



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 1 OF 2020

IN THE MATTER OF ARTICLE 50 (2) (j), (2) (c), 27 (1), 27 (4), 236, 47, 257 (ii)

OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015 SECTIONS 4, 6, 7, 11

AND

IN THE MATTER OF PROBATION OF OFFENDERS ACT CAP 64 AND THE PROBATION OF OFFENDERS RULES MADE THEREUNDER

AND

IN THE MATTER OF THE VICTIM PROTECTION ACT, 2014 SECTIONS 4 (2), 11, 23

BETWEEN

SAMSON KABUTHIURI AKOTHA.....PETITIONER

VERSUS

THE ETHICS AND ANTICORRUPTION COMMISSION.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....3RD RESPONDENT

THE PRINCIPAL SECRETARY, MINSITRY OF INTERIOR &

CO-ORDINATION OF NATIONAL GOVERNMENT.....4TH RESPONDENT

THE CHIEF MAGISTRATE'S COURT ISIOLO.....5TH RESPONDENT

HON. ATTORNEY GENERAL.....6TH RESPONDENT

JUDGMENT

1. The Petitioner is employed as a Probation Officer II in the Department of Probation and After Care Services within the Ministry of Interior and Co-ordination of National Government stationed at Isiolo Sub County Probation Office. His duties, among others, include supervising offenders committed to probation, conducting social inquiries, providing to Court pre-sentencing reports, resettlement and rehabilitation of offenders, facilitating restitution and reconciliation with victims, general aftercare services and taking the interests of the victim into account. He had been assigned the duty of supervision of an accused person who was convicted for the offence of manslaughter and sentenced to three years imprisonment on probation. In the course of the supervision, certain reconciliation talks between the families of the probationer and the

deceased emerged and in the midst of these talks, which allegedly included payment of compensation to the widow of the deceased, the Petitioner was arrested and charged with the offence of **'Abuse of Office Contrary to Section 46 as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.'**

2. The particulars of offence were as follows: -

'On 23rd February 2015, at Isiolo Probation Office within Isiolo township, Isiolo County, being a person employed by a public body to wit Ministry of Interior and Co-ordination of National Government as a Probation Officer II used your office to improperly confer a benefit on Alice Kanini to wit an agreement for compensation in respect of the loss and prejudice occasioned on her by Joseph Ngolua Peter a probationer whom you were supervising.'

3. Aggrieved by the decision to prosecute him, vide his Petition dated 6th January 2020, the Petitioner seeks that Isiolo Criminal Case No. 2 of 2018 be quashed and that he be set free.

Petitioner's Case

4. The Petitioner states that on 1st December 2014, the Meru High Court in Criminal Case No. 14 of 2014 committed Joseph Ng'olua Peter to 3 years probation for manslaughter, where the victim was his close friend. He states that he had prepared the report that the Court used to place the convict on probation and was then assigned the duty of supervision, but since he had already done the recommendation that led to the offender being placed on probation, there was very little ground work left to be done in the supervision. He states that he was required to come up with a rehabilitation plan by bringing the two families, of the probationer and the deceased together and the progress of this task was reported to the District Probation Case Committee at its meeting held on 20th May, 2015 which was chaired by a Magistrate in Isiolo Court and the reconciliation efforts continued. He states that as an initial effort, the family of the Probationer agreed to pay hospital bills of the deceased and to pay the widow of the deceased Ksh 40,000/= as compensation and that on 23rd February 2015, the first reconciliation agreement was signed in his presence and that of her immediate boss, Catherine Along'o. He states that this agreement was voluntarily signed by all parties and that his mandate is limited to facilitating and guiding the parties so as to achieve reconciliation. He states that all the compensation money was paid and recorded even when he was absent from the office and that in the process, the probationer fell into arrears and that on 31st March 2016, the probationer brought to the office Ksh 1,500/= which later turned out to be trap money from the 1st Respondent as on the same day, the 1st Respondent reported a complaint at Isiolo Police Station O.B No. 6 alleging that the Petitioner had received the money as a bribe, which led to the arrest of the Petitioner and that the 1st Respondent then arranged wide video and TV coverage about the arrest.

5. He states that he was released on cash bail of Ksh 10,000/= and that his bosses submitted reports dismissing the allegations of bribery. He states that he was later in August 2018 charged with 3 counts of abuse of office which according to him was unwarranted because his duties are sanctioned by statute and law. He states that on an application made by his Advocate, the 5th Respondent agreed to defer plea taking to allow him to challenge the propriety of the charge but subsequently, on an application by the 2nd Respondent, the 5th Respondent set aside the orders deferring plea taking.

