



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 356 OF 2019**

**DAVID GICHERU GICHUGU.....PETITIONER**

**-VERSUS-**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT MURANG'A.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner is David Gicheru Gichugu.

2. The 1<sup>st</sup> Respondent, the Director of Public Prosecutions, by virtue of Article 157 of the Constitution, exercises State powers of prosecution in Kenya against any person before any court (other than a court martial) in respect of any offence.

3. The 2<sup>nd</sup> Respondent, the Director of Criminal Investigations, oversees the Directorate of Criminal Investigations whose core mandate is the investigation and prevention of crime. The Directorate of Criminal Investigations is established as a branch of the National Police Service through the National Police Service Act, 2011.

4. The 3<sup>rd</sup> Respondent, the Chief Magistrate's Court at Murang'a, is a subordinate court established pursuant to Article 169(1) of the Constitution and Section 5 of the Magistrates' Courts Act, 2015.

5. The 4<sup>th</sup> Respondent, the Attorney General, is an office established by Article 156(1) of the Constitution and given the role of the principal legal adviser to the national government.

6. The Petitioner's petition dated 5<sup>th</sup> September, 2019 is premised on Articles 1, 2, 3, 10, 19, 20, 22(1), 25(a), 28, 29, 31, 40, 47, 49, 50 and 51 of the Constitution. It is supported by the Petitioner's affidavit of even date. Through the petition, the Petitioner seeks the following reliefs:

**a) A declaration that the Petitioner's rights as enshrined in the Constitution with respect to dignity, degrading treatment, privacy and property have been infringed by the acts and/or omissions of the Respondents;**

**b) A declaration that the Petitioner is entitled to damages for violation of his constitutional rights to dignity, degrading treatment, privacy and property to be assessed by this Honourable Court;**

**c) A declaration that investigations on the Petitioner by the DCI and the DPP's institution of criminal proceedings against the Petitioner in Murang'a Criminal Case No. 1061 of 2019-Republic v David Gichugu Gicheru violates his constitutional rights, is an abuse of the process of the court and therefore unlawful, null and void *ab initio*;**

d) An order of certiorari to quash the entire charge sheet dated 8.8.2019 and proceedings against the Petitioner in Murang'a Criminal Case Number 1061 of 2019-Republic v David Gichugu Gicheru;

e) Conservatory orders prohibiting the Respondents from proceeding with the prosecution of Murang'a Criminal Case Number 1061 of 2019-Republic v David Gichugu Gicheru;

f) An order of prohibition be and is hereby issued against the IG, DCI and DPP from investigating, recommending the prosecution or commencing any prosecution of the petitioner in respect of which Murang'a Criminal Case Number 1061 of 2019-Republic v David Gichugu Gicheru was instituted;

g) This Honourable Court to issue such further orders and give such directions as it may deem fit to meet the ends of justice and the protection of the Constitution and in the context of the declarations made;

h) The costs of the Petition be awarded to the Petitioner.

7. The crux of the Petitioner's case is that the officers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents have unlawfully conducted investigations and preferred charges against him hence violating his constitutional rights. The Petitioner also avers that the actions of the officers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents amount to abuse of the legal process and violation of his rights to dignity, not to be subjected to degrading treatment, privacy and property under the Constitution.

8. It is the Petitioner's averment that on 6<sup>th</sup> August, 2019, he was arrested and charged before the 3<sup>rd</sup> Respondent on allegation that he had fraudulently obtained a title to land. The Petitioner deposes that the land whose title he allegedly fraudulently obtained is the subject of *Nairobi High Court Succession Cause No. 709 of 2002* (hereinafter *Nai HCSC No. 709 of 2002*) in which he filed an application to revoke letters of administration granted to the respondents who were the petitioners in *Murang'a PM's Court Succession Cause No. 67 of 1998* (hereinafter *Murang'a PMCS No. 67 of 1998*). It is the Petitioner's averment that the land which the respondents in the revocation proceedings seek to administer is his land.

9. The Petitioner further deposes that after he instituted the revocation proceedings in *Nai HCSC No. 709 of 2002* he did not prosecute his case and only revived the matter in 2018 after getting *pro bono* legal services.

10. The Petitioner's case is that he was arrested on 6<sup>th</sup> August, 2018 and taken to Court where the investigation officer obtained *ex-parte* orders to detain him for three days to allow for investigations. When his advocate raised the issue of the *ex-parte* orders, the parties were directed to appear in Court for *inter partes* hearing on 9<sup>th</sup> August, 2019. However, despite the direction that the parties appear in Court on 9<sup>th</sup> August, 2019, the 2<sup>nd</sup> Respondent took him back to Court on 8<sup>th</sup> August, 2019 and charged him in *Murang'a Magistrate's Court Criminal Case No. 1061 of 2019* with obtaining land registration by false pretense contrary to Section 320 of the Penal Code. The Petitioner further states that he was granted bond by the 3<sup>rd</sup> Respondent without an alternative of cash bail. It is the Petitioner's averment that while he was in custody, the 1<sup>st</sup> Respondent's officers ransacked his house, confiscated his documents in an unlawful and unconstitutional manner leading to infringement of his already stated constitutional rights.

