



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 139 OF 2019

IN THE MATTER OF ARTICLES 22(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 28, 29, 39 AND 50 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

DENIS JOSEPH SHIJENJE.....1ST PETITIONER

BACHMAN ENTERPRISES LIMITED.....2ND PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

JUDGEMENT

THE PETITION

1. The Petitioners through a Petition dated 4th April 2019 seek the following orders:-

a) A declaration be and is hereby made that the investigations being undertaken and/or ongoing by the 1st and 2nd Respondents as against the Petitioners in respect of facts and issues related to Criminal Case Number 2091/2018- Republic s. Denis Joseph Shijenje & Another violates the Petitioners' Constitutional rights as set out under Article 27, 28, 29(a), 39, 31, 47, 49 (1) (a) (i), (c) & (h) and 50 of the Constitution, are an abuse of administrative power, are an abuse of the Court process and therefore unlawful, null and void ab initio.

b) An Order of Prohibition be and is hereby issued prohibiting the 1st and 2nd Respondents from investigating, conducting investigations, summoning the Petitioners and in any manner whatsoever conducting into facts and issue similar and pertaining to Criminal Case Number 2091/2018 during the trial and prosecution of the said case.

c) An Order of Prohibition be and is hereby made prohibiting the 1st and 2nd Respondents from harassing, intimidating, assaulting and in any matter whatsoever threatening the Petitioners.

d) An Order of Prohibition be and is hereby made prohibiting the 1st, 2nd and 3rd Respondents from commencing any further criminal investigations against the Petitioners, from recommending the prosecution of the Petitioners, from arresting the Petitioners, from questioning the Petitioners, in respect of issues relating and similar to Criminal Case Number 2091/2018 Republic vs. Denis Joseph Shijenje & Another.

e) The Respondents be and are hereby directed to pay the Petitioners the costs of their Petition.

PETITIONERS' CASE

2. The Petitioners were on 5th November 2018 arraigned in Court charged with the offence of deliberately defaulting to pay tax contrary to **Section 97(e) and 104 (3) of the Tax Procedure Act** and were released on cash bail in **Criminal Case Number 2091/2018 Republic vs. Denis Joseph Shijenje & Bachmann Enterprises Limited.**

3. The Petitioners contend that since taking plea on the aforesaid charges the criminal case herein above, has never commenced due to the deliberate actions and inactions of the 1st Respondent. It is averred the case has never proceeded because the 1st Respondent has never complied with the pre-trial directions on supplying all the documentary evidence it intended to rely upon during the trial. It is stated further the suit was set down for hearing twice but failed to take off because of the 1st Respondent's non-compliance with the directions as given by Court. That the Case has come up for mention seven (7) times for pre-trial and the 1st Respondent has never complied.

4. It is Petitioners averments that the 1st Respondent only partially complied upon compulsion by the Honourable Magistrate and furnished some documents while deliberately failing to supply crucial documents to the Petitioners such as the witnesses statements, Receipts, notices, E-slips; E-returns, investigations Diary; extracts of occurrence Book and witnesses statements of the investigating officer.

5. It is Petitioners case that as days unfolded, it became apparent that the 1st Respondent did not have enough evidence or none at all to prosecute the case. It is contended this is because they failed to offer full disclosure and/or supply the information it sought to rely on in the criminal case. The 1st Respondent and 2nd Respondent it is asserted in an effort to collect evidence to produce in court embarked on rigorous processes of investigations over the same matter that was already in court thus:-

“a) On the 8th day of March, 2019 the 1st Respondent summoned the 2nd Petitioner demanding for documents that are of the same subject matter and involving the same dispute in court for the period.

b) On the 28th day of March, 2019 the 1st Respondent wrote a letter to the Petitioners demanding for documents that are of the same subject matter and involving the same dispute in court for the period.

c) Since 15th day of March, 2019 the Petitioners have received phone calls from DCI who is under the supervision of the 2nd Respondent asking questions and documents pertaining to the same issues and fact as in Criminal Case Number 2091/2018.

d) The Petitioners have continued to call and ask question over the case in court using mobile phone numbers 0722925164 and 0720092209.

