



**Kariuki v Director of Public Prosecutions & another (Constitutional Petition E387 of 2021)
[2022] KEHC 17102 (KLR) (Constitutional and Human Rights) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E387 OF 2021**

AC MRIMA, J

DECEMBER 16, 2022

BETWEEN

LOISE KARIRA KARIUKI PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Loise Karira Kariuki is business woman dealing in bottle recycling along Kangundo Road in Nairobi.
2. In the course of her business transactions, she met one Martin Ng'ang'a Mwangi whom she agreed to set up the business of milling animal feeds.
3. For that purpose, they rented a Godown on Viken Thirty Industrial Park in LandReference No. 9363/2543 as co-tenants and accordingly executed the Rental Agreement with the proprietor, Stephen Mugo Muchemi.
4. It was agreed that as co-tenants, they would pay a deposit and 4 months' worth of rent, totalling to KShs. 750,000/-.
5. As it would be, the Petitioner solely paid the KShs.750,000/- on the agreement that Martin Ng'ang'a Mwangi would procure the milling machine for the business.
6. As fate would have it, 5 months later, Martin Ng'ang'a Mwangi failed to procure the milling machine. Consequently, they agreed to end the lease in respect of the Godown in Viken Thirty Industrial Park.



7. To that end, on 2nd April 2021, they executed a Management Agreement where the Petitioner relinquished her share, management and control of the property in favour of Martin Ng'ang'a Mwangi.
8. On 17th September 2021, the Petitioner was arrested and detained by the Director of Criminal Investigations, the 2nd Respondent herein, on the claim that she was in possession of uncustomed goods found in Viken Thirty Industrial Park, in contravention of East African Community Customs Management Act 2004.
9. Accordingly, Nairobi Chief Magistrates' Criminal Case No E1023 of 2021 (hereinafter 'The Criminal Case') was instituted against the Petitioner by the Director of Criminal Investigations, (hereinafter 'The DCI' or the 1st Respondent).

The Petition

10. Through the Petition dated 24th September 2021 supported by the Affidavit of Loise Karira Kariuki deposed to on the same date, the Petitioner approached this Court seeking to stop her prosecution.
11. Contemporaneously filed with the main Petition was the Notice of Motion Application (hereinafter 'The Application') supported by Affidavit of the Petitioner.
12. In the Application, the Petitioner sought among other prayers, interim conservatory orders restraining and staying the Director of Criminal Investigations from prosecuting her pending the hearing and determination of the application and the main Petition.
13. Upon hearing the Application and the main Petition on 17th December 2022, this Court ordered stay of plea taking in the Criminal Case since as at that time, it had not been taken, pending judgment.
14. In the main, the Petitioner pleaded that at the time of commission of the offence, she ceased having any rights or control over the premises where the uncustomed goods were found.
15. She pleaded that Mr. Mwangi was the solely responsible for the property, the damages, the claims and liabilities upon her exit from the tenancy agreement executed on 2nd April 2021.
16. The Petitioner posited that her questioning by the 2nd Respondent, taking of her finger prints and subsequent detention over the alleged office was done without any indication that the DCI attempted to seize, arrest, question or investigate the registered owners of the property or Mr. Ng'ang'a, whom she disclosed to them.
17. The Petitioner averred that her prosecution was imminent since a charge sheet had already been presented in the Criminal Court under Criminal Case No. E1023 of 2021.
18. It was her case that her impending prosecution was illegal and in contravention of the Constitution on the basis that, the decision to prosecute violated of her right to fair administrative action under Article 47 of the Constitution.
19. She pleaded that in absence of cogent and justifiable reasons, the 1st and 2nd Respondents ought not to have arrested her and as such, their actions fell short the requirement that administrative actions must be lawful, reasonable and procedurally fair.
20. The Petitioner further pleaded that her right to access justice, constitutionally guaranteed under Article 48 was violated as a result of her illegal arrest and detention.



