the sum of Kshs. 7,360,000.00.
30. However, a dispute arose prompting the 2nd Interested Party to engage the services of the Petitioner in his capacity as Advocate. It was not disputed that the 1st Interested Party introduced the Petitioner to the 2nd Interested Party.
31. It was then rehashed that judgment was entered in favour of the 2nd Interested Party in the sum of Kshs. 7,360,000.00 plus interest at Kshs. 2,900,000.00 following the filing of HCCC No. 39 of 2011.
32. The Judgment Debtor, Benjamin Nyamumbo Oonga through Messrs. J. M. Wafula & Company Advocates wired Kshs. 2,900,000.00 to the Petitioner's Account for onward transmission to the 2nd Interested Party. He then subsequently transferred a sum of Kshs. 7,000,000.00 through Messrs. Kiarie & Company Advocates to the Petitioner.
33. The Respondents maintained that while the Petitioner received a total sum of Kshs. 9,900,000.00 from the Judgement-Debtor, those funds were never transmitted to the 2nd Interested Party hence the complaints lodged at the police and the Advocates Disciplinary Committee. It was the Respondents' conclusion that the Petitioner was in breach of the agency relationship he had shared with his quondam client.
34. The Respondents added that the Petitioner admitted in his statement recorded on 15th July, 2021, that he covertly remitted, from the sums received from the Judgment-Debtor, a sum of Kshs. 4,000,000.00



to the 1st Interested Party. This, coupled with the fact that the Petitioner's legal fees to the tune of Kshs. 570,000.00, were settled in full by the 2nd Interested Party.

35. The Respondents maintained that the Petitioner, with further intent on depriving the 2nd Interested Party's right to enjoy the fruits of his judgment, filed several Bills of costs totalling Kshs. 8,000,000.00 yet his fees had been paid in full. In his statement dated 21st July, 2021, the 1st Interested Party admitted that he authored some 'Authority for Payment' instructions note with a view to receiving money on behalf of the 2nd Interested Party. He, however, stated that he did not receive any funds to that end.
36. The Respondents further reiterated that the Petitioner was convicted of professional misconduct in the Tribunal case and ordered to pay the 2nd Interested Party as per the judgment. It was based on the foregoing, and in good faith, that the Respondents levelled charges as delineated above herein against the Petitioner and the 1st Interested Party.
37. The Respondents deposed that the drawn charges were in line with the dictates of Article 157 of *the Constitution*. That, this Court could only intervene in exceptional circumstances as to where it is ascertained that the charges were drawn unlawfully, illegally, null and void, in bad faith or for political gain.
38. The Respondents were adamant that in light of the above reasons, the charges levelled were proper and the Petition did not fall within those exceptions.
39. They added that public interest militated towards protecting the Respondents' mandate of preferring charges against the Petitioner and the 1st Interested Party. Be that as it may, the accused persons will have ample opportunity to raise their defences since they are presumed innocent until the matter is determined.
40. The Respondents furthered that Article 165 of *the Constitution* does not invoke this Court's supervisory jurisdiction to consider, review or evaluate whether the evidence by the Respondents is sufficient to sustain a prosecution. The Petition was thus a red-herring as the allegations raised herein amount to a defence.
41. They urged this Court to detach itself from clogging a lawful process and allow the continuation of the criminal proceedings. For those reasons, they beseeched this Court to find that the Petition was frivolous, speculative and devoid of truths.

The 1st Interested Party's case:

42. The 1st Interested Party intimated that he swore two Affidavits in opposition to the Petition. However, this Court has only benefited from the one sworn on 28th September, 2022.
43. The 1st Interested Party denied that he was regularly disbursed sums of money by the Petitioner on behalf of the 2nd Interested Party. He confirmed that he only received several sums of money from the Petitioner but in settlement of fees arising out of services rendered from a company belonging to the Petitioner and 1st Interested Party.
44. He, therefore, urged that the Petition was a waste of Court's time and that the 2nd Interested Party was entitled to the sums owed by the Petitioner.