6. He states that the witness statements that were subsequently availed to him were typed ones without the certificate as to the typist, were unsigned and they related to previous allegation of bribery and that when asked to avail handwritten statements, it turned out that there were no such statements. He states that the 2nd Respondent then applied to transfer the case to Nanyuki Court for trial and the 5th Respondent poised to make an order for transfer even without hearing the defence. He states that the 1st Respondent wrote to the 4th Respondent demanding suspension of the Petitioner pending trial. He states that his arrest scuttled midway the supervision and reconciliation efforts and that despite the embarrassment and wide publicity meted on the Petitioner by the 1st Respondent, no charges were preferred with respect to the alleged bribery of 31st March 2016.

7. In his submissions dated 15th April 2020, the Petitioner states that EACC did shoddy investigations. He urges that the charge sheet is indirectly trashing the whole process carried out at the Petitioner's office with his seniors and other various organs including the Isiolo Court. He further submits that the interference by the 1st Respondent intends to water down the whole After Care services offered by the Probation Office. He submits that all the officials mentioned in all his exhibits ought to have been charged and this is an indication of witch hunt against the Petitioner. He states that the 1st Respondent is the author of the shoddy investigations, the 2nd Respondent filed the case without an iota of verification, the 3rd Respondent was directed to take disciplinary action against the Petitioner, that ACEC No. 2 of 2018 is filed with the 5th Respondent, and that the 6th Respondent has failed to advice the rest of the Respondents as the Chief Government Advisor. He urges that the 4th Respondent vide its letter dated 16th July 2018 exonerated the Petitioner from any wrong doing.

8. Concerning the Agreement dated 23rd February 2015, in addition to stating that it was voluntarily entered into by parties, the Petitioner states that the same has its foundation in the Probation of Offenders Act, the Victim Protection Act and the Probation and Aftercare Service Policy Outline by the 4th Respondent Ministry State Department of Correctional Services at Function 7 which provides for facilitating restitution and reparation through alternative dispute resolution mechanisms. He submits that the pre-sentencing report had indicated that the probationer's parents were willing to facilitate his re-integration back to society and that there was no intention whatsoever to confer a benefit on the victim as the amount was a reasonable figure paid to show remorse to the victim, given that the probationer was a great friend to the victim's family.

9. He submits that he acted well within his mandate as the Probation Officer and that no conviction can arise out of carrying out functions as stipulated by law and that in coming up with the decision to charge him, the 1st and 2nd Respondents did not take into account relevant matters and they never made any effort to check the veracity of the complaints raised and hence abuse of system. He relied on the cases of **Republic v Director of Public Prosecutions & 2 Others ex parte Zablon Agwata Mabea (2017) eKLR** and **Mohamed Gulan Hussein Fazal Karmali & Another v Chief Magistrates Court, Nairobi & Another (2006) eKLR**.

Respondent's Case

10. The application was opposed by the 1st and 2nd Respondents vide the replying affidavit of Rashid Kibet, a Police Officer employed by the National Police Service and seconded to the Ethics and Anti-corruption Commission where he served as an investigator and that he is the investigating officer in the case herein. The 1st and 2nd Respondents also filed submissions dated 11th May 2020.

11. In the replying affidavit, Rashid Kibet restated various provisions of law that outline the mandate of EACC including Sections 3 (2) (b), 11 (1) (c), (d), (e), (g), (j) of the EACC Act.

12. The 1st and 2nd Respondent's case is that the powers of the 1st Respondent include among others receiving complaints on the breach of the code of ethics by public officers and to investigate and recommend to the Director of Public Prosecutions the prosecution for any acts of corruption or violation of code of ethics or other matter prescribed by the Act or any other law. They also indicate that pursuant to Sections 3, 4 and 6 of the Leadership and Integrity Act, 2012, EACC is mandated to oversee and enforce implementation of the Act by various public bodies.