11. The Petitioner avers that he has since taken issue with the investigations instituted by the 1<sup>st</sup> Respondent, his being charged by the 2<sup>nd</sup> Respondent, as well as the manner in which the 3<sup>rd</sup> Respondent conducted himself in his case. He also deposes that the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in respect of *Murang'a Magistrate's Court Criminal Case No. 1061 of 2019* is meant to interfere with the proceedings in *Nai HCSC No. 709 of 2002* and their actions are therefore illegal and an abuse of the court process.

12. In opposition to the petition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit sworn by Sergeant Pius Kasuni on 4<sup>th</sup> June, 2021. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents' case that a complaint of obtaining land through fraud was made in 2019. They averred that upon investigation of the complaint by the 2<sup>nd</sup> Respondent's officers it was established that the Petitioner was culpable. Further, that the Petitioner's complaint to the 1<sup>st</sup> Respondent's Nairobi office came back with the recommendation that the prosecution should continue to its logical conclusion. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the existence of the succession proceedings does not bar the criminal prosecution of the Petitioner. Sergeant Kasuni averred that he is the officer who arrested the Petitioner and he did so in a lawful manner.

13. The 3<sup>rd</sup> and 4<sup>th</sup> respondents filed grounds of opposition and opposed the petition on the grounds that this Court lacks jurisdiction to hear and determine this petition as it ought to have been filed at Murang'a High Court as per Rule 8 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which requires cases to be instituted in the High Court within whose jurisdiction the alleged violation took place; that the petition fails the competency test set out in the case of **Anarita Karimi Njeru v Republic [1979] eKLR**; that Section 193A of the Criminal Procedure Code, Cap. 75 allows parallel prosecution of criminal and civil matters in respect of the same facts; that the 3<sup>rd</sup> Respondent is impartial and will take care of the parties' right to fair trial; and, that the Petitioner can appeal or seek review against the decisions of the 3<sup>rd</sup> Respondent.

14. The Petitioner filed written submissions dated 23<sup>rd</sup> April, 2021 and states that his petition met the competency threshold of a constitutional petition as established in **Anarita Karimi Njeru v Republic [1979] eKLR** and reaffirmed in **Mumo Matemu v Trusted Society of Human Rights [2014] eKLR**. He argues that his petition had precisely stated the issues complained of, the constitutional provisions said to have been infringed, and the manner in which they are alleged to have been infringed. Specifically, the Petitioner submit that the violations complained of are in respect of Articles 29, 40, 47, and 49 of the Constitution.

15. On the alleged violation of Articles 47 and 49 of the Constitution, the Petitioner submits that during his first appearance in Court, the 3<sup>rd</sup> Respondent made *ex-parte* orders for his continued detention in his absence and without informing him of the reasons for his arrest and

continued detention. The Petitioner relies on the decision in **Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others [2019] eKLR** and submits that nothing would have been easier than for the 1<sup>st</sup> and 2<sup>nd</sup> respondents to finalize investigations before preferring any charges against him.

16. The Petitioner contends that the decision by the 3<sup>rd</sup> Respondent to take his plea on 8<sup>th</sup> August, 2019 instead of 9<sup>th</sup> August, 2019 when his case had been scheduled to be mentioned and the failure to grant him the alternative of cash bail violated his constitutional rights.

17. It is the Petitioner's argument that the respondents violated his right to freedom and security of person under Article 29 of the Constitution by depriving him of his freedom arbitrarily or without just cause. Further, that his detention pending investigation violated his right not to be detained without trial. The Petitioner relies on the decision in **Joses Ntwiga v Commissioner of Police & 2 others [2011] eKLR** in support of the submission that Article 29(a) requires good reason for depriving someone of their freedom.

18. The Petitioner contends that the criminal proceedings were instituted so as to frustrate him in the succession matter. According to the Petitioner, he commenced the revocation proceedings after the complainants in the criminal case obtained letters of administration in respect of his parcel of land. He states that his case was in limbo for a long time until 2018 when he secured *pro bono* legal services and it is only after he revived the succession proceedings that the complainants, who had not made any complaint for over seventeen years from 2002, went and filed a complaint with the police.