The 2nd Interested Party's case:

45. The 2nd Interested Party filed a Replying Affidavit on 27th April, 2022. It raised forty-six (46) prolix depositions in opposition to the Petition.



46. He raised frivolity on the Petition which made general observations on issues which were raised and canvassed in the Tribunal Case arising out of a complaint emanating from a judgment and decree in his favour in HCCC No. 39 of 2011.
47. While conceding that he was aware the judgment sum was remitted to the Petitioner, he maintained that he has never been in receipt of the funds. Furthermore, he never authorized any payments to be made in favour of the 1st Interested Party or its affiliates. He further denied executing or drawing a letter of authority allowing the Petitioner to transfer funds to the favour of the 1st Interested Party. He further denied instructing the 1st Interested Party to lodge a complaint at the Advocates Complaints Commission.
48. The 2nd Interested Party pitted out that following the judgment entered in the Tribunal case, the 1st Interested Party filed, ten (10) days later, an Affidavit confirming that the 2nd Interested Party, and not him, was the complainant. The Affidavit further disclosed that the total sums of Kshs. 3,200,000.00 was paid to the 1st Interested Party by virtue of a private treaty he entered with the Petitioner. Consequently, those payments did not form part of the judgment debt thereby exposing the cahoots mannerisms the Petitioner and the 1st Interested Party engaged in.
49. Citing the foregoing transgressions, the 2nd Interested Party filed a complaint with the police. He cited that as per the 1st Interested Party's admission in his statement recorded, he lacked authority to draw a letter of authority since he did not act at the 2nd Interested Party's behest. The 2nd Interested Party additionally clarified that the 1st Interested Party was not his son.
50. The 2nd Interested Party deposed that the Petitioner admitted that he unlawfully withheld Kshs. 9,900,000.00 from the 2nd Interested Party. On the intervention of the police, the Petitioner transferred Kshs. 3,000,000.00 to the 2nd Interested Party on 3rd August, 2021 leaving a balance of Kshs. 6,900,000.00. The Petitioner further undertook to settle further payments on or before 31st August, 2021 but failed to honour such obligations.
51. He added that the above actions, including the purported transfer of funds to the favour of the 1st Interested Party and/or its affiliates amounted to impersonification, colluding and forgery; the subject of the criminal charges levelled against the Petitioner and the 1st Interested Party.
52. The discovery of the above facts compelled the 2nd Interested Party to visit the Petitioner in his Chambers on 8th April, 2019. He was accompanied by his son Christopher Okolo. On that very day, the 2nd Interested Party instructed his son to draft a letter to the Petitioner and the Law Society of Kenya disclosing protest in the complaint lodged by the 1st Interested Party. He further directed the Petitioner to halt any further payments to the favour of the 1st Interested Party.
53. Thereafter, the 2nd Interested Party filed an application before the Tribunal seeking enjoinder in the proceedings to further demonstrate that the 1st Interested Party was an imposter. The 2nd Interested Party was successfully substituted as the complainant on 16th August, 2021 in lieu of the 1st Interested Party.
54. In response to the taxation claims, the 2nd Interested Party disclosed that the only taxation proceedings arising out of the subject complaint was taxed at Kshs. 412,439/= on 11th October, 2016. He affirmed that he had already paid Kshs. 570,000/= in legal fees to the Petitioner.
55. The 2nd Interested Party posited that the preliminary police findings revealed the commission of various offences by the Petitioner and 1st Interested Party. He maintained that the charges preferred were well founded and within constitutional prerogatives.



56. The 2nd Interested Party concluded the said Petition was wanton, disgraceful and dishonourable since the decisions in the Tribunal had never been set aside. Consequently, the purported violation of Section 80 of the [Advocates Act](#) was unfounded, misleading and a misapprehension.
57. The 2nd Interested Party accused the Petitioner of taking advantage of his senility to deny him to enjoy the fruits of his judgment. He added that his attempts to explore an out of court settlement with the Petitioner on 20th March, 2022 were met with futility.
58. He urged this Court to dismiss the Petition and the application for the reasons, inter alia, that the Petitioner is guilty of material non-disclosure.