13. Their case is also that the 1st Respondent (EACC) initiated investigations after receiving a complaint (Exhibit RK-1) from the probationer, one Joseph Ng'olua and the nature of the said allegations was bribery and/or abuse of office and upon conclusion of the investigations, it recommended that that the Petitioner be charged with 3 counts of Abuse of Office pursuant to the provisions of Section 35 of the EACC Act. They submit that thereafter, the 2nd Respondent (DPP), pursuant to the provisions of Article 157 (10) of the Constitution independently reviewed the evidence gathered by the 1st Respondent and found it to be sufficient for purposes of establishing the charges preferred against the Petitioner. They submit that the particulars of witch hunt and dishonesty as pleaded by the Petitioner had not been demonstrated. They therefore urge that they rightfully acted within their mandate in charging the Petitioner.

14. They further submit that in accordance with Article 50 (2) (j) of the Constitution, the Petitioner has admittedly been supplied with all the documents and exhibits that the 1st and 2nd Respondents intend to rely on and that the Petitioner will therefore have an opportunity to dispute the authenticity of the 'unsigned statements' that he is aggrieved by. They argue that pursuant to the provisions of Article 159 (2) (d) of the Constitution, in exercising judicial authority, the Courts and tribunals shall be guided by a number of principles including that justice shall be administered without undue regard to procedural technicalities.

15. They further urge that the contrary to what the Petitioner alleges, the Petitioner acted outside his mandate since the investigations revealed that the agreement (Petitioner's Exhibit 3) was neither entered into voluntarily nor was it taken to the Court that sentenced the probationer for ratification. They urge that whereas the Petitioner's actions might have been well intentioned, they had no basis in law as according to Section 6 of the Probation of Offenders Act, Cap 64 Laws of Kenya, only the Court may order an offender to pay costs, damages or compensation for loss suffered by a victim. They urge that the Petitioner clearly used his office to confer benefit by causing the probationer to compensate the victim which compensation did not form part of the order issued by the Court and this contravenes Section 48 of ACECA and Chapter 6 of the Constitution of Kenya, 2010.

16. They further urge that the Petitioner has been using delay tactics to prevent Isiolo AC No. 2 of 2018 from proceeding.

17. Concerning the recommendation to suspend the Petitioner without a hearing and whether this was a violation of Article 47 of the Constitution, they urge that pursuant to his contract of employment, the Human Resource Policies, Section J, the Procedures Manual for the Public Service of 2016, Section 11 of the EACC Act and Section 62 (1) of the Anti-corruption and Economic Crimes Act (ACECA), a public officer who is charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge and this is what applied to the Petitioner's case. They urge that Section 62 of ACECA must be read in the context of its purpose and the overall purpose of the Act and the spirit enshrined in Chapter 6 of the Constitution and that suspension does not amount to penalty but merely suspends certain rights pending determination of the trial and that once trial is concluded, an officer is reinstated to his position with full pay, if he is found not guilty. They urge that there is no requirement for hearing before suspension and also, that it would be contrary to public interest if the Petitioner, who is charged with corruption is to be left to continue holding office. They relied on the case of **Republic v Ethics & Anti-Corruption Commission and Hon. Attorney General ex parte Patrick Gichunge Mwambia and Francis Atanasio Kithure, Meru JR No. 25 of 2016, Moses Mutehtis & 5 Others v Jacob Muthomi Kirera & 4 Others (2017) eKLR, Joshua Muindi Maingi v National Police Service Commission & 2 Others (2015) eKLR, Republic v Director of Public Prosecution & 4 Others (2018) eKLR.**

18. They urge that the Petitioner has failed to prove any violation of his rights and that his Petition should be dismissed with costs and that Isiolo Anti-Corruption Case No. 2 of 2018 should proceed for hearing as a matter of urgency before another Court other than Isiolo Law Courts as the Petitioner has worked closely with the Court as a Probation Officer.

4th and 6th Respondent's Case

19. The 4th and 6th Respondents opposed the application vide their replying affidavit sworn by Catherine K. Along'o, an employee of the 4th Respondent as a Probation Officer and the Petitioner's immediate supervisor. She states that during a probation case committee meeting held on 20th May 2015, the Petitioner's case was discussed and the Petitioner was advised to pursue reconciliation among other measures, in his duties with respect to the case that had been assigned to him for Joseph Ngolua who had been convicted for manslaughter and had been placed on probation for 3 years.