1ST RESPONDENT'S CASE

6. The 1st Respondent is opposed to the Petition and rely on the Replying Affidavit of Dominic Keng'ara sworn on 30th December 2019 and on supplementary affidavit sworn on 15th June 2020 and annexures thereto.

7. The 1st Respondent further contend that in October 2018 it conducted a compliance checks on Bacham Enterprises Limited, the 2nd Respondent herein to, determine whether the company had complied with filing of Tax Returns and payment of taxes.

8. It is also urged that the 1st Respondent did a comprehensive tax audit to establish if there was any tax due and payable. Upon conclusion of the audit, it became apparent that the 2nd Petitioner had evaded payment of taxes through under-declared taxes resulting to a loss of income tax amounting to Three Hundred and Fifty Five Million Kenyan Shillings (Kshs.355,000,000.)

9. It is asserted that upon conclusion of the investigations, the 2nd Petitioner and Denis Joseph Shijenje (the 1st Petitioner herein) in his capacity as director of the 2nd Petitioner were arraigned and charged in court on 5th November 2018 for several tax fraud offences under **Section 97 of Tax Procedures Act, 2015** in **Milimani Chief Magistrate Court Criminal Case NO. 2091 of 2018.**

10. It is 1st Respondents contention that subsequently, the Petitioners were supplied with the witnesses statements and other documents which the prosecution sought to rely on in court on 6th February 2019.

11. The 1st Respondent further aver that on 8th March 2019, the 1st Respondent wrote to Ms. Christine Kwamboka Ongaga, an officer of the 2nd Petitioner, summoning her to appear before the 1st Respondent to shed light on her culpability for the offences disclosed by the new information received by the 1st Respondent.

12. It is 1st Respondent's averment that on 26th March 2019, the 1st Respondent made an Application to the High Court in **Milimani High Court Miscellaneous Criminal Application No. 161 of 2019 KRA vs. Brian Waluchio and Oxygen & Limited** under **Section 81 of the Criminal Procedure Code** to transfer the **Criminal Case number 3037 of 2018 registered at Makadara Law Court to Milimani Law Courts** for purposes of consolidation owing that the offences arose from the same transactions. It is further contended that because of the High Court Criminal Application, the proceedings in the criminal cases including and connected to Milimani Criminal Case Number 2091 of 2018 were stayed pending the outcome of the Application for consolidation. Consequently, the said criminal cases have not been set down for hearing.

13. The 1st Respondent further state that on 23rd April 2019, the Petitioners filed a notice of motion Application dated 18th April 2019 before Honourable Cheruiyot, in the Criminal Case No. 2091 of 2018 seeking similar reliefs as those being sought in the present petition. **(Please refer to Annexure "DK4" to the 1st Respondent's Supplementary Affidavit dated June 2020.)** The 1st Respondent contend that the Magistrate Court heard the Application conclusively and delivered a ruling settling the issues raised.

THE 2ND AND 3RD RESPONDENTS CASE

14. The 2nd and 3rd Respondents aver that the Director of Public Prosecutions received the investigation file together with the report and recommendation from the Director of Criminal Investigations and independently analysed the evidence for sufficiency to charge the Petitioners with the alleged offence with due regard to the law and evidence. That based on the independent review of the evidence the Director of Public Prosecutions was satisfied that there was sufficient evidence and directed that the Petitioners be charged with several offences stated in the charge sheet. That the decision to charge was made independently based on sufficiency of evidence and the public interest underlying prosecution of criminal offences.