The Parties' Submissions:

59. The parties filed their respective written submissions in support of their rival positions.
60. The Petitioner's submissions were filed on 5th July, 2022. He reiterated the contents deciphered in his pleadings. He urged this Court to allow the Petition.
61. The Respondents filed their joint written submissions on 4th June, 2022. They pointed out that while this Court, under Article 165 (6) of [the Constitution](#), can exercise a supervisory role over the Respondents, the present Petition failed to demonstrate any basis for invoking the same. They urged that this was a criminal matter that should be left to a criminal court. Consequently, this Court was urged to dismiss the Petition in its entirety and pave way for criminal proceedings.
62. The 1st Interested Party filed his submissions on 28th September, 2022. He submitted that the issues raised in the Petition amounted to a defence. Consequently, this Court lacked jurisdiction to determine the subject dispute.
63. He further submitted that the Petition failed to disclose the constitutional breaches allegedly complained of. He urged a dismissal of the Petition in its entirety.
64. The 2nd Interested Party filed his submissions on 22nd June, 2022. He submitted that the Petition was incompetent as it failed to meet the standard threshold. Additionally, the Petitioner was in breach of the doctrine of exhaustion unearthing that the present suit is inviting this Court to sit on appeal disguised as a Petition. He added that the Petitioner could well make the arguments preferred herein in the intended criminal proceedings.
65. The 2nd Interested Party continued that the Petition offended the doctrine of separation of powers and constitutional supremacy as it invited this Court to interfere with the powers of constitutionally established creatures. He dismissed the Petitioner's allegations that Section 80 of the [Advocates Act](#) ought to be complied with since the intended charges were criminal in nature and not professional misconduct. Finally, he submitted that Petitioner failed to demonstrate that Articles 29 (a), 47 and 48 of [the Constitution](#) had been infringed.

Analysis:

66. This Court has carefully considered the material on record. Accordingly, it has discerned the following issues for discussion: -
 - a. Whether the Petition raised any constitutional issues.
 - b. Whether the 1st Respondent's decision to prefer charges against the Petitioner contravenes Articles 29(a), 47 and 48 of [the Constitution](#).



67. As a precursor, suffice to remind ourselves that *the Constitution* is a solemn and sacred instrument which inter alia guarantees people's rights and fundamental freedoms as well as appropriate legal redresses in protecting *the Constitution* itself and the said rights and fundamental freedoms.
68. Perhaps the sovereignty of the people, guaranteed under Article 1 of *the Constitution*, seals that guarantee that a litigant can invoke this Court's supervisory role established under Article 165 of *the Constitution*. This is indeed a calling on this Court to uphold and defend *the Constitution* as structured in Article 3 of *the Constitution*. Ultimately, a breach of *the Constitution* or any of the human rights and fundamental freedoms is shunned and condemned.
69. With such a curtain-raiser, the Court will now deal with the issues delineated above.

a. Whether the Petition raised any constitutional issues:

70. As captured above, the Respondents and Interested Parties took a common stand against the Petition. One of the salvos was the competency of the Petition.
71. A party alleging violation of constitutional rights must demonstrate to the Court with reasonable precision, spelling out the relevant breaches in *the Constitution* with full particulars, and how those breaches were committed. This has remained the aphorism as set out in Anarita Wairimu Njeru vs. Republic [1976-80] KLR 1272.
72. In that same vein, the locus classicus Court of Appeal decision in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR elaborated the standard of proof in constitutional Petitions as follows: -

...The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before



it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent...