20. She states that she indeed witnessed the first reconciliation agreement of 23rd February 2015 and thereafter, a second reconciliation agreement was made after the probationer defaulted in remitting installments as was agreed in the first agreement. She further states that on 31st March 2016, the probationer brought to the office Ksh 1,500/= which money was understood to be part of the agreed installments by the probationer to the victim, and that upon receiving the said Ksh 1,500/=, the Petitioner was arrested by the EACC officers who were apparently waiting outside their office as the Petitioner received the money on behalf of the victim. She states that the Petitioner was then

charged in Isiolo EACC Cr Case No. 2 of 2018 with 3 counts of abuse of office contrary to Section 46 and 48 (1) of ACECA. She states that the suspension of the Petitioner was done as per the Human Resource Policies in place and that the Petitioner jumped the process and should have waited for the verdict of the Court on whether he is guilty or not.

21. Where a person is placed by a probation order under the supervision of a probation officer, the order shall be without prejudice to the powers of the court, under any law for the time being in force, to order the offender to pay costs, and such damages for injury or compensation for loss as the court may think reasonable.

Issues for Determination

22. From the pleadings on record, the following issues arise for determination:-

i) Whether the 1st and 2nd Respondents acted as required of them in charging Petitioner with the offence of Abuse of Office.

ii) Whether the Petitioner's right to a fair trial has been infringed upon.

Whether the 1st and 2nd Respondents acted as required of them in charging the Petitioner with the offence of Abuse of Office

23. The Petitioner's case is that his charges were framed against him and that he was on his ordinary course of duty when the Respondents framed him and arrested him. He states that the reconciliation talks were initiated by the parties themselves, being the deceased's family and the probationer's family and that his only role was to facilitate. His case is that the proposal to offer compensation to the deceased's widow was initiated by the probationer's family and he did not influence this arrangement in any way. The Petitioner has made reference to the numerous statutes and policies which allow for facilitation and guidance in reconciliation including the Probation of Offenders Act, the Victim Protection Act and the Probation and Aftercare Service Policy Outline by the 4th Respondent Ministry State Department of Correctional Services at Function 7. He also states that the decision to pursue reconciliation was sanctioned by the Probation Case Committee at the meeting held on 20th May 2015. He also states that the 4th Respondent already exonerated him from any offence related to the subject probation exercise and that the 1st Respondent did shoddy investigations.

24. The 1st and 2nd Respondents on the other hand argue that the agreement entered into on 23rd February 2015 was not entered into voluntarily. They urge that following receipt of a complaint in the nature of bribery/abuse of office from the probationer, the 1st Respondent conducted investigations and thereafter the 2nd Respondent upon review of the evidence gathered deemed it sufficient to charge the Petitioner.

25. This court has considered the principle of law involved in applications for stay of the prosecutorial power in **Republic v Director of Public Prosecution & another & Exparte Joshua Kilonzo Mutisya [2018] eKLR** and held as follows:

"30. The principles upon which the Court shall interfere with the prosecutorial mandate of the DPP, the respondent herein, or with the antecedent investigatorial powers of the Police are now well settled. The applicant must show that the criminal process was being abused in an unreasonable, malicious manner to serve motives ulterior to the objectives of the criminal justice to investigate, prevent and punish crime, or that the prosecution is an infringement of the rights or fundamental freedoms of the individual or otherwise against public interest."

26. Again in Nairobi PETITION NO. 523 OF 2014, **Christina Gakuhi Kubai v. DPP & 2 Ors.**

the court held:

"The Prosecutorial Mandate and Abuse of the Legal Process

38. I agree with the position that the police and the DPP have respectively constitutional investigation and prosecutorial powers under Articles 245 and 157 of the Constitution. Article 157 (10) of the Constitution provides for the independent prosecutorial powers of the DPP in terms as follows:

*"(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.***

39. Although both powers of investigations and prosecution are to be exercised independently without direction or control from any person, this does not preclude the High Court as a constitutional court from terminating investigations and prosecution undertaken in breach of rights and fundamental freedoms, public interest or in abuse of the legal process. The position was first established in Kenya by the High Court (Madan Ag. CJ., Aganyanya & Gicheru, JJ.) in **Githunguri v. Republic** (1986) KLR 1 and affirmed subsequently by the Court of Appeal (Tunoi, Githinji & Deverrel, JJA.) in **JORAM MWENDA GUANTAI v THE CHIEF MAGISTRATE, NAIROBI**[2007] eKLR when it held that the High Court has an inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court as follows:

*"Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. It was succinctly put in **Stanley Munga Githunguri vs Republic** [1985]*

KLR 91 that if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious the Judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court. This dictum is now an everyday edict in our courts and we are indeed surprised that the learned Judge was shy to so declare.”

