



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 23 OF 2020**

**IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 29, 41, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE VIOLATION OF THE CONSTITUTION UNDER ARTICLES 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE VIOLATION OF SECTIONS 3, 9(a) (b) (c) AND (g), 10, 18, 19, 25 AND 35 OF THE PUBLIC OFFICER ETHICS ACT, 2003**

**AND**

**IN THE MATTER OF: SECTIONS 22 AND 23 OF THE COUNTY ASSEMBLY SERVICE ACT, 2017**

**BETWEEN**

**HAMISI BWENI DZILA.....PETITIONER**

**VERSUS**

- 1. DIRECTOR OF PUBLIC PROSECUTION**
- 2. THE OFFICER COMMANDING KWALE POLICE STATION**
- 3. CHITIBWA M. SAID**
- 4. JOHN KALU.....RESPONDENTS**

**JUDGMENT**

**The Petition**

1. By a petition herein dated 3/4/2020 the Petitioner prays for the following orders:

(a) A declaration that Kwale Chief Magistrate Criminal **Case No 125 of 2020 Republic v Hamisi Bweni Dzila and Janet Mwanja** is unfairly and unprocedurally commenced in violation of article 29, 48 and 50 of the constitution of Kenya, 2010 and is therefore illegal, null and void.

(b) A declaration that Kwale Chief Magistrate Criminal **Case No 125 of 2020 Republic v Hamisi Bweni Dzila and Janet Mwanja**

is unfairly and unprocedurally commenced in violation of section 35 of the Public Officer Ethics Act and is therefore illegal, null and void.

(c) An order against the 1<sup>st</sup> to 4<sup>th</sup> Respondents prohibiting them from proceeding with the prosecution of Kwale Chief Magistrate Criminal Case No 125 of 2020 Republic v Hamisi Bweni Dzila and Janet Mwania.

(d) Costs of this claim.

### **Facts making the Petition**

2. Sometime on 17th December, 2019 the Petitioner filed ELR Claim No. 99 of 2019 **Hamisi Bweni Dzila v County Assembly of Kwale & Another** complaining about the illegal and or unlawful termination of his appointment as a clerk to the Kwale County Assembly. The Petitioner simultaneously with the filing of the claim filed an application under a certificate of urgency seeking among others an order of reinstatement to his position of a clerk of the Kwale County Assembly pending the hearing and determination of the claim. After hearing both parties, the Court did allow the application and ordered that: -

- a. the Claimant be reinstated with immediate effect to his position as the clerk to the County Assembly of Kwale;
- b. that he be paid his back-salary from the date of termination, 11/12/2019 to the date of ruling which was 28/2/2020;
- c. that the Respondents were not to interfere with the Claimant's discharge of his mandate as the clerk, provided that any steps taken by the Respondents to remove the Claimant from office, in accordance with the law, shall not be deemed to amount to interference with discharge of mandate, and
- d. the matter is to be mentioned on 31/3/2020.

3. The Petitioner reported for work on 2/3/2020 but he was not allowed into his office as there were police officers deployed with specific instructions to prevent him from accessing his office. However, before he was ordered out of the compound, he was issued with a Notice of Administrative Suspension Pending Investigation dated 2/3/2020. In the said notice, the 3<sup>rd</sup> Respondent alleged that the 1<sup>st</sup> Respondent was in possession of information and allegations that the Petitioner:

- (i) Failed to exhaust internal disciplinary mechanism in handling allegations against an officer of the service and opted to explore external disciplinary mechanism.
- (ii) Has refused and or failed to implement several decisions and or resolutions of the board.
- (iii) Has on various occasions undertaken programs without seeking the Board's approval.
- (iv) Has written to sources external to the service seeking advice without the knowledge or approval of the Board.
- (v) Has authorized and or approved payments from the Assembly's account without the approval of the Board and contrary to financial procedures and guidelines.
- (vi) Has misrepresented information to the Board and presented minutes that do not capture the true deliberations and decisions of the Board.
- (vii) Has in subordinated the Board.