15. It is further the 2nd and the 3rd Respondents contention that the Petitioners have not demonstrated that in making the decision to charge the Director of Public Prosecutions has abrogated any provision of the Constitution or any written law or any rules made there under or that the said decision was arrived at in breach of rules of natural justice and therefore the Petition lacks merit and it ought to be dismissed with costs.

ANALYSIS AND DETERMINATION

16. I have carefully considered the Petition; the Respondents responses, parties rival submissions and from the above the following issues arise for determination:-

- a) *Whether the Respondents can be stopped from investigations against the Petitioners?*
- b) *Whether the Respondents have infringed on the Petitioners' Constitutional rights?*
- c) *Whether the Petitioners rights can be limited to accommodate the evidence collection by the Respondents?*

A. WHETHER THE RESPONDENTS CAN BE STOPPED FROM INVESTIGATIONS AGAINST THE PETITIONERS?

17. It is the fundamental rule of law that the police will only charge a person if they have enough evidence to prove, an offence has been committed and that the crime was allegedly committed by the accused person. The standard criminal law practice is that if a police officer has not finished investigations, he must produce the arrested person in court within 24 hours as provided under **Articles 49(1)(f) of the Constitution** and either have him released on bail or bond terms pending the conclusion of investigations or be detained for more days until the investigations are over if he believes the arrested person will interfere with the investigations.

18. The Petitioners urge that the legal assumption to be made is that if an arrested person has been charged in court, the police must have concluded investigations unless the accused person commits a new offence. To buttress this proposition the Petitioners refer to **Article 50(i) (ii) of the Constitution of Kenya** which state that an accused person has unqualified right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to the evidence. It therefore follows that it is practicality impossible for one to realize this right if one is charged before conclusion of investigations. To purport to proceed with investigation upon charging an accused person in my view amounts to a violation of this right and is contrary to one's constitutional rights to fair hearing.

19. **Article 50(i) and (l) of the Constitution** provides that an accused person has the right to remain silent and not to testify during the proceedings and to refuse to give self-incriminating evidence. It therefore follows any investigation touching into a case for which an accused person has answered to by taking a plea is a clear violation of fair hearing, as this would amount to exposing the accused person to self-incriminating evidence and/or action and the conduct of the prosecution would be against **Article 50 of the Constitution** and would be unlawful.

20. The Petitioners in support of the above proposition sought reliance in the case of **Kenya Commercial Bank Limited and 2 others vs. Commissioner of Police and Another Nairobi Petition No. 218 of 2012 (2013) eKLR** where the Court stated that **"...the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of rights and fundamental freedoms guaranteed under the Constitution."**

21. The 1st Respondent in its opposition to the Petition urges that paragraphs 45 – 47 of the Petition and paragraphs 22 – 24 of the supporting affidavit that M/s Christine Kwamboka Ongaga that the allegation that she has been harassed, intimidated and/or threatened by the officer of the 1st Respondent to be hearsay, and states further M/s Christine Kwamboka Ongaga should have been enjoined in this suit so as to set forth her own redress. It is further averred as in the meeting of 13th March 2019 where the 1st Petitioner was not in attendance is hearsay and that the 1st Petitioner's affidavit is confined to such facts to which the deponent is unable on his own knowledge to prove. In view of the above I find that the 1st Petitioner lacked capacity to make averments of what happened to M/s Christine Kwamboka Ongaga and her experience with the 1st Respondent and as such I find the averments in paragraphs 45 – 47 of the Petition and paragraphs 22 – 24 of the Petitioners' Affidavit sworn by the 1st Petitioner regarding a third party herein Christine Kwamboka Ongaga are facts which the deponent is not able of his own knowledge to prove and are therefore hearsay and inadmissible. Furthermore M/s Christine Kwamboka Ongaga is not one of the accused persons nor a co-accused person in criminal case number 2091 of 2018 where the Petitioners are co-accused persons. I find that any probe touching on her is justified and is not prejudicial to the Petitioners.