40. It is true that courts have generally held this view of law as regards the court’s power to intervene in appropriate cases. For instance, in a ruling for conservatory order to stay prosecution in Nairobi Petition No. 442 of 2016, **Shivji Jadva Parbat and 2 Ors. v. The Hon. Attorney General and 2 Ors.**, this Court observed that –

“**22. It is clear that the police have general powers of investigation of crime under Article 245 (4) (a) of the Constitution and the DPP a general power to prosecute offenders subject only to the Constitution and the requirements of public interest under Article 157 (11) of the Constitution. The test appears therefore to be whether there is demonstrated a reasonable justification to commence investigation and prosecution for a crime. Where however, it can be shown that the prosecution is being carried out some purpose ulterior to the objects of the criminal process to enforce the law and to prosecute offenders, as to amount to what the constitution in Article 157 (11) calls abuse of the legal process, the court must intervene to halt such abuse.**”

41. Most recently, in **Director of Public Prosecutions v. Justus Mwendwa Kathenge & 2 others** [2016] eKLR delivered on 25th November 2016, the Court of Appeal has restated the principle that the powers of the DPP to prosecute are not absolute, and may be halted in cases of abuse of process, and held that:

“From the days of **Githunguri** [(1986) KLR 1], the prosecutorial powers, then exercised by the Attorney General, was held to have limits; that it must never be abused, never exercised oppressively, maliciously or against the public interest. The Court in that decision emphasized that, where it was clear that the power to prosecute was being misused, the court, under its inherent jurisdiction would stop such prosecution as it would amount to an abuse of the process of the court. This holding has since been consistently followed. See also **Mohammed Gulam Hussein Fazal & another v The Chief Magistrate Court, Nairobi & another** H.C. Misc Application No 367 of 2005, and **Peter George Antony D’costa v A.G & Another**, Petition No. 83 of 2010.”

42. Similarly in Australia, the High Court of Australia in **Williams v Spautz** [1992] HCA 34; 174 CLR 509; 66 ALJR 585; 107 ALR 635; 61 A Crim R 431 long held that abuse of process is a ground for termination of criminal proceedings as follows:

“**15. It is well established that Australian superior courts have inherent jurisdiction to stay proceedings which are an abuse of process** (5) **Clyne v. N.S.W. Bar Association** [1960] (1960) 104 CLR 186, at p 201; **Barton v. The Queen** [1980] HCA 48; (1080) 147 CLR 25, at pp 96, 107, 116; **Jago**. Although the term “inherent jurisdiction” has acquired common usage in the present context, the question is strictly one of the power of a court to stay proceedings. That power arises from the need for the court to be able to exercise effectively the jurisdiction which the court has to dispose of the proceedings. The existence of that jurisdiction has long been recognized by the House of Lords (6) **Metropolitan Bank v. Pooley** (1885) 10 App. Cas 210; **Connelly v. D.P.P.** (1964) AC 1254; **Reg. v. Humphrys** (1977) AC 1. **The jurisdiction extends to both civil and criminal proceedings.** As Lord Morris of Borth-y-Gest observed in **Connelly v. D. P.P.** (7) (1964) AC, at p 1301.

“(A) court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. **A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.**”

43. The position in England and Wales is no different. At paragraphs 4-48 and 4-49 p. 347, Archibold, *Criminal Pleading, Evidence and Practice*, 2006 ed. notes as follows:

“Abuse of Process

(a) Jurisdiction

General

In **Connelly v. DPP** [1964] A. C 1254-1355, Lord Devlin added a fifth ground to the list set out in *ex p. Downes*, ante viz. **where particular Criminal proceedings institute an abuse of the courts process**, see also Lord Pearce at pp. 1361, 1364 and Lord Reid at p. 1296, but cf, Lord Morris at pp 1300-1302 and Lord Hodson at pp. 1335-1338 what all their Lordships do seem to agree upon is that the court has a general and inherent power to protect its process from abuse. This power must include power to safeguard an accused person from oppression or prejudice: Lord Monis, ante; Lord Devlin at p. 1347; Lord Pearce, ante.

The views expressed in *Connelly*, ante, were considered, obiter, in *DPP v. Humphrys* [1977] AC 1, HL. Only Lords Dilhorne, Salmon and Edmund-Davies considered the point. Lord Salmon and Lord Edmund-Davies concurred with the views expressed by Devlin and Lord Pearce in *Connelly*, while Lord Dilhorne supported the narrower approach adopted by Lord Morris and Lord Hodson.