4. Further the said notice stated that the board sat on 1/3/2020 which was on a Sunday and past the above stated resolution. The said suspension was for a period of sixty (60) days. While it was not disciplinary, it was intended to pave way for thorough investigations and to determine appropriate action. The suspension was with full pay. However, on 11/3/2020 at the Kenya Ports Authority Social Club at Mbaraki Mombasa, the Petitioner was inhumanely and degradingly arrested by the Officer Commanding Matuga Police Division and transported to Kwale Police Station where he was informed that he was to be charged for giving false information to a person employed in the public service. He was later that evening, released on Police bond after depositing Kshs. 30,000/- cash.

5. The Petitioner avers that he attended Court on 12/3/2020 for the taking of plea but the prosecution recommended for reconciliation. However, the police were reluctant and the matter had to be adjourned to 13/3/2020. The Petitioner and his co-accused were granted cash bail of Kshs. 10,000/- each and were advised to reconcile with the complainant. They did not take plea but the matter was to be mentioned on 2/4/2020.

6. The Petitioner states that on 17/3/2020 he was issued with an undated notice to show cause why removal proceedings should not be commenced against him. In the notice, the 3<sup>rd</sup> Respondent formulated eight (8) charges against the claimant which are:-

- (i) Failing to exhaust internal disciplinary mechanisms and opting to explore external mechanisms without involving the board.
- (ii) Refusal and or failing to implement several decisions and or resolutions of the board.

- (iii) Writing to sources external to the County Assembly Service Board seeking advice without the knowledge or approval of the Board.
- (iv) Authorizing and or approving payments from the assembly's account without the approval of the board and contrary to financial procedures and guidelines.
- (v) Misrepresentation of information and records to the board.
- (vi) Refusal and or failure to subject himself to the attendance control system set by the assembly to check time-keeping and attendance.
- (vii) Insubordination to the board.
- (viii) Abscondment of duty.

7. The Petitioner, through his advocates Messrs Aboubakar, Mwanakitina & Company Advocates, showed cause why removal proceedings should not be commenced against him through their letter dated 23/3/2020 and served on the County Assembly Service Board on 24/3/2020. The Petitioner avers that despite him having shown cause he was apprehensive that the Respondents had already made their decision to terminate his services as a clerk of the County Assembly of Kwale and were only going through the process to appear to be complying with the legal procedures, hence he filed ERL Claim No 21 of 2020 **Hamisi Bweni Dzila Kwale County Assembly Service Board and 6 Others.**