22. In the instant Petition, the 1st Respondent aver that it has not carried out further investigations against the 1st and 2nd Petitioners, after their arraignment in Court in the Criminal Case number 2091 of 2018. The 1st Respondent denies ever contacting the 1st Petitioner through phone calls since they were charged in court as alleged in paragraphs 19 and 20 of the 1st Petitioner's Replying Affidavit and in reply affidavit at paragraph 24 of the 1st Respondent's Replying Affidavit. I note under **Section 107 of the Evidence Act** it is clearly provided that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove

that those facts exists.

23. The 1st Respondent referred to the case of **Pravin Singh Dhalay v. Republic, Cr. App. No. 10 of 1997**, the Court of Appeal warned about reliance on telephone conversation in determining guilt or otherwise of a person. The Court of Appeal stated that the trial court has a duty to treat such allegations with great caution, particularly where the telephone conversation is challenged. This is to avoid the dangers of concoction or innocent misrepresentation of what was said or meant.

24. Similarly, in the case of **Sango Mohamed Sango & another v Republic [2015] eKLR** (where the above **Parvin Singh Dhalay case** was cited with approval), the Court of Appeal while determining a matter which involved a question of whether a phone call was made or not had the following to say:

“...we agree with counsel for the appellants that proper evidence that this alleged phone call was made by the 2nd appellant to PW2, including, the number from which the call was made, the number to which the call was made, the time, the date, the ownership of the respective telephone numbers, among others, should have been led. As it is, there is no credible evidence on record that the call was ever made.” (Emphasis added).

25. The important point which the Court of Appeal in **Sango Mohamed Sango Case** noted is that a Person who alleges to have received a phone call from another should provide the following: **“... the number from which the call was made, the number to which the call was made, the time, the date, the ownership of the respective telephone numbers.”**

26. The 1st Respondent admit summoning the director of the 2nd Petitioner’s, M/s Christine Kwamboka Ongaga urging that was necessary for her to shed light on the new information which the 1st Respondent received implicating her and which information was not within the 1st Respondent’s knowledge when the Petitioners were arraigned and charged in court. I find as long as the investigations were limited to M/s Kwamboka culpability without touching on the Petitioners for the offences under tax laws the 1st Respondent was within the law to do what they did as the Petitioners had already been charged in Court.

27. This Court is alive to the fact that under **Section 61 of the Tax Procedure Act No. 29 of 2015** the 1st Respondent is mandated to issue notice of summons to anyone whom the 1st Respondent reasonably believes has committed offences under the relevant tax laws. **Section 61 of Tax Procedures Act, 2015** provides:

“Where the Commissioner is satisfied that a person has committed an offense under a tax law, the Commissioner may, by notice in writing, require the person to appear before him.”

28. In addition to the above **Section 61 of the Tax Procedure Act, 2015** is to be read together with **Section 7 of the Tax Procedure Act, 2015**. **Section 7 of the Act** reads as follows:-

“7. Authorised officers to have powers of police officers

(1) For the purposes of administering a tax law, an authorised officer shall, in the performance of that officer’s duties, have all the powers, rights, privileges and protection of a police officer.

(2)....

29. It is clear therefore that **Section 7 of the Tax Procedure Act, 2015** donates the Police powers to the 1st Respondent as far as the Tax investigations are concerned. To buttress this proposition the 1st Respondent sought reliance in the case of **Africa Spirits Limited v Director of Public Prosecutions & another (Interested Party’s) Wow Beverages Limited & 6 others [2019] eKLR** where Hon. Justice Kimaru held as follows:-

“...For instance, under our tax laws, the body that is recognised as authorized to administer our tax laws are the officers of Kenya Revenue Authority. Under Section 7 of the Tax procedures Act 2015 and Section 7 of the East African Community Customs Management Act 2004, Kenya Revenue Authority officers have been given “all powers, rights, privileges and protection of a police officer” in the performance of their duty. Indeed, the two Acts envisage that the Kenya Revenue Authority officers, as authorised officers have the power to investigate and in appropriate cases, seize and forfeit goods” (Emphasis added).