21. In asserting her right to fair hearing under Article 50 of the Constitution, the Petitioner pleaded that the 2nd Respondent failure to avail information or documentation and reasons which they relied on to commence her prosecution ran counter her fair hearing rights.
22. The Petitioner pleaded that the 2nd Respondent did not accord her procedural fairness and the totality her prosecution was anchored in improper exercise of power.
23. The Petitioner further averred that the decision to prosecute her amounted to abuse of court process, prosecutorial powers and contrary to public interest and Article 244 of the Constitution as read with section 24 of the National Police Service Act which set out the objectives of Police Service and the obligation to protect life and property respectively.
24. On the foregoing factual and legal foundation, the Petitioner prayed for the following reliefs;
 1. An Order of Certiorari to remove into this Court for the purposes of quashing the criminal prosecution of the Petitioner in Nairobi Chief magistrates Court Criminal Case No. E1023 of 2021.
 2. An Order of Prohibition be and is hereby issued prohibiting the Respondents from proceeding with the prosecution of the Petitioner in Criminal Case No. E1023 of 2021.
 3. A permanent injunction restraining the 1st respondent from prosecuting the petitioner in respect of being found in possession of uncustomed goods stored at Viken Thirty Industrial Park, Land reference No. 9363/2543 contrary to section 200(d)(iii) of the East African Community Customs Management Act, 2004.
 4. Punitive damages for abuse of Court process, abuse of police power, unlawful arrest and detention.
 5. Costs and interest on prayer (3) above.
 6. Such other orders that this Honourable Court may deem expedient to meet the ends of justice.

The submissions

25. The Petitioner further urged her case through written submissions dated 2nd November 2021. From the outset, she stated that the conduct of the Respondents was not within the allowable limits set out in Article 24(1) of the Constitution.
26. She submitted that since the Respondents made no attempts to arrest the sole owner of the premises, the charge against her lacked in merit and were based on misinformation.
27. To demonstrate that the irrationality and unreasonableness of her prosecution, she referred to the case of *Musyoki Kimanthi -vs- Inspector General of Police & 2 Others* (2014) eKLR, where the High Court restated the position that it has inherent power to stop a prosecution that amounts to an abuse to court process, is oppressive and vexatious.
28. It was her case that her arrest was done by the 2nd Respondent even before ascertaining the important fact of ownership of the premises.



29. She reiterated that the alleged uncustomed goods were not in her possession and to that end, her arrest, detention and consequent prosecution was illegal.
30. The Petitioner faulted the Director of Public Prosecutions for approving and commencing criminal prosecution based on inadequate evidence.
31. In reference to the decision in Rosemary Wanja Mwariru & Other -vs- The Honourable Attorney General & Others (2013) eKLR it was her case that the prosecution abused the criminal process.
32. By stating that she gave the 2nd respondent a copy of the Management Agreement indicating her status in relation to the premises, it was her position that there was exculpatory evidence but decided to prosecute her anyway contrary to section 2 and 3(ii)(a)(L) of the the National Prosecution Policy.
33. She further impugned the 2nd Respondents decision to prosecute submitting that it commenced when investigations were still ongoing.
34. In demonstrating that they had justified the prayed on the Petition, it was submitted that in what appears to be rectification of their mistakes, the Respondents had apprehended the right culprits.
35. In conclusion it was her submission that her prosecution was lacking in justification and was vexatious and was deserving of the orders sought as was held in Republic -vs- Director of Public Prosecutions & 2 Others Evanson Miriuki (Interested Party) Ex-Party James M. Kahumbura (2019) eKLR.