8. The Petitioner's reasons for his apprehension are as follows-

- (i) Although he was appointed as clerk of the Kwale County Assembly effectively from 1/8/2019 and by virtue of section 12(4) of the County Government Act, 2012 he became the secretary to the Kwale County Assembly Service Board, he has never been allowed to take and sign the minutes of the board as is required by law.
- (ii) From the date of his appointment he has never been handed over the office of the clerk and a handing over report has never been submitted to him as is required.
- (iv) On the same month of August, 2019, even before the Petitioner had settled into his appointment and before he was handed over his office, he started receiving threatening phone calls informing him that they the callers had a dossier on him of his corrupt activities where he had worked previously before he was appointed as a clerk of the County Assembly of Kwale and consequently they asked him to quit his new appointment or else they would present the dossier to the Board so that his appointment is terminated. The Petitioner asked for the dossier but it was not presented to him. He thus decided to report to the police through OB NO 18/25/09/2019. The investigations are pending before the police.
- (iv) The Petitioner believes he antagonized the Kwale County Assembly Service Board together with all its members when he advised them that he could not authorize and or approve payments to a contractor of a project which was under investigations by the Ethics and Anti-Corruption Commission (EACC) without the commission's authority and particularly when he wrote to the EACC to seek information which would enable him act within the law.
- (v) The Petitioner's advice against paying the contractor was supported by the Assembly's Legal Department and the EACC.
- (vi) The Petitioner's aforesaid actions annoyed the Kwale County Assembly Service Board members who discussed the same with the staff amongst them, the County Procurement Officer one John Kalu who was so angry that on 4/12/2019 he uttered threats to the claimant's secretary Janet Mwanja. Miss Mwanja informed the Petitioner about the threats and he advised her to report to the police which she did. The police called the Petitioner to record the statement as the person against whom the threats were directed.
- (vii) This action further angered the members of Kwale County Assembly Service Board prompting the chairperson to terminate the Petitioner's appointment on 11/12/2019 which termination the Petitioner successfully challenged in the Employment and Labour Relations court.
- (viii) Again this angered, annoyed and or displeased the members of Kwale County Assembly Service Board prompting the chairperson to unprocedurally issue a letter of suspension dated 2/3/2020 and later issued an undated notice to show cause with trump up charges.
- (ix) The alleged meeting of the board that allegedly took place on Sunday 1/3/2020 a day after the Employment and Labour Relations Court's ruling to reinstate the Petitioner is illegal as the provisions of clause 3 of the Second Schedule to the County Assembly Service Act, 2017 were not complied with. The same is a demonstration of the malice, lack of good faith and abuse of office or power by the members of Kwale County Assembly Service Board.
- (x) The Petitioner believes that his arrest in Mombasa on 11/3/2020 was engineered by the members of Kwale County Assembly Service Board with the collusion of the police as he could have been summoned to the police station and informed that he was to be charged in court. This too is a demonstration of the malice, lack of good faith and abuse of office or power by the members of Kwale County Assembly Service Board.
- (xi) The Petitioner wonders how he could be charged for giving false information when his complaints are still under investigations.

9. It is therefore the Petitioner's claim that the whole process initiated by the Kwale County Assembly Service Board in order to remove him as a Clerk of the County Assembly of Kwale is an abuse of their power and a violation of the values and principles of public service as provided for under article 232 of the Constitution of Kenya, 2020. The Petitioner believes that the Respondents have acted unprofessionally and unethically, and without accountability for their administrative acts.

10. Further to the foregoing the Kwale County Assembly Service Board's actions are a violation of Article 236 of the Constitution of Kenya, 2010 as the said actions are a victimization or discrimination against the petitioner for having performed the functions of his office in accordance with the Constitution, the County Government Act, 2012, the County Assembly Service Act, 2017 and the Public Finance Management Act, 2017.

11. Considering the aforesaid, the Petitioner avers that the charges against him in Kwale Chief Magistrate Criminal Case No 125 of 2020 **Republic v Hamisi Bweni Dzila and Janet Mwanja** are based on malice and bad faith and are intended to be used against him in justifying the Kwale County Service Board's process of removing him from office and amount to abuse of power and conspiracy to defeat justice against him. This, according to the Petitioner, is a violation of the right to access justice and fair hearing under articles 48 and 50 of the constitution of Kenya, 2010.

12. Despite the Petitioner having complained to the Police, his complaints have not been investigated and action taken against those who issued the threats which is a violation of article 27 of the constitution of Kenya, 2010. In any event there is no person who registered a complaint against him to warrant him being charged in court.

13. The Petitioner avers that by virtue of Section 35 of the Public Officer Ethics Act, the Kwale County Assembly is required to investigate whether by the Petitioner reporting the threat uttered by the 4<sup>th</sup> Respondent John Kalu to the Police he had acted contrary to the Code of Conduct of the Public Officer and if they find him having breached the code they take appropriate disciplinary measures but not to allow the 4<sup>th</sup> Respondent or the Police to charge the petitioner with criminal charges as is the case herein.

14. Consequently, the Petitioner avers that the Respondents breached the constitution and the law as follows:

(a) The 1<sup>st</sup> Respondent failed to exercise his authority under Article 175 to direct the police to conduct proper investigations in respect of the complaints registered by the Petitioner.

(b) The 1<sup>st</sup> Respondent failed to have regard to the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

(c) The 2<sup>nd</sup> Respondent failed to properly advise the 3<sup>rd</sup> Respondent to complete investigations of the complaint by the Petitioner.