30. I find from the aforesaid Sections that it would be absurd and contrary to the law, as there is nothing in law that prohibit the 1st Respondent from carrying out investigations especially where there is a reasonable suspicion of commission of an offence under relevant Tax Law to prohibit, investigations without any lawful justification.

31. In the instant Petition, it is I noted that the Petitioners have not demonstrated that the investigations against Ms. Christine Kwamboka Ongaga will prejudice their case or defence in Criminal Case Number 2091 of 2018. There is no credible evidence to show that the investigations which were being done by the 1st Respondent are being carried out with ulterior motives of intimidating and/or targeting the Petitioners with vexatious and annoying criminal prosecution as alleged.

32. In the case of **Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 Others [2019] eKLR**, this Honourable Court has stated that investigations legally sanctioned by law should not be stopped. Hon. Justice Ogola in paragraph 50 & 51 of his judgment stated as follows:-

“...The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.

51. Odunga J. in *Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others* [2016] eKLR, said with regard to the power of the police to investigate:

“42. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and 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 could be reluctant to intervene.”

In *Pauline Adhiambo Raget v. DPP & 5 others*, (2016) eKLR, a case where breach of right to equality was alleged to have been violated by investigations of an offence, Onguto J. held, and I agree, that-

“I have also been unable to see how in investigating an alleged criminal conduct or activity there could be discrimination or a practice of inequality before the law. The respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the Petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the interested party in this case. In so doing, it is a legal mandate they would be undertaking.” (Emphasis added)

33. This Court note that the Petitioner’s allege that as a result of further investigations against them Ms. Christine Kwamboka Ongaga, their constitutional rights under **Article 27, 28, 29(a), 39, 31, 47(1), 49(1)(a)(i), (c) & (h) and 50(2) (a) of the Constitution of Kenya, 2010** have been violated by the 1st Respondent. Further the Petitioners allege that the 1st Respondent has violated the provisions under **Article 10, 157(11) and 239(a) of the Constitution of Kenya, 2010**. The Court to stop the alleged investigation is aware amongst other things the Petitioners must prove the 1st Respondent’s improper exercise of investigative powers. The basis for the alleged constitutional rights violations herein above it is alleged by 1st Respondent it ranges from hearsay evidence to unsubstantiated allegation or mere statements with no credible evidence to prove them. It is a trite that a person who alleges a fact must prove. Further the principles for determining claim for violation of Constitutional provisions are now well settled. It has been time and again held that it is not sufficient for a Petitioner to allege constitutional rights’ violation without proving the extent and the manner in which they have been violated or threatened with violation. The learned Judge, Justice Mativo in the case of *A M v Premier Academy* (2017) eKLR stated as follows:-

“I find that no contravention of constitutional rights has been proved at all. The evidence tendered on behalf the Petitioner in my view does not demonstrate the alleged violation. Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any) (Emphasis added)

34. In the instant Petition, I find that there has been no proof that the investigations on M/s Christine Kwamboka Ongaga violates the petitioners constitutional fundamental rights and freedom as contended so as to justify granting the prayers sought in her favour.

35. The office of the Director of Public Prosecutions is an independent prosecution authority established under **Article 157 of the Constitution. Article 157 (6) of the Constitution** vests upon the DPP the power to: institute and undertake criminal proceedings; take over and continue any criminal proceedings; and to discontinue any criminal proceeding at any stage before judgment is delivered. The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority. This is stipulated under **Article 157 (10)** as follows:-

“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”.

36. Further to the above **Section 6 of the Director of Public Prosecutions Act** provides that:-

“6. Pursuant to Article 157(10) of the Constitution, the Director shall –

(a) Not require the consent of any person or authority for the commencement of criminal proceedings;

(b) Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) Be subject only to the Constitution and the law.”