73. And, the Apex Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR had the following to say: -

Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

74. Going by the above legal principles and jurisprudence, it is not sufficient for a party to only allege or cite that an Article of *the Constitution* was breached. It is incumbent upon the indignant person to demonstrate the manner in which those cited provisions were allegedly violated or threatened with violation.
75. In this matter, the Petitioner contended that the Respondents were in breach of Articles 29(a), 47 and 48 of *the Constitution*. To the contrary, the Petitioner’s adversaries unanimously submitted that the Petitioner had failed to demonstrate how the cited provisions of *the Constitution* were breached.
76. Article 29 (a) of *the Constitution* guarantees that every person has the right to freedom and security including the right not to be deprived of freedom arbitrarily without just cause. Article 47 guarantees the right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action. Furthermore, any right or fundamental freedom likely to be adversely affected by an administrative action requires that written reasons be supplied in justification for the action. Article 48 requires the state to ensure access to justice for all persons.
77. The Petitioner contended that the Respondents were in breach of Article 29(a) of *the Constitution* as he will be arraigned in Court without just cause, Article 47 for the decision to charge him is unlawful by dint of Section 80 of the *Advocates Act* and Article 48 which apprehension is founded upon being incarcerated before this Petition is determined.
78. The question at this juncture is not on the merits otherwise of the Petition but rather whether the Petitioner has ably demonstrated how the Respondents have committed the infringements from the cited provisions of *the Constitution*.
79. In light of the above, this Court finds that the Petitioner has met the threshold set out in *Anarita Wairimu Njeru vs. Republic* case (supra). The Petitioner explained the manner in which the cited provisions were allegedly infringed.
80. Having so held, a determination of the rest of the issues follow.

(b) Whether the 1st Respondent’s decision to prefer charges against the Petitioner contravenes Articles 29(a), 47 and 48 of *the Constitution*:

81. The facts in support of the parties’ positions on this issue have been well captured above.



82. In sum, the Petitioner posited that the Respondents were in violation of their constitutional mandate when they preferred charges against him. He was emphatic that the intended arrest, arraignment and prosecution as per the 1st Respondent's decision to charge, was an infringement of Articles 29 (a), 47 and 48 of *the Constitution*.
83. In seeking declaratory orders in that aspect, the Petitioner urged this Court to accordingly prohibit his arrest, arraignment and prosecution.
84. The rest of the parties are diametrically opposed to the Petitioner's averments.
85. The resolution of this issue calls for a scrutiny of the legal regime giving the 1st and 2nd Respondents the mandate to investigate offences and to prosecute those culpable and whether they exercised those powers within the constitutional and legal limits.
86. This Court has previously and so broadly discussed this issue in Nairobi High Court Constitutional Petition No. E033 of 2021 Maura Muigana vs. Stellan Consult Limited & 2 Others (unreported) and also in Nairobi High Court Constitutional Petition No. E216 of 2020 Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR.
87. As part of the introduction to the subject in Maura Muigana vs. Stellan Consult Limited & 2 Others case (supra), this Court acknowledged the many writings by legal scholars and decisions by Courts and appreciated that whereas it would have been desirable to come up with all the marvellous work on the issue in a 'one-stop shop', that was a tall order given the time constraints and the need for expeditious disposal of cases. The Court, however, rendered a concise discussion on the subject.
88. The Court then traced the legal basis of the exercise of prosecutorial powers in Kenya to *the Constitution* and the law. Article 157 of *the Constitution* establishes the Office of the Director of Public Prosecutions as under: -
1. There is established the office of Director of Public Prosecutions.
 2. The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.
 3. The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.
 4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
 5. The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.
 6. The Director of Public Prosecutions shall exercise State powers of prosecution and may--
 - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and



- c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
 7. If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.
 8. The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.
 9. The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
 10. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
 11. 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.
 12. Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.
90. There is, as well, the Office of Director of Public Prosecutions Act No. 2 of 2013 (hereinafter referred to as 'the ODPP Act'). It is an Act of Parliament aimed at giving effect to Articles 157 and 158 of *the Constitution* and other relevant Articles of *the Constitution* and for connected purposes. The ODPP Act provides in Section 4 the guiding principles in prosecution of cases as follows:
- (4) In fulfilling its mandate, the Office shall be guided by *the Constitution* and the following fundamental principles—
 - (a) the diversity of the people of Kenya;
 - (b) impartiality and gender equity;
 - (c) the rules of natural justice;
 - (d) promotion of public confidence in the integrity of the Office;
 - (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
 - (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
 - (g) protection of the sovereignty of the people;
 - (h) secure the observance of democratic values and principles; and
 - (i) promotion of constitutionalism.
91. The ODPP Act, among other statutes, variously provide for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers by the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed.