“I respectfully agree with [Lord Dilhorne] that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. **It is only if the prosecution amounts to an abuse of power to intervene. Fortunately such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred “(per Lord Salmon at p. 46C-F).**”

44. In addition, Article 157 of the Constitution of Kenya which gives the DPP the power to institute and undertake criminal proceedings in respect of any offence is subject to sub-Article (11) as follows:

“(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.”

Section 193 A of the Criminal Procedure Code, which provides that the institution of civil proceedings does not preclude the State from instituting and maintaining criminal proceedings against a party with respect to an issue which is also directly in issue in a pending civil suit is, as a statutory stipulation, similarly subject to **abuse of process** principle of Article 157 (11) of the Constitution.”

27. The cardinal rule in the conduct of criminal trial is that the decision to charge must have been informed by the law and must have been done within the confines of the law and for lawful purposes. Normally, the presumption is that the law was followed and the burden to prove otherwise rests on the person alleging so, in this case, the Petitioner. In the case of **Geoffrey K. Sang v Director of Public Prosecutions & 4 Others in Petition No. 19 of 2020 (Machakos)**, G. V. Odunga J held as follows at paragraph 167: -

“However, it is upon the person who seeks to terminate or quash a criminal process to satisfy the Court that the discretion given to the 1st and 2nd Respondents to investigate and prosecute ought to be interfered with.”

28. In the case of **Diamond Hasham Lalji & Another v Attorney General & 4 others Civil Appeal No. 274 of 2014 [2018] eKLR** Mohammed J, H. M. Okwengu J and E. M. Githinji J sitting at the Court of Appeal held as follows: -

[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.”

29. From the above, it is clear that the Prosecution will only be required to justify their prosecution if the Petitioner discharges his burden and casts doubt as to the lawfulness of his Prosecution.

30. In the case of **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** which was cited by G. V. Odunga J in the other case of **Attorney General vs Chief Magistrate, Milimani Law Courts & 3 Others ex parte Mohan Galot, JR Miscellaneous Application No. 82 of 2018, (2018) eKLR**, it was held as follows: -

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial.”

31. Applying this principle in the abovementioned case, this Court finds that for an order terminating and/or quashing the criminal proceedings instituted against him, the Petitioner must show that there was **manipulation, abuse or misuse of court process or that his right to a fair trial is likely to be infringed upon** should the said proceedings go on.

32. Indeed, when exercising duty, the Director of Public Prosecutions is required to act within the confines of the law and avoid abuse of the legal process. Article 157 (11) of the Constitution of Kenya provides as follows: -

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.

33. This Court observes that a larger part of the submissions filed by parties in the matter herein have gone into the merits of the charge that is pending before the trial court. In essence, the Petitioner has set out his defence which is to be adduced before the trial Court i.e that he was acting within his mandate in facilitating the reconciliation between the parties and that the agreement was entered into voluntarily by the parties themselves. The Petitioner has also highlighted that fact that his seniors who were very well aware of the agreement have exonerated him. The validity of the Petitioner’s defence is a matter for the trial Court.

34. For purposes of determining whether or not there was manipulation or abuse or misuse of court process, this Court is keen on the events that happened prior to the decision to charge the Petitioner. Courts should exercise caution when interfering with the discretion of the trial Court which is the proper Court to determine the merits of the criminal case. This Court should therefore not, at this stage, go into the merits of the case before the criminal trial court. In the case of **Republic v CS, In Charge of Internal Security & 3 others Ex-Parte Jean Eleanor Margaritis Otto Misc. APPL. No 271 of 2015 [2015] eKLR** G. V. Odunga J held as follows: -

“Several decisions have been handed down which, in my view, correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. However while applying the said principles to a particular case, the Court must always be cautious in its findings so as not to prejudice the intended or pending criminal proceedings so as not to transform itself into a trial court.”

35. In the present case, the Petitioner has merely stated that his prosecution was a witch hunt because he was acting within his mandate with the knowledge of his superiors and that his superiors exonerated him from an offence. The Respondents on the other hand have shown that they received a complaint from the probationer to the effect that the Petitioner had asked for a bribe and/or abused his office. The summary of the complaint was adduced in evidence. It is also confirmed by way of affidavit evidence that investigations were done by the 1st Respondent and handed over to the 2nd Respondent who upon independent review of the same, found that there was sufficient evidence to sustain the charges of abuse of office. This Court therefore finds that there was reason genuine and good enough to move the Respondents to initiate the charges. Although the Petitioner urges that the Respondent conducted shoddy investigations, this is a matter that would go to support his defence. The fact that the Petitioner appears to have a good defence, has been held time and again as being insufficient to interfere with the criminal proceedings.