(d) The 2<sup>nd</sup> Respondent failed to properly advise the 3<sup>rd</sup> Respondent not to present the charges in court without a formal complaint by the alleged complainant John Kalu.

(e) The 2<sup>nd</sup> Respondent failed to properly advise the 3<sup>rd</sup> Respondent not to press charges against the petitioner who is a public officer in view of the provisions of Section 35 of the Public Officer Ethics Act.

(f) The 3<sup>rd</sup> Respondent failed to complete investigations of the complaint by the Petitioner.

(g) The 3<sup>rd</sup> Respondent presented charges in court against the Petitioner without a formal complaint by the alleged complainant John Kalu.

(h) The 3<sup>rd</sup> Respondent wrongly pressed charges against the Petitioner who is a public officer in view of the provisions of Section 35 of the Public Officer Ethics Act.

15. The petition is supported by affidavit sworn by Petitioner on 3/4/2020 as a Further Affidavit sworn on 19/6/2020.

### **The Response**

#### **The 1<sup>st</sup> Respondent's Response**

16. The 1<sup>st</sup> Respondent, the DPP, opposed the petition vide Grounds of Opposition dated 27/5/2020 as follows:

(i) That the Petitioner has failed to demonstrate that the petition is arguable and that the suit will be rendered nugatory if the stay orders are not granted.

(ii) That the Petitioner has failed to demonstrate and provide any evidence of malice, evidence of unlawful actions, evidence of excess or want of authority, evidence of harassment or intimidation or even of manipulation of court process so as to show the likelihood that the Petitioner might not get a fair trial.

(iii) That the petition is a clear demonstration of abuse of process as the Applicant has not yet taken plea hence making this application premature.

(iv) That the petition contravenes Article 157(6) of the Constitution of Kenya, 2010, which gives the Director of Public Prosecutions the authority to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed.

(v) That the Petitioner contravenes Section 24 of the National Police Service Act, Cap 84, which gives the National Police powers to maintain law and order, investigate crimes and apprehend offenders.

### **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's Responses**

17. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the petition vide Grounds of Opposition filed on 18/6/2020, stating that the application is scandalous, vexatious and an abuse of the court process; that the petition/application herein is meant to curtail and or fetter the 1<sup>st</sup> Respondent's constitutional mandate contrary to Article 157(10) of the constitution; that the 3<sup>rd</sup> Respondent enjoys immunity from legal action while carrying duties per Section 66 of the National Police Service Act; that the claim against the 3<sup>rd</sup> Respondent has been brought contrary to Section 12(1) of the Government Proceedings Act; that the claim against the 3<sup>rd</sup> Respondent is informed by malice and clearly calculated to intimidate the 3<sup>rd</sup> Respondent therefore ought to be dismissed and that the claim against the 2<sup>nd</sup> Respondent having been filed contrary to Section 66 of the National Police Service Act ought to be struck out in the first instance.

### **The 4<sup>th</sup> Respondent's Response**

18. The 4<sup>th</sup> Respondent John Kalu, opposed the petition vide Grounds of Opposition filed herein on 26/5/2020, stating that the petition is misconceived, frivolous, bad in law and nothing but an abuse of the process of the court and must fail in its entirety.

19. The 4<sup>th</sup> Respondent also filed a Replying Affidavit sworn by himself on 26/5/2020. The 4<sup>th</sup> Respondent's case is that on the afternoon of 3/12/2019 he received a routine call from his colleague directing him to pick a letter from the County Assembly Clerk's office and on 3/12/2019 he visited the County Assembly Clerk's office where he was handed the letter by the Secretary to the County Assembly Clerk one Janet Mwanja and he left the office without any altercation or uttering any threatening words towards the Petitioner. On 4/12/2019 he received a called from an officer who identified himself as Mr. Mokaya directing him to report to Matuga DCI office and after visiting the DCI Matuga office he was shocked to learn that the Petitioner and Janet Mwanja had made a complaint against him for issuing threatening words directed towards the Petitioner and he was directed to record a statement which he did.