The Respondents' Case

36. The Director of Public Prosecutions and the Director of Criminal Investigations opposed the Petition through the Replying Affidavit of No. 237540 IP Reuben Wanyonyi, the Investigating Officer attached to Kenya Revenue Authority, deposed to on 15th October 2021.
37. He deposed that officers from DCI parklands reacted to a tip off on 7th September 2021 on uncustomed ethanol at a Godown in Viken Thirty Industrial Park where upon searching the premises, recovered liquid substance suspected to be ethanol.
38. It was his case that due to the nature of the goods they invited officers from Kenya Revenue Authority to take over .
39. He deposed that he received technical report from one George Barisa where he established from the collected sample that the substance was ethanol of dutiable value of KShs. 53,737,580.06/-.
40. It was his deposition that upon pursuing the landlord of the premises, he established that Stephen Mugo Muchemi, the owner, had rented the premises to Martin Ng'ang'a Mwangi and the Petitioner herein for a period of five years, effective 1st November 2020, and to that end, the Petitioner paid Kshs. 750,000/- as deposit and two months' rent.
41. He deposed that since the Petitioner was party to lease, they organized an operation that led to her arrest on 17th September 2021 where she was booked to Capitol Hill Police Station vide OB No. 14/17/09/2021 and was released on Cash bail of Kshs. 200,000/-.
42. It was his deposition that the Agreement entered between the Petitioner and Martin Mwangi do not in any way extinguish the rights, privileges and obligations created in the rental agreement entered into between the two of them and the owner of the Godown.



43. On the foregoing information, it was his case that he forwarded the investigations file to the Director of Public Prosecutions where they formed an independent opinion that evidence on record was sufficient to charge both of them.
44. He deposed further that Martin Ng'ang'a and Julius Njoroge Mburu were arrested at the scene as primary suspects and were arraigned in Court on 15th September 2021 and charged in Chief Magistrates Criminal Case No. E1004/2021 and at that time the Petitioner was still at large.
45. Based on the foregoing sequence of event, he deposed that the 2nd Respondent did not infringe, violate or contravene the Constitutional rights alleged by the Petitioner.
46. It was his case that the accuracy and correctness of the evidence gathered can be ascertained at the trial court.
47. He deposed that the 1st Respondent's decision to charge was independently made pursuant to its powers under Article 157 of the Constitution and the Petitioner will have an opportunity to present her case at the trial court.
48. In conclusion he deposed that the High Court is not the forum for pretrial to determine sufficient of evidence for charging of suspects and that the Petitioner was abusing the process with the aim of interfering with the investigations and prosecution's mandate.
49. In the end he urged that the Petition be dismissed with costs.

The submissions

50. In its written submissions dated 16th November 2021, the Respondents amplified their case stating that the management agreement executed between the Petitioner and Martin Ng'ang'a on 2nd April 2021 did not void or invalidate the Rental Agreement.
51. It was therefore their case that the 2nd Respondent relied and properly so on the validity and enforceability of the Rental Agreement for the arrest of the Petitioner.
52. With respect to her prosecution, it was submitted that the 1st Respondent properly invoked its mandate under Article 157(6)(a) of the Constitution that entitles it to institute an undertake criminal proceedings against any person before any Court for any offence alleged to have been committed.
53. It was its case further that the 2nd Respondent was within its mandate in conducting investigations as arresting the Petitioner in accordance to Article 247 of the Constitution as read with section 35 of the National Police Service Act.
54. In reference to the decision in *Uwe Meixner & Another -vs- Attorney General (2005) eKLR* it was their case that correctness of evidence and facts gathered in investigation can be assessed and tested by the trial Court. In the case it was observed as follows;

“That the Petitioner Applicant may have a good defence to the complaint is a ground that ought not to be relied upon by a Court in Order to halt the bona fides criminal process of investigation and prosecution.”
55. The Respondents urged the Court not to allow the Petitioner to use the Court process to subvert the criminal justice system since they did not act outside the scope of their mandate as to deserve the order of mandamus or prohibition.



56. To buttress the foregoing, support was drawn from the decision in Kenya National Examination Council -vs- Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others and the one in Joram Mwenda Guantai -vs- The Chief Magistrate, Nairobi (2007) eKLR where in the latter it was observed;

“the issue as to prima facie case is an issue that should be and can be determined by the trial court. To grant prohibition orders will amount to fettering the execution of the trial Court.”

57. On the foregoing, it was urged that the Petition and the Application to be found to be without merit.

Issues for Determination

58. From the foregoing discourse, the issues that arise for determination are as follows;

- i. A general discussion prosecutorial powers and abuse of Court Process.
- ai. Whether the arrest, detention and institution of Nairobi Chief Magistrates’ Criminal Case No E1023 of 2021 against the Petitioner violated her rights under Article 47, 48 and 50 of the Constitution.