36. In the case of *George Joshua Okungu & Another V The Chief Magistrates Court, Nairobi & Another, Petition No. 227 and 230 of 2009 [2014] eKLR* G V Odunga J and W Korir J held as follows: -

“50. The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the petitioner’s Constitutional rights, the Court will not hesitate in putting a halt to such proceedings.”

37. Similarly, in the case of *Republic v Grace Wangari Bunyi (Sued as the Administrator of the Estate of the Late Obadiah Kaira Bunyi) & 7 others ex parte Moses Kirruti & 28 others [2018] eKLR* R. Nyakundi J held as follows: -

“It is important to note that the discretion given to the Director of Public Prosecutions to undertake investigation and prosecute criminal offences is not to be taken for granted or lightly interfered with and must be properly exercised. In the same respect, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions. The mere fact that their high chance of success as regards the intended or ongoing criminal proceedings does not count, it not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned merits of the case but to address defects in decision making process by a decision making body. However, the court may only intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence and the justice system such as with a view to forcing a party to submit to a concession of a civil dispute, the court will not hesitate to bring such proceedings to a court.”

38. See also *Eunice Khalwali Miima v Director Public of Prosecutions & 2 others [2017] eKLR*.

39. This Court therefore finds that the mere fact that the Petitioner appears to have a good defence in the criminal proceedings is not enough to terminate the said proceedings. If the said proceedings were instituted with a reasonable belief that the Petitioner was involved the acts of bribery and/or abuse of office, as was the case herein, then it is not for this Court to interfere with the mandate of the Respondents.

40. Although he has not strongly urged it, the other issue that the Petitioner raised was on the wide media coverage done at the 1st Respondent’s instant. This Court finds that wide media coverage is not an issue good enough to infer doubt on the legality of the process or to suggest the possibility of compromising the right to fair trial. This matter was discussed at length in the case of *Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) Petition No. 295 of 2018 [2019] eKLR* where H. A. Omondi J, Mumbi Ngugi J, Francis Tuiyott J, W. M. Musyoka J and E. C. Mwita J held as follows: -

“342. We use the term ‘perception of tensions’ deliberately. This is because the question of the effect of adverse pre-trial publicity on the rights of an accused person has been considered in various decisions in our courts. In Republic v Attorney General & 3 others ex parte Kamlesh Mansukhlal Damji Pattni (supra) the court discussed the issue and held that the Constitution guarantees freedom of the media, freedom of expression and, where applicable, the right of access to information and limitations to the exercise of these rights and therefore media freedom can only be limited as prescribed in Article 24 of the Constitution.

343. Similarly, in William S.K. Ruto & Another v Attorney General (supra), the court observed that a criminal trial is conducted by qualified, competent and independent judicial officers who are not easily influenced by statements made to the press and that courts are able to rise above such publications and utterances.

344. In its decision in Republic v Director of Public Prosecution & another ex parte Chamanlal Vrajlal Kamani & 2 others [2015] eKLR, the court found that there was no allegation of a risk that as a result of the adverse publicity generated, the applicants’ right to fair trial was threatened and there was no allegation against the trial court.

345. What emerges from these decisions is that in a criminal justice system such as ours in which the trial is conducted by a judicial officer as opposed to trial by jury, pre-trial media publicity or any media publicity cannot influence the mind of the trial court which is manned by a competent and independent judicial officer. It follows therefore that such publicity would not be deemed to be in violation of the right of an accused person to the presumption of innocence and the right to a fair trial. That is the position in this Petition.”

41. Accordingly, this Court does not find any sufficient linkage to the wide media coverage with the claims for misuse of process or infringement of right to fair trial.

42. This Court does not also find any reasons to conclude that the criminal prosecution was instituted for any other reasons other than the honest enforcement of criminal law. While this Court observes that there is a report from the Petitioner’s own employer exonerating him from abuse of office, this Court finds that this is a point to be raised during trial in the Petitioner’s defence. The mere fact that there appears to be a good defence is not sufficient to conclude that there was abuse of office and that the prosecution was initiated so as to achieve some other nefarious ends.

43. This Court therefore finds that the Petitioner has not satisfactorily proved, that his prosecution was tainted with abuse of office or that his right to a fair trial is likely to be infringed should the proceedings be left to proceed.