20. The 4<sup>th</sup> Respondent further stated that 3 of his colleagues present when he collected the letter were summoned by the DCI office at Matuga and recorded statements; that his advocate on record advised that after the investigation to a complaint are concluded, the suspect if found culpable is charged against the offence in a court of law and where evidence is not sufficient, no charge is preferred against the suspect and that investigation was conducted and concluded by the investigations officers and to-date there has never been any charges preferred against him regarding the complaints made.

21. The 4<sup>th</sup> Respondent denies ever issuing threats to the Petitioner. However, after the investigations were conducted in the matter, it was concluded by the DCI Kwale that the Petitioner jointly with Janet Mwanja gave false information to the effect that the 4<sup>th</sup> Respondent had threatened the Petitioner. The 4<sup>th</sup> Respondent avers that he knows that giving false information to a person employed in the public service is an offence contrary to Section 129(a) of the Penal code and is punishable by law; that the mandate of conducting investigations is vested on the Inspector General of Police through the Directorate of Criminal Investigation as provided under Section 35 of the National Police Service Act (Cap 11A of 2011) Laws of Kenya; that the mandate to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed is vested on the Director of Public Prosecution as established under Article 157 of the Constitution of Kenya, 2010 and that he has nothing to do with the arrest and prosecution of the Petitioner nor did he influence or discuss the same with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as alleged by the Petitioner.

22. The 4<sup>th</sup> Respondent further states that on 13/4/2020 when the Petitioner was arraigned in court for plea taking in Criminal Case No. 125 of 2020 (**Republic v Hamisi Bweni Dzila**), the Petitioner voluntarily made an application before court for the plea to be deferred to enable him pursue an out of court settlement. The court granted the application and released the Petitioner on a cash bail; that despite the Petitioner's own request to settle the case out of court, he never complied but in an attempt to blackmail, delay and defeat justice, the Petitioner mischievously hastened to file this petition. The 4<sup>th</sup> Respondent states that he is only a witness and not the complainant before the trial court in Criminal Case No. 125 of 2020 (**Republic v Hamisi Bweni Dzila**) and that it is the Petitioner who initiated the complaint with the DCI Matuga on 4/12/2019.

23. The 4<sup>th</sup> Respondent states that the mandate to conduct disciplinary measures against the clerk of a County Assembly is vested with the County Assembly Service Board in line with the provisions of Section 22 and 23 of the County Assembly Services Act, 2017 and as such the Board executed its mandate within the law; that the application is brought in bad faith and an afterthought by the Petitioner and that the Petitioner was properly charged with the offence of giving false information to an officer employed by the public service and that this Court should allow the criminal cause to run its full course without interference.

### **Submissions**

24. The petition was canvassed via written submissions. The Petitioner filed three sets of submissions on 2/6/2020, 19/6/2020 and on 23/12/2020.

25. I have carefully considered the petition and submissions of parties and authorities relied on.

26. Mr. Aboubakar, learned counsel for the Petitioner submitted that pursuant to the employment dispute between the Petitioner and his employer Kwale County Assembly Board which led to unprocedural termination of the Petitioner's services, the Petitioner through ELRC No. 99 of 2019, was reinstated to his employment. However, barely a day later, on 1/3/2020 the County Assembly of Kwale sitting on a Sunday resolved to suspend the Petitioner pending investigations. Counsel submitted that this was an action in malice. The Petitioner reported for work on Monday 2/3/2020 but he was prevented from accessing office and he was served with the suspension letter dated 2/3/2020. Counsel wondered why the Board would be so anxious to remove the Petitioner from office to make it sit on a Sunday and resolve to suspend him? Counsel submitted that the reason for such desperate act is nothing but malice, pride and or anger against the Petitioner. Counsel submitted that the Board suspended the Petitioner pending investigations when they had already terminated his services only for malicious reasons, because the Board would not be fair and objective in its alleged investigations after it had already formed an opinion that the Petitioner was culpable. Mr. Aboubakar submitted that the Petitioner's fate was pre-determined. As if that was not enough nine (9) days later on 11/3/2020 a senior officer, an Assistant Superintendent of Police, the 3<sup>rd</sup> Respondent who is in charge of Matuga Sub County in Kwale County broke police protocols and procedures by entering somebody else's jurisdiction in Mombasa and inhumanly and degradingly manhandled and commandeered the Petitioner and frog matched him to a private vehicle in the control of the police and transported him to Kwale Police Station where he was informed that he was to be charged for giving false information to a person employed in the public service, that is, Inspector Peter Mokaya. The alleged false information is that the Petitioner reported that John Kalu, the 4<sup>th</sup> Respondent herein, a Procurement Officer of the Board had threatened him. Mr. Aboubakar submitted that the 3<sup>rd</sup> Respondent was so agitated to prompt him to cross borders to Mombasa and roughly arrest and humiliate the Petitioner.