37. I find that the office of the Director of Public Prosecution being an independent institution established under the Constitution, the court

can only interfere with or interrogate its actions where there is contravention of the Constitution. In the case of *Paul Ng'ang'a Nyaga v Attorney General & 3 others (2013) eKLR*, 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 acted in contravention of the constitution.”**

38. Further in the case of *Francis Anyango Juma v The director of Public Prosecutions and another* the Court observed that:-

“Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under the Constitution, or violation of the Constitution itself.”

39. This Court is aware that the Law is that the Courts ought to usurp the constitutional mandate of the director of Public Prosecution conferred pursuant to *Article 157 of the Constitution*. In the case of *Kenya Commercial Bank Limited & 2 others v Commissioner of Police and Another, Nairobi Petition No. 218 of 2012 (2013) eKLR*, Majanja J held that:-

“the office of the Director of Public Prosecution and Inspector General of the National Police Service are independent and this Court would not ordinarily interfere with the running of their offices and exercise of their discretion within the limits provided by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.” Substantive unless there is demonstration of clear violation of their constitution or exceeded its mandate as donated by the Constitution. *(Emphasis added)*

40. The question that begs answers is under what circumstances a Court can grant an order prohibiting the commencement or continuation of criminal proceedings. In the case of *George Joshua Okungu and Another vs. Chief Magistrate Court Anti-Corruption Court at Nairobi and Another (2014) eKLR* the Court summarized some of the considerations that will not form the basis for the court to interfere with the DPP’s Constitutional mandate thus:-

“The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defense is always open to the Petitioner in those proceedings. The fact however that the facts constituting the basis of a criminal proceedings may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.”

41. I find the Petitioners herein have failed to demonstrate that the Respondents herein have acted contrary to the constitution in execution of their mandate or acted in contravention of the constitution or their action are actuated by improper motive to justify them being stopped from investigations.

B. WHETHER THE RESPONDENTS HAVE INFRINGED ON THE PETITIONERS CONSTITUTIONAL RIGHTS?

42. The Petitioners urge that by a letter dated 8th March 2019 the 1st Respondent wrote to the Petitioners that:-

“failure to comply with notice therein shall be an offense under the relevant tax laws and this office may proceed to take necessary legal action against you without further reference to yourself.”

43. The Petitioners urge the letter is clear that the investigations are ongoing respecting the same matter in court touching on same parties. The Petitioners contend that all the above is done in the full awareness of the fact that the Petitioners are entitled to unqualified rights to remain silent during trial, not to give self-incriminating evidence, to be entitled to all the evidence and adequate time to prepare for a defense.

44. It is contended by the Petitioners that the conduct of the Respondents is in direct contravention of the constitution and therefore can only be summarized as violation and infringement of the fundamental constitutional rights of the Petitioners.

45. Further it is averred in its letter dated 28th March 2019, the 1st Respondent once again issued a further demand in the tone of investigations. In particular, the 1st Respondent demanded for books, records, documents, payrolls, income statements respecting:

- i. The same period under trial;
- ii. The same tax head under trial;
- iii. The same parties; and
- iv. The same tax issues.

46. The 1st Respondent contend that it has not carried out further investigation against the 1st and 2nd Petitioners after their arraignment in Court in the Criminal Case Number 2091/2018. It is also submitted by the 1st Respondent that it has never contacted the 1st Petitioner

through phone calls since they were charged in court as alleged in paragraph 19 & 20 of the 1st Petitioner's Replying Affidavit, and sought reliance on paragraph 24 of the 1st Respondent's Replying Affidavit.

47. The 1st Respondent further urge that there has been no valid proof for a Petitioner to allege constitutional rights' violation without proving the extent and the manner in which they have been violated or threatened with violation. The 1st Respondent rely on Judgment of Justice Mativo in the case of *A M v Premier Academy [2017]* where he stated as follows:-

"I find that no contravention of constitutional rights has been proved at all. The evidence tendered on behalf the Petitioner in my view does not demonstrate the alleged violation. Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any)" (Emphasis added).