Whether the Petitioner’s right to a fair trial has been infringed upon.

44. The Petitioner has complained that the witness statements that were subsequently availed to him were typed ones without the certificate as to the typist, that they were unsigned and that they related to previous allegations of bribery and that when asked to avail handwritten statements, it turned out that there were no such statements. He further complains that the 2nd Respondent then applied to transfer the case to Nanyuki Court for trial and the 5th Respondent poised to make an order for transfer even without hearing the defence.

45. The 1st and 2nd Respondents have trivialized the matter of unsigned witness statements as a procedural technicality. According to the 1st and 2nd Respondents, the Petitioner has admittedly been supplied with all the documents and exhibits that the 1st and 2nd Respondents intend to rely on and that the Petitioner will therefore have an opportunity to dispute the authenticity of the ‘unsigned statements’ that he is aggrieved by. They argue that pursuant to the provisions of Article 159 (2) (d) of the Constitution, in exercising judicial authority, the Courts and tribunals shall be guided by a number of principles including that justice shall be administered without undue regard to procedural technicalities.

46. On the question of transfer, they argue that it is necessary to have the matter transferred because the Petitioner has worked closely with the Court in Isiolo.

47. These above two questions are at the heart of the constitutional principle that every accused person has a right to a fair trial. Article 50 (2) (j) of the Constitution of Kenya provides that the right to a fair trial includes the right: -

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

48. Witness statements are considered part of evidence. The question of whether failure to provide handwritten statements and failure to provide signed statements is an omission fatal enough to be said to have violated the right to fair trial as per Article 50 (2) of the Constitution of Kenya arises for determination. This Court finds that the failure to provide handwritten statements is not fatal. Indeed there could be many reasons as to why a witness is not able to write by hand his statements, necessitating the use of technology more so in this digital era. To this Court, the bigger concern is on the omission to sign the statements. In the case of ***Martin Richard Oduor v Republic Criminal Appeal No. 46 of 2017 [2019] eKLR*** R. E. Aburili J, in refusing to consider an unsworn affidavit held as follows: -

“This is because it is now settled law that an unsigned pleading or document has no validity in law as it is the signature of the party filing the pleading or document that signifies or authenticates the same and ownership of the document; and without a signature, a document or statement which is on record is not owned by anyone. It is amenable for striking out.”

49. This Court does not agree with the 1st and 2nd Respondents’ argument that this omission is a procedural technicality. Failure to sign a witness statements has far reaching consequences in that the same is deemed to have no owner. Without an owner, the document is as good as meaningless. It is not enough for the names of the witnesses to be there. In the event the author is not able to sign for whatever reason, the most feasible thing for him to do is to have him affix his thumbprint on the document. However, as to whether this is enough to quash the entire proceedings, this Court finds otherwise. This Court is mindful that it has not even had a chance to look at the said statements. This Court thus finds that this is a matter that the trial Court is best placed to deal with. The trial Court is equally bound to the very law this Court is bound to.

50. On the question of transfer, the Petitioner has urged that the Court was about to order for transfer before hearing the defence side. This Court will not at this stage make a definitive finding on whether or not the matter should be transferred. The provisions of law on the place of institution of a suit and the matter of transfer are found in Sections 71 and 81 of the Criminal Procedure Code respectively. This Court observes that the power to order for transfer of a matter from one court to the other is the preserve of the High Court. For such an order to be made, there must be a proper application by way of motion before the Court. Section 81 (3) of the Criminal Procedure Code provides as follows: -

81. Power of High Court to change venue

(3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when

the applicant is the Director of Public Prosecutions, be supported by affidavit.

There is no such application before the Court and this Court cannot therefore make such finding on this issue. Should parties wish to make such application, they are at liberty to do so in the manner prescribed for by the Criminal Procedure Code.

Orders

51. In the end, this Court makes the following orders: -

1. The Petitioner's Petition dated 6th January 2020 is hereby dismissed.

2. The trial Court is directed to hear Isiolo Chief Magistrate's Court ACEC Criminal Case No. 2 of 2018 Republic v. Samson Kabuthuri Akotha to its final disposal.

3. Each party shall bear its own costs of the Petition.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF APRIL, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mukira Mbaya & Co. Advocates for the Petitioner

Ruth J Kilimo Advocate for the 1st and 2nd Respondents

The Hon. Attorney General for the 3rd, 4th, 5th and 6th Respondents.