27. Mr. Aboubakar submitted further that when the Petitioner attended court on 12/3/2020 for taking plea, the DPP Kwale had advised that the Petitioner do reconcile with the complainant. However, the 3<sup>rd</sup> Respondent was adamant that the Petitioner do take plea prompting the court to intervene, and advised the matter be mentioned on the following day. On the 2<sup>nd</sup> day the Petitioner and his co-accused did not take plea but were advised to appear in court on 2/4/2020 for either withdrawal of the matter by the DPP upon parties reconciling or taking plea. Counsel wondered why, if the DPP had advised for charging the Petitioner, the DPP would again advise a reconciliation. Why would the 3<sup>rd</sup> Respondent insist on charging the Petitioner in court? What is the 3<sup>rd</sup> Respondent's interest in this matter? Is he the complainant? Or Is he working under instructions of someone else? Mr. Aboubakar posed.

28. The Respondents, on their part submitted that the Petitioner's woes are intimately connected with the Kwale County Assembly approving his appointment as the Clerk and particularly when he allegedly refused to approve a payment to a contractor of a project which was under investigations by EACC. Mr. Makuto, learned counsel for the Attorney General submitted that the Petitioner wrote to the EACC to seek clarification if it was proper to authorize payment to a contractor on a project that is under investigation for corruption. This is contained in his letter dated 30/10/2019 and he was exercising due diligence as he is required under the law. Counsel noted that the 4<sup>th</sup> Respondent John Kalu is the Procurement Officer of the Board. He is involved with the tendering of the project and he may not have been happy when the Petitioner sought clarification from EACC. Counsel submitted that these are disputes with possible criminal ramifications that this Court cannot just brush aside by stopping the ongoing prosecution. The trial must go on to unravel all the allegations one way or the other.

29. Mr. Fedha, learned counsel for the State submitted that there is no reason for this Court to believe the Petitioner's story and not that of the Respondents. The only Court with that mandate is the trial court. This Court will only intervene where there is a clear red line, disclosing a constitutional abuse.

30. Further, this Court cannot prove the allegation that the Petitioner's complaint to the police has not been investigated and that instead false charges are framed against the Petitioner. Counsel dismissed the submission that the Petitioner being a public officer, who acted in the interest of the public when he refused to pay the contractor ought not to be charged and prosecuted. Counsel cited Article 157(ii) of the constitution.

**“ (24) The decision whether or not to institute criminal proceedings is purely discretionary. That the discretion must be exercised by the DPP within the Constitutional Limits, that is with regard to the public interest of the administration of justice and the need to prevent and avoid abuse of the legal process. See article 157(ii) of the Constitution.”**

31. I have carefully looked at the petition. The only issue I raise for determination is whether or not this is a proper case in which this Court can interfere with the prosecutor's right to charge and prosecute. The matters complained of involve issues of investigations, allegations and disputes.