And urges that there is nothing to warrant courts intervention by way of order of prohibition. The 1st Respondent further urges the Honourable Court to exercise restraint and rely in the case of *Republic s. Chief Magistrate Milimani & another Ex-parte Tusker Mattresses Ltd & 3 others [2013] eKLR*, the learned Judge Justice Odunga while adjudicating over the same issue affirmed that Courts must exercise restraint. He stated as follows in paragraph 48 of the Judgment;

"The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. ...However, it is upon the ex parte applicant (read Petitioners) to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. ... The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecutions unless cogent reasons are given for doing so." (Emphasis added).

48. It is further submitted by 1st Respondent that tax evasion is a cancer that undermines the ability of the State to effectively raise its finances and support the constitutional structures. Therefore, the 1st Respondent must be allowed (in the absence of a wrongdoing) to continue to discharge its statutory mandate under the relevant tax laws in order to zealously protect the integrity of tax collection.

49. The Petitioner urge that tax offences are peculiar in nature in the sense that the Respondents cannot prefer charges unless, assessment is done, notice is issued and in-depth audit is conducted. In order to do a default assessment and issue a demand notice on taxes in question, the Respondent must have collected and/or interacted with the very documents it now demands. If they did not do so, on what basis did they prefer charges?

50. The Director of Public Prosecution it is urged herein received the investigation file together with the report and recommendation from the Director of Criminal Investigations and independently analysed the evidence for sufficiency to charge the Petitioner with the alleged offence with due regard to the law and evidence. It is further stated the Director of Public Prosecution was satisfied that there was sufficient evidence and directed that Petitioners be charged with several offences as stated in the charge sheet and that the decision to charge was made independently based on sufficiency of evidence and public interest underlying prosecution of criminal offences.

51. I find the 1st Respondent issuance of letters dated 8th March 2019 and 28th March 2019 to the 1st Petitioner after Petitioners were arraigned in Court and charged with various counts and indicating that the investigations are ongoing in respect of the same subject matter in Court, touching on the same parties or rather issuing further demand in the name of investigations and demanding for books, records, documents, payroll, income statements respectively;

- i) The same period under trial
- ii) The same tax head under trial
- iii) The same parties and
- iv) The same tax issues.

was investigating on the Petitioners after they had been arraigned in Court.

52. It is clear that such demand of same documents, where a case relating to the same issue in Court in my view amounts to investigations and collection of evidence contrary to **Article 50 of the Constitution** to be used in the court of law against the accused persons. This in my view would be a violation of Petitioners constitutional rights as enunciated under **Article 50(1) and (j) of the Constitution** which clearly provides the Petitioners have unqualified rights to remain silent, and not to testify during the proceedings and refuse to give self-incriminating evidence.

53. I find that **Article 50 of the Constitution** is clear that an accused person rights to a fair trial which include the right to be presumed innocent until the contrary is proved, to have the trial begin and conclude without unreasonable delay, to remain silent and not to testify during the proceedings; to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence, to refuse to give self-incriminating evidence amongst other enunciated rights under the aforesaid Article cannot be limited as provided for under **Article 25(c) of the Constitution**.

54. The 1st Respondent should have moved to Court, and have Petitioners charged when fully armed with all relevant evidence. The 3rd Respondent is not seeking any further evidence but the 1st Respondent. The Petitioners should not have been charged without any evidence, if that is the case herein. No evidence should be collected and more so from the Petitioners as the 1st Respondents is seeking to do since doing so would amount to a clear violation of the Petitioners fundamental rights and rights to fair hearing as enshrined in **Article 50 of the Constitution of Kenya 2010**. The 1st Respondent's acts are pure violation of **Article 50 of the Constitution of Kenya** and the Court is under duty and obligation to intervene to protect the Petitioners fundamental rights. **Article 25(c) of the Constitution** provides that amongst fundamental rights and freedoms that may not be limited despite any other provision of the constitution to include the right to fair trial. I therefore find such right is unfettered and unlimited. I find the respondents have in seeking to collect further evidence to be used in the pending **Criminal Case No. 2091 of 2018** after taking of the plea by the Petitioners to have infringed on Petitioners Constitutional rights as enshrined under **Article 50 of the Constitution**. It is therefore unconstitutional, null and void, to seek to collect further evidence against an accused person after taking of a plea.