59. I will hence deal with the issues sequentially.

Analysis and Determination

- i. A general discussion prosecutorial powers and abuse of Court Process.

60. The powers and functions of the Prosecution are constitutionally statutorily delineated. Superior Courts have on their part given interpretation regarding the extent which those powers can be exercised.

61. In Nairobi High Court Constitutional Petition No. E033 of 2021 Maura Muigana vs. Stellan Consult Limited & 2 Others and 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, this Court endeavoured to discuss the foregoing as follows;

56. 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.

57. 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.

58. 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.

62. In Petition No. 38 of 2019 *CyrusShakhalanga Khwa Jirongo -vs- Soy Developers Ltd & 9 others* [2021] eKLR The Supreme Court spoke to the constitutional powers of the Director of Public Prosecution as provided for under Article 157 vis-à-vis the power of the High Court to stop prosecution. It observed 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.

62. On public interest, the 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.

63. With respect to the principles and guidelines attendant to prosecutorial powers, this Court, in *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)* case (supra) observed as follows;

91. Regarding the exercise of prosecutorial discretion by the Director of Public Prosecutions, the Court of Appeal in *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR stated as follows: -

(41)] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the Courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in *Mohit v Director of Public Prosecutions of Mauritius* [2006] 5LRC 234:



these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...

In *Regina v. Director of Public Prosecutions ex-parte Manning and Another* [2001] QB 330, the English High Court said partly at para 23 page 344:

At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.

Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.

(42)] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.

In *Ramahngam Ravinthram v Attorney General* (supra) the Court of Appeal of Singapore said at p. 10. Para 28:

however, once the offender shows on the evidence before the court, that there is a prima facie breach of fundamental liberty (that the prosecution has a case to answer), the prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At this stage the prosecution will not be able to rely on its discretion under Article 35(8) of the Constitution without more, as a justification for its prosecutorial decision.

92. The High Court in *Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others* [2019] eKLR had the following to say about the role of the Director of Public Prosecutions in prosecuting criminal offences: -

25. It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this Court cannot shirk its constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in *Nakusa vs. Tororei & 2 Others* (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that:

the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General* Miscellaneous Application No. 494 of



2003 is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.

93. Long before the advent of the Constitution of Kenya, 2010 the High Court in *R vs. Attorney General exp Kipngeno arap Ngeny Civil Application No. 406 of 2001* expressed itself as follows: -

.... Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognized, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognized lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual’s liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds....

94. It has also been well and rightly argued that, on the basis of public interest and upholding the rule of law, Courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. The Court of Appeal in *Diamond Hasham Lalji & another v Attorney General & 4 others (supra)* stated as follows: -

The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, inter alia, that persons reasonably ‘suspected of committing a crime are prosecuted and convicted,



punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by state and citizens.

95. The Court of Appeal in *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR referred to the Supreme Court of India in *State of Maharashtra & Others v. Arun Gulab & Others*, Criminal Appeal No. 590 of 2007, where the Court stated:

The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as “Cr.P.C.”) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.

96. The High Court in *Bernard Mwikya Mulinge* case (supra) expressed itself as follows: -

14. As has been held time and time again the Court ought not to usurp the constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon.....

97. In *Meixner & Another vs. Attorney General* [2005] 2 KLR 189 the Court stated as follows: -

The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the



Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution....

98. Mumbi Ngugi, J (as she then was), in *Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others* (2014) eKLR stated that:

The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated...

99. In *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR the Court held that:

... 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...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene....

100. Recently, the High Court in *Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties)* [2021] eKLR dealt with several instances where a Court may intervene and stop a prosecution. They include where: -

- (i) There is no ostensible complainant in respect to the complaint;
- (ii) The prosecution fails to avail witness statements and exhibits without any justification;
- (iii) There is selective charging of suspects; or
- (iv) An Advocate is unfairly targeted for rendering professional services in a matter.