32. In this matter, and as submitted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, a complaint was made to the police and investigations were launched. During their investigations the police recorded witness statements including the Petitioner's. Upon conclusion of investigation the investigation file was forwarded to the 1<sup>st</sup> Respondent and a decision to prosecute the Petitioner was reached by the 1<sup>st</sup> Respondent. The Director of Public Prosecutions then exercised his power under Article 157 of the Constitution. Under Article 157 of the Constitution the 1<sup>st</sup> Respondent has power to among others: -

(a) Institute and undertake criminal proceedings against any person before any court (other than a Court Martial) in respect of any offences alleged to have been committed;

(b) Take over and continue any criminal proceedings against any person before any court that have been instituted or undertaken by another person or authority, with the permission of the person or authority;

(c) With permission of the court, discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecution under paragraph b of Article 157(6) of the Constitution.

In the case of **Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR** the court stated that:

**“... a court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecutions in the exercise of the discretion conferred upon that office.”**

33. This position has foundation in Article 157 (10) of the Constitution which provides that: -

**“(10) The Director of Public Prosecutions is also empowered to work without being under the direction of or control of any person or authority and to apply all principles and values of the Constitution and to be subject only to the Constitution.”**

The Constitution further provides guidelines on how the 1st Respondent is to undertake his functions in Article 157 (11).

Article 157(11) provides that: -

**“(11) And in the exercise of the powers conferred by the Constitution, 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.”**

34. In line with Article 157(11) of the Constitution the National Prosecution Policy was put in place to ensure the right considerations are taken into account before reaching a decision to prosecute. The policy gives guidelines that ensue before a decision to prosecute is reached; the totality of evidence both for and against the suspect has been scrutinized to establish if there is a realistic chance of conviction. This is the reason the Petitioner’s statement and that of the 4<sup>th</sup> Respondent were sought before a decision to prosecute was reached.

35. Paragraph 3 at page 6 of the National Prosecution Policy states as follows: -

**“In exercising the prosecution mandate the DPP is constitutionally bound to have due regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This provision applies equally to the DPP and officers acting on his or her behalf. This requirement is generally accepted as an international best practice whose origins are in common law.”**

36. After investigations were concluded there was reasonable ground to believe the petitioner had made a false report to the police hence the decision to charge the Petitioner herein. This Court is not then empowered to disregard those investigations and quash the said charges. Once investigations establish reasonable suspicion that a person committed a crime he ought to be charged in a court of law. The rest is left to the courts of law. This position was set out in the case of **Republic v Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held that: -

**“... The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...”**

The court went on to state that: -

**“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”.**

37. In the current case no evidence has been adduced by the Petitioner to the effect that either the police and of the 1<sup>st</sup> Respondent acted unreasonably. The Petitioner has instead given a long and winding story about his disputes with the County Assembly of Kwale; his disputes with the 4<sup>th</sup> Respondent and his dispute with the investigating agencies. These are legitimate issues but not for the determination by this Court. If every suspect were to run to the High Court to stop their impending prosecutions, no criminal prosecutions can take place. The constitutional court is not an investigative court. It does not listen to criminal evidence so as to decide who should, and who should not be prosecuted. The constitutional court only comes in to stop or to check intended or ongoing prosecutions which establish blatant abuse of constitutional rights. That abuse must be apparent on the face of proceedings. In this petition, there is no notable constitutional abuse which this Court can stop. Further, there is evidence that the Petitioner at one time asked the Court to adjourn the proceedings so that he could explore a settlement of out of court. Whatever it is, this Court does not deem it fit to interfere with the mandate of the DPP to institute prosecutions upon completion of investigations. It may as well be that the prosecution’s case is weak, but let that be dealt with in the criminal trial. At the end of the day every criminal trial amounts, at some level, to a violation of individual rights, but they cannot be stopped because the truth must be established. But ultimately unfounded criminal prosecutions are vindicated through trial. In this petition there is no compelling constitutional rights abuse to warrant interference with the prosecutorial powers of the DPP by this Court. For these reasons, the petition herein is dismissed. Parties shall bear own costs.

**Dated, Signed and Delivered at Mombasa this 31<sup>st</sup> day of May, 2021.**

**E. K. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Mr. Kututa holding brief Lagat for 3<sup>rd</sup> Respondent

Mr. Makuto for 2<sup>nd</sup> Respondent

Mr. Fedha for 1<sup>st</sup> Respondent

Ms. Peris Court Assistant