C. WHETHER THE PETITIONERS RIGHTS CAN BE LIMITED TO ACCOMMODATE THE EVIDENCE COLLECTION BY THE RESPONDENTS?

55. The Petitioners contend that their right under **Article 50 of the Constitution** is being infringed upon. It is further urged it matters not the Respondents have a right to investigate as any element of the execution of investigative powers that contravenes **Article 50 of the Constitutional** is tantamount to violation and therefore unconstitutional.

56. The Powers of the Respondents to investigate an offence is hinged on either statute or bound by the Constitution as the Respondents do not operate in vacuum or as they wish. **Article 21 of the Constitution of Kenya** specifically provides that it is the fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundaments freedoms in the Bill of Rights. The Respondents herein are state organs and are required to respect the supreme law of the land in their discharge of their constitutional mandate.

57. The Respondents herein as state organs are bound by the provision of **Article 10(2) of the Constitution** which binds all the state organs, State Officers, Public Officers and all persons to national values and principles of good governance including:-

- i. Human dignity;
- ii. The rule of law;
- iii. Human rights;
- iv. Good governance; and
- v. Integrity.

58. **Article 25(c) of the Constitution** provides that despite of the other provisions in this Constitution, the right to a fair trial shall not be limited. I therefore find the Petitioners rights to fair trial as enshrined under **Article 50 and 25 of the Constitution** such right cannot be limited to accommodate the purported 1st Respondent's efforts on evidence collection after charging the Petitioners and plea having been taken as that is clear violation of the petitioners constitutional rights to fair trial, protection against self-incriminating evidence and further it is unconstitutional.

59. **The upshot is that the Petitioners Petition is meritorious and I proceed to make the following orders:-**

a) A declaration be and is HEREBY issued that the investigations being undertaken and/or ongoing by the 1st and 2nd Respondents as against the Petitioners in respect of facts and issues related to Criminal Case Number 2091/2018- Republic s. Denis Joseph Shijenje & Another violates the Petitioners' Constitutional rights as set out under Article 27, 28, 29(a), 39, 31, 47, 49 (1) (a) (i), (c) & (h) and 50 of the Constitution, are an abuse of administrative powers, are an abuse of the Court process and therefore unlawful, null and void ab initio.

b) An Order of Prohibition be and is HEREBY issued prohibiting the 1st and 2nd Respondents from investigating, conducting investigations, summoning the Petitioners and in any manner whatsoever conducting into facts and issue similar and pertaining to Criminal Case Number 2091/2018 during the trial and prosecution of the said case.

c) An Order of Prohibition be and is HEREBY issued prohibiting the 1st and 2nd Respondents from harassing, intimidating, assaulting and in any matter whatsoever threatening the Petitioners.

d) An Order of Prohibition be and is HEREBY issued prohibiting the 1st, 2nd and 3rd Respondents from commencing any further criminal investigations against the Petitioners, from recommending the prosecution of the Petitioners, from arresting the Petitioners, from questioning the Petitioner, in respect of issues relating and similar to Criminal Case Number 2091/2018 Republic vs. Denis Joseph Shijenje & Another.

e) Costs of the Petition to be borne by the 1st Respondent.

Dated, Signed and Delivered at Nairobi on this 28th day of January, 2021.

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J. A. MAKAU

JUDGE