65. And, in *Maura Muigana vs. Stellan Consult Limited & 2 Others* case (supra), I further discussed the subject as follows: -

58. I have also come across several other decisions on the subject. I will refer to only some few. In *Anthony Murimi Waigwe v Attorney General & 4 others* [2020] eKLR, the Court held that the Prosecutor has a duty to analyze the case before prosecuting it and it should let free those whom there is no prosecutable case against them. It expressed itself thus: -

48. It is no doubt dear that under Article 157 (1) of the Constitution the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article



159 (2) of the Constitution is crying loudly every day, every hour that "justice shall be done to all, irrespective of status". Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.

49. The Petitioner in support of interest of administration of justice dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction, In other words Public Prosecutors should ask themselves• would an impartial tribunal convict on the basis of the evidence available?

50. In the case of Republic v. Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No. 78 of 2015 while quoting the case of R vs. Attorney General ex Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001; the Court held;

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper ... there must be in existence material evidence on which the prosecution can say with certainty that it has a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and inactionable.

51. In a democratic society like ours, no one should be charged without the authorities conducting proper investigation. The prosecutor on the other hand is under duty to consider both incriminating and exculpating evidence, In the case of Republic v. Director of Public Prosecutions & Another ex parte Kaman/ Nairobi Judicial Review Application Nog 78 of 2015 (supra), the court expressed itself as follows:

this court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of •justice is a hallowed lace and ought to be reserved for those mattes in which the protagonists have a conviction stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the Office of the Director of Public Prosecutions Act to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a catwalk.

59. In Meme -vs- Republic & Another (2004) eKLR the Court of Appeal discussed abuse of the Court process thus: -

An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.



60. In quashing a criminal prosecution on the basis of abuse of Court process, the Court in *Peter George Anthony Costa v. Attorney General & Another* Nairobi Petition No. 83/2010 expressed itself thus:-

The process of the Court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or of oppression in the process of litigation. It follows that where there is an abuse of the court process there is a breach of the petitioner's fundamental rights as the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.

61. Still on abuse of Court process in using Court to settle personal scores, the Court in *Rosemary Wanja Mwangiri & 2 Others V Attorney General & 2 Others*, Mumbi J (as she then was) stated that: -

The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.

62. On the need for a Prosecutor to act within the law, the Court in *Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others* stated that: -

The discretionary power vested in the Director of Public Prosecution is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably within the law and to promote the policies and objects of the law which are set out in Section 4 of the Office of Director of Public Prosecution Act. These objects are as follows: the diversity of the people of Kenya; impartiality and gender equity; the rules of natural justice, promotion of public confidence in the integrity of the office; the need to discharge the functions of the office on behalf of the people of Kenya, the need to serve the cause of justice; prevent abuse of legal process and public interest, protection of the sovereignty of the people; secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.

63. In *Republic v. Commissioner of Co-operatives ex parte Kirinyaga Tea Growers Cooperative Savings & Credit Society Ltd* CA 39/97 119991 EALR 245 the Court of Appeal warned against the improper use of power in the following words: -

...it is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allowed anyone on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith....



64. The above position was amplified in Nairobi High Court Miscellaneous Application No. 1769 of 2003 Republic vs. Ministry of Planning and Another ex-parte Professor Mwangi Kaimenyi, where it was held:

So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power, The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner.

65. The need for Courts to act with deference and accord constitutional and legal entities to discharge their mandates was revisited in Paul Ng'ang'a Nyaga vs Attorney General & 3 Others (2013) eKLR, where it was held that: -

... this Court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of the Constitution.