92. Article 239 of *the Constitution* provides for the national security organs. They include the National Police Service. The primary object of the national security organs and security system is to promote and guarantee national security in accordance with the principles mentioned in Article 238(2).
93. Article 243 of *the Constitution* establishes the National Police Service. Under Article 244, *the Constitution* provides the objects and functions of the National Police Service as follows: -
- (a) strive for the highest standards of professionalism and discipline among its members;
 - (b) prevent corruption and promote and practice transparency and accountability;
 - (c) comply with constitutional standards of human rights and fundamental freedoms;
 - (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
 - (e) foster and promote relationships with the broader society.
94. The National Police Service is under the command of the Inspector-General of Police. The manner in which the Inspector-General of Police is to carry out its mandate is provided for under Article 245(2) (b) and (4) of *the Constitution* as follows: -
1. The Inspector General –
 - a.
 - b. shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
 4. The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector General with respect to—
 - (a) the investigation of any particular offence or offences;
 - (b) the enforcement of the law against any particular person or persons; or
 - (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
 5. Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.
95. Article 157(4) of *the Constitution* provides that: -
- The Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
96. The independence of the Inspector-General of Police is constitutionally-insulated from any form of interference or directional command. Apart from the Director of Public Prosecutions and only to the extent so provided, no other person, body or entity has the power to give any form of directives to the 2nd Respondent on how to discharge its functions. The position is further ring-fenced in that even the power donated to the Cabinet Secretary under Article 254(4) of *the Constitution* to issue any directives to the Inspector-General of Police is only limited to policy issues.



97. Pursuant to the provisions of Article 239(6) of *the Constitution*, The *National Police Service Act*, No. 11A of 2011 (hereinafter referred to as 'the Police Act') was enacted on 30th August, 2011. It is an Act of Parliament to give effect to Articles 243, 244 and 245 of *the Constitution*; to provide for the operations of the National Police Service; and for connected purposes.

98. Sections 24, 27 and 35 of the Police Act variously provide for the functions of the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations respectively as follows: -

24. The Functions of the Kenya Police Service

The functions of the Kenya Police Service shall be the—

- a. provision of assistance to the public when in need;
- b. maintenance of law and order;
- c. preservation of peace;
- d. protection of life and property;
- e. investigation of crimes;
- f. collection of criminal intelligence;
- g. prevention and detection of crime;
- h. apprehension of offenders;
- i. enforcement of all laws and regulations with which it is charged; and
- j. performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

27. The Functions of the Administration Police Service

The functions of the Administration Police Service shall be the—

- (a) provision of assistance to the public when in need;
- (b) maintenance of law and order;
- (c) preservation of peace;
- (d) protection of life and property;
- (e) provision of border patrol and border security;
- (f) provision of specialized stock theft prevention services;
- (g) protection of Government property, vital installations and strategic points as may be directed by the Inspector-General;
- (h) rendering of support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties;
- (i) co-ordinating with complementing Government agencies in conflict management and peace building;
- (j) apprehension of offenders;



- (k) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

35. Functions of the Directorate

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 perform any other function conferred on it by any other written law.

99. The above is the constitutional and statutory regime within which the Respondents must exercise their various powers. Suffice to say that the manner in which the Respondents ought to exercise such powers has been, over time, subject of many Court decisions.

100. For instance, the Supreme Court in *Petition No. 38 of 2019 Cyrus Shakhlanga Khwa Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR discussed some of the applicable parameters. On whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the Director of Public Prosecutions contrary to *the Constitution*, the Supreme Court stated as follows: -

(79) The High Court in its finding, prohibited the Respondents from proceeding with any criminal proceedings against the Appellant in relation to the suit property or any subject matter and transaction connected to the suit property. The Court of Appeal reversed this judgment by holding that the High Court had interfered with the discretion given to the Director of Public Prosecutions (DPP) to initiate and conduct prosecution. Essentially, the Court of Appeal found that the High Court went against public interest in preventing investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property and that the learned Judge interfered with the prosecutorial mandate of the DPP to decide on whether to charge or not to charge an individual.

[80] The 5th, 6th and 7th Respondents on their part, maintain the position that the decision to commence investigations against the Appellant was consistent with the provisions of Article 157 of *the Constitution* and Section 6 of the Office of Director of Public Prosecutions Act. They also submitted that the decision to institute criminal proceedings by the DPP is discretionary



and that such exercise of power is not subject to the direction or control by any authority as provided for under Article 157(10) of *the Constitution*.

(81) Under Article 157(6) of *the Constitution*, the DPP is mandated to institute and undertake criminal proceedings against any person before any Court. Article 157(6) provides as follows:

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”

Article 157(4) provides that:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

However, Article 157(11) stipulates that:

(11) 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.

(82) Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of Article 157(11) have not been met, then the High Court under Article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.

(83) In that regard, the Court of Appeal in the case of *Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 Others* [2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power and held that: -

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by



stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v. R.*[2002] 1EA 205. See also *Kuria & 3 Others V. Attorney General* [2002] 2KLR. (emphasis supplied)

- (84) Furthermore, the Supreme Court of India in *R.P. Kapur v State of Punjab* AIR 1960 SC 866 laid down guidelines to be considered by the Court on when the High Court may review prosecutorial powers. They 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; or
 - (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; or
 - (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; or
 - (IV) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.
- (85) We are persuaded that this is a good guide in the interrogation of alleged abuse of prosecutorial powers and read alongside Article 157(11) of *the Constitution*, we have sufficiently expressed ourselves elsewhere in this Judgment to show that the unconstitutional continuance of the criminal proceedings against the Appellant amounts to abuse of Court process and that, balancing the scales of justice, the weight would favor the Appellant and not the Respondents.
101. On public interest, the Supreme Court expressed itself as follows:
- (86) On public interest, what is in issue is a dispute arising from a commercial transaction 24 years ago where the complainants have not denied receiving part payment of the purchase price. There is hardly any public interest element in such a transaction save the wide interest of the law to apprehend criminals.
- (87) The learned Judge of the High Court, in our view, was well within his mandate under Article 165(3)(d)(ii) as read with Article 157(11) of *the Constitution* to curtail the Appellant's prosecution and the DPP'S powers have not in any way been interfered with, outside the constitutional mandate conferred on the High Court.
102. This Court summed up the instances in which a Court may intervene and stop any prosecutions against a person in *Maura Muigana vs. Stellan Consult Limited & 2 Others* case (supra) as follows: - demonstrated that: -
- (i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;
 - (ii) Where the quashing of the impugned proceedings would secure the ends of justice;