64. Having laid out the precincts within which prosecutorial powers must be exercised as provided for under Article 157 of the Constitution. I now will look at the evidence as presented by the Petitioner and how the Respondents have surmounted it as to warrant her arrest and charging.
65. It is common ground that the Petitioner and Martin Mwangi Ng'ang'a entered into a Rental Apartment in respect of the Godown in Viken Thirty Industrial Park.
66. The evidence on record, in the form a Cash Deposit slip shows the Petitioner's payment of Kshs. 750,000/- on 22nd November 2020 in favour of S. M. Muchemi the Proprietor of the godown.
67. As of 22nd November 2020, it is the position that the Petitioner and Martin Mwangi Ng'ang'a were co-tenants in the premises.
68. However, on 2nd April 2021, the Petitioner entered into a Management Agreement with Martin Mwangi Ng'ang'a where she effectively surrendered control, rights and liabilities that would arise from the rented premises.
69. The foregoing essentially meant that whereas the original Rental Agreement between the Petitioner and Martin Mwangi Ng'ang'a and S.M Muchemi stood, it only did so to the extent of creating legally binding obligations between the Martin Mwangi Ng'ang'a and the proprietor, S.C Muchemo. The Petitioner's obligations ceased to be operational.
70. To that extent, therefore, I find fault in the 2nd Respondents claim that the Rental Agreement was still in force in respect to the Petitioner and subsequently using it as a basis of conducting the arrest.
71. The failure by the 2nd Respondent to travel over and beyond the Rental Agreement in the course of his investigations would have revealed the person whose control the premises was in and therefore forestall the unnecessary arrest of the Petitioner.
72. What is of more significance to this Court is the statement of the Martin Mwangi Ng'ang'a who said that he was not the owner of the Godown but was only managing it for the owner by the name Benson Mburu.
73. Mr. Ng'ang'a only mentions the Petitioner as being in the lease agreement but the actual business belonged to Benson Mburu.



74. In his statement, Mr. Ng'ang'a further stated that, as Mr. Mburu's Manager, his duty was to receive the supplies of ethanol which were later sold to different people by Mr. Mburu himself.
75. The foregoing statement are corroborated by the Statement of one Julius Njoroge Mburu, a security personnel employed to guard the premises. He stated that Mr. Ng'ang'a was his boss who usually brought drums and organized its sale personally or by sending persons to collect on his instructions.
76. The Petitioner is not mentioned anywhere in the statements of the two persons of interest and her arrest was far-fetched.
77. The totality of the circumstances leading to the arrest and charging of the Petitioner leaves no doubt that she was not accorded administrative action that was fair and reasonable.
78. Article 47 of the Constitution addresses the manner in which public decisions ought to be made. It provides 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.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.
79. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. No. 4 of 2015. Section 4 thereof provides that: -
1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
80. Section 2 of the Fair Administrative Actions Act defines an 'administrative action' and an 'administrator' 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;
- 'administrator' means 'a person who takes an administrative action or who makes an administrative decision'.
81. Flowing from the foregoing, it is evident that the haste with which the 2nd Respondent conducted its investigation left many gaps that rendered its decision manifestly unlawful, unprocedural and unreasonable to arrest and detain the Petitioner.



82. This Court is not interfering with the investigations but rather stopping the furtherance a process whose result only goes towards violating a person's fundamental rights and freedoms.
83. Deriving from the foregoing, it follows that the Director of Public Prosecutions could not base their decision to prosecute on inconclusive and hurriedly pieced together evidence at the expense of the Petitioners rights.
84. Their conduct fell short the requirement in Article 157(11) of the Constitution and section 4 of the ODPP Act which makes it a requirement for the Prosecution to serve the cause of justice, prevent abuse of the legal process and public interest.
85. I am guided by the decision in *Githunguri v Republic* [1985] LLR 3090 where it was observed that a Court must express its disapproval if it comes its attention that there has been a serious abuse of power, by stopping prosecution, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.
86. With respect to the claim of violation of the right to fair hearing and access to justice under Article 50 and 48 of the Constitution respectively, there is no evidence on record to demonstrate where and in what manner it was violated.
87. In the premises, I find the Petition and the, notice of Motion Application both dated 24th September 2021 to be partly successful and hereby make the following final Orders;
 - i. The Order of Certiorari is hereby issued bringing into this Court for purposes of being quashed Criminal Prosecution in Nairobi Chief Magistrates Court Criminal Case No. E1023 of 2021.
 - ai. A declaration is hereby made that the Respondents violated the Petitioners right to Fair Administrative Action guaranteed under Article 47 of the Constitution.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 16TH DAY OF DECEMBER, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Osundwa, Counsel for the Petitioner.

Mr. Achochi Counsel for the Respondent.

Kirong/Nawatola – Court Assistant