- (iii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
 - (iv) 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;
 - (v) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.
 - (vi) The prosecution is not in public interest;
 - (vii) The prosecution is not in the interests of the administration of justice;
 - (viii) The prosecution is oppressive, vexatious and an abuse of the court process;
 - (ix) The prosecution amounts to a breach of rights and fundamental freedoms;
 - (x) The investigation and prosecution amounts to abuse of power and discretion and is aimed at achieving an ulterior or improper motive;
 - (xi) The investigation and the prosecution are tainted with illegality, irrationality and procedural impropriety;
 - (xii) The investigation and prosecution is in gross contravention of *the Constitution* and the law;
103. It is, therefore, not contested that Courts have the powers to speak against a prosecution. However, in doing so, a Court must not lose focus of the required balance created by *the Constitution* and the law to the extent that lawful organs must be accorded space to discharge their mandates and that in doing so, such discharge must be within *the Constitution* and the law.
104. In this case, the Petitioner alleged infringement of Articles 29(a), 47 and 48 of *the Constitution* by the Respondents.
105. The rights and fundamental freedoms enumerated in Articles 29(a), 47 and 48 of *the Constitution* are not absolute. They can be limited within *the Constitution* and the law. In other words, they are not among the rights and fundamental freedoms which cannot be in any way limited under Article 25 of *the Constitution*.
106. Article 29(a) of *the Constitution* relates to the non-deprivation of the right to freedom and security of a person arbitrarily and without a just cause.
107. As stated earlier above, the decision to charge the Petitioner was arrived at after the police undertook investigations after they received a complaint from the 2nd Interested Party. They interviewed potential witnesses and recorded statements. The Petitioner was, as well, interrogated and recorded his statement.
108. Upon conclusion of the police investigations, the matter was referred to the 1st Respondent for the way forward. The 1st Respondent reviewed the evidence and was satisfied that indeed offences were established. It then gave its consent for the Petitioner's prosecution.
109. The Respondents based their findings and actions on the investigation undertaken. On his part, the Petitioner did not specifically fault either of the Respondents in the manner in which they variously discharged their duties. There is no allegation that the 1st Respondent acted contrary to Article 157(10) or (11) of *the Constitution*.



110. There was, however, an allegation that the Respondents were acting contrary to Section 80 of the [Advocates Act](#). The provision states as follows: -

80. Betrayal of trust:

Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence:

Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of Section 61.

111. This Court's response to the Petitioner's contention is three-fold. First, Section 80 of the [Advocates Act](#) creates a specific offence known as betrayal of trust. That offence is different from other offences in say the Penal Code and other statutes.

112. Second, there is no evidence that the Petitioner was to be charged in relation to being in breach of Section 80 of the Advocates. Third, the Petitioner did not enjoin the Attorney General in the Petition.

113. The upshot is, hence, that the contention that Section 80 of the [Advocates Act](#) amounts to a bar to the intended prosecution does not hold in the unique circumstances of this case.

114. This Court now finds and hold that the Petitioner has not demonstrated any infringement of Article 29(a) of [the Constitution](#).

115. Article 47 of [the Constitution](#) is on fair administrative actions. Sub-Articles 1 and 2 states as follows: -

- (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.

116. Section 2 of the Fair Administrative Actions Act defines an 'administrative action' as follows: -

"administrative action" includes–

- (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;

117. The decision to charge the Petitioner was, hence, an administrative action since it affected his legal rights. In such a case, the Respondents were called upon to comply with Article 47 of [the Constitution](#) and the provisions of the Fair Administrative Actions Act and ensure that the decision passed the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

118. Speaking to Article 47, the Court of Appeal in Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR held that: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and



other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

119. The South African Constitutional Court in *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98* 2000 (1) SA 1 ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

120. The right was further discussed in *Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti* [2018] eKLR. The Court had the following to say:

25. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*[39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

- a. Illegality - Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.
- b. Fairness - Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.
- c. Irrationality and proportionality - The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*:



If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

121. Returning to the matter at hand, the Court will now ascertain whether the decision to charge the Petitioner complied with the lawfulness, reasonableness and procedural fairness requirements.
122. On lawfulness, there is no doubt that *the Constitution* and the law accords the Respondents the responsibility of undertaking investigations on complaints and making the decision to charge as well as to prosecute criminal cases.
123. In relation to whether the decision was unreasonable or arbitrary, I will refer to the Court of Appeal in *Malindi Civil Appeal 56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR where the Court referred to the Black's Law Dictionary 8th Edition on the definition of arbitrariness, and as follows: -

.... in it connotes a decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts.
124. The High Court in *Civil Suit No. 3 of 2006 Kasimu Sharifu Mohamed vs. Timbi Limited* [2011] eKLR referred to Oxford Advanced Learner's Dictionary A. S. Horby Sixth Edition Edited by Sally Wehmeiner which defines the term 'arbitrary' in the following way: -

..... the term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair.
125. The Supreme Court of China in *Sharma Transport vs. Government of A. Palso* (2002) 2 SCC 188 had the occasion to interrogate the meaning and import of the term 'arbitrarily'. The Court observed as follows: -

... The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.
126. The term 'arbitrariness' had earlier on been defined by the Court (Supreme Court of China) in *Shrilekha Vidyarthi vs. State of U.P* (1991) 1 SCC 212 when it comprehensively observed as follows;

The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.
127. As stated elsewhere above, the 2nd Respondent undertook investigations and the 1st Respondent reviewed the evidence and made the decision to charge the Petitioner. The manner in which the impugned decision was arrived at was on the basis of evidence gathered from witnesses who are willing



- to testify before Court. There were no allegations that the evidence was otherwise illegally obtained, neither were the investigations not founded in the nature of things, were irrational, not done or acting according to reason or judgment nor was there any allegation that the decision to charge the Petitioner was not based on the law, but on personal and whimsical sole will of the 1st Respondent.
128. It is, therefore, the finding of this Court that the decision to charge the Petitioner was not unreasonable.
129. On procedural fairness, there is evidence that the Petitioner was summoned by the 2nd Respondent and made aware of the investigations. He then recorded a statement. The Petitioner cannot then fault the investigative process for procedural unfairness.
130. The other issue is whether the administrative action in making the decision to charge by the 1st Respondent was communicated to the Petitioner in writing.
131. The Respondents did not state that they forwarded the decision to the Petitioner. However, the Petitioner annexed a copy of the 1st Respondent's letter dated 23rd March, 2022 addressed to the CCIO Kitale communicating the impugned decision in his pleadings.
132. It, hence, means that whereas the Respondents failed to give the Petitioner written reasons for the impugned decision, the Petitioner nevertheless obtained a copy of the letter containing the reasons and in fact used the same to support the Petition.
133. This Court, therefore, finds and hold that the Petitioner was well aware of the reasons for the impugned decision. Perhaps, it is important to emphasize the need to abide by the constitutional requirement that written reasons be given once administrative decisions which are likely to adversely affect any human right or fundamental freedom of a person are made.
134. One way of fulfilling that requirement is for the Prosecutor to copy the letter communicating the decision to charge to all those likely to be adversely affected by the decision. Another way is for the Prosecutor to formally write to the parties likely to be adversely affected.
135. Having said so, and deriving from the foregoing, this Court finds that the Petitioner failed to prove any infringement of the rights enshrined in Article 47 of *the Constitution*.
136. The other challenge was on the infringement of Article 48 of *the Constitution*. The provision is on the right to access to justice. It states as follows: -
48. Access to justice:
- The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.
137. The Petitioner contended that his right to access justice was to be infringed if he was to be charged before the hearing and determination of the Petition. Truly, the Court granted conservatory orders until the determination of the Petition.
138. In such a case, and given that the Petition is now for determination, the Petitioner cannot still hold to the contention on Article 48. In other words, the contention is now overtaken by events.
139. The upshot is, therefore, that the 1st Respondent's decision to prefer charges against the Petitioner did not contravene Articles 29(a), 47 and 48 of *the Constitution*.

Disposition:

140. In the end, the Petition is hereby determined in the following terms:



- a. The Petition dated 4th April, 2022 is hereby dismissed.
- b. The interim conservatory orders issued on 21st April, 2022 are hereby set-aside.
- c. The Petitioner shall bear the costs of the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 17TH DAY OF NOVEMBER, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for Mr. Otieno, Learned Counsel for the Petitioner.

No appearance for Mr. Odongo, Learned State Counsel instructed by the Honourable Attorney General for the Respondents.

Mr. Orumbo, Learned Counsel for the 2nd Interested Party.

No appearance for Elijah Oloo Amolo, 1st Interested Party in person.

Regina/Kirong – Court Assistants.