19. The Petitioner relies on the decision in **Republic v Chief Magistrate's Court at Mombasa Ex-parte Ganijee & another [2002] 2 KLR 703** for the submission that the use of the criminal law and process to harass, intimidate or coerce a person for personal gain or for ulterior motives or for purposes totally unrelated to the protection of public interest amounts to abuse of the court process and this Court is allowed to halt such a process. The Petitioner cites the decision in **Wycliffe Ouma Omondi v Nine One One Group Limited & 2 others [2020] eKLR** in support of the submission that violation of the rights protected under Articles 47, 49 and 29 of the Constitution amount to mental and emotional torture. The Petitioner further cites the case of **Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR** for the submission that any treatment meted out on a citizen which causes pain, humiliation and mental trauma corrodes the concept of human dignity.

20. On the alleged violation of his right to property under Article 40 of the Constitution, the Petitioner urges that he holds a legitimate interest in the property that is the subject of the intended prosecution and he should be able to protect his right to that property without fear of intimidation and coercion through criminal proceedings.

21. The Petitioner consequently submits that he is entitled to the orders sought as well as damages. On the prayer for conservatory orders, the Petitioner argues that this Court has the power to issue conservatory orders in this matter. He also submits that the proceedings in *Murang'a Magistrate's Court Criminal Case No. 1061 of 2019* should be halted for they are laced with malice and ulterior motive. On the power of the Court to halt malicious criminal proceedings, the Petitioner relies on the case of **Joram Mwenda Guantai v The Chief Magistrate [2007] 2 E.A. 170**.

22. Regarding the prayer for an order of certiorari, the Petitioner submits that this Court has inherent powers which include preventing an abuse process. He relies on a number of cases, including **Republic v Chief Magistrate Law Courts Nairobi & 2 Others ex parte Azim Jiwa Rajwani [2007] eKLR** in support of his argument.

23. On the issue of damages, the Petitioner urges this Court to award damages for the infringement of his constitutional rights as he had been subjected to anguish and ridicule. In support of the assertion that he is entitled to damages, the Petitioner relies on the cases of **Edward Akong'o Oyugi & others v Attorney General [2019] eKLR** and **Reuben Njuguna Gachukia & another v Inspector General of Police Service & 4 others [2019] eKLR**.

24. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed submissions dated 7<sup>th</sup> September, 2021 and state that pursuant to Article 245 of the Constitution as well as Section 35 of the National Police Service Act, the 2<sup>nd</sup> Respondent has power to investigate the Petitioner for any alleged offence. Reliance is placed on the cases of **Dr Alfred N. Mutua v The Ethics and Anti-Corruption Commission & others, Misc. Application No. 31 of 2016** and **Cascade Company Limited v Kenya Association of Music Production (KAMP) & others, Murang'a HC Petition No. 7 of 2014** as affirming the 2<sup>nd</sup> Respondent's investigatory authority. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents no evidence has been adduced by the Petitioner in support of his claim that the charges against him were commenced for a collateral purpose and unless the Petitioner proves that the 2<sup>nd</sup> Respondent was acting *ultra vires*, the power to investigate crimes should not be curtailed.

25. In regard to the 1<sup>st</sup> Respondent, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that the DPP has powers to prosecute as mandated by Article 157 of the Constitution. It is submitted that the DPP discharges his duties independently and is not under the control of any person. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the DPP made the decision to charge the Petitioner based on the evidence availed to him and in the public interest and these factors are lawful considerations. In support of their submission on the prosecutorial authority of the DPP, the 1<sup>st</sup> and 2<sup>nd</sup> respondents cite several decisions including **Hon. James Ondicho Gesami v The Attorney General & others, Nairobi HC Petition No. 376 of 2011**; **Mohamed Ali Saleh v The Director of Public Prosecutions & another, Mombasa HC Petition No. 2 of 2017**; **Pauline Raget Adhiambo Agot v DPP & 5 others, Petition No. 446 of 2015**; and **Republic v Attorney General & 4 others Ex-parte Kenneth Kariuki Githii [2014] eKLR**.

26. Additionally, the 1<sup>st</sup> and 2<sup>nd</sup> respondents urged this Court to keep off this matter as it violates the doctrine of separation of powers because too much superintendence by one State organ against other State organs will render them dysfunctional thus threatening the rule of law which can possibly lead to constitutional paralysis or crises in government. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, based on the doctrine of separation of powers, the various arms of government should be allowed to discharge their duties without any interference from another arm or other arms. The case of **Dr Alfred N. Mutua v The Ethics and Anti-Corruption Commission & others, Misc. Application No. 31 of 2016** is cited for the statement that it is not the work of courts to interfere with other State organs unless it can be shown that they have violated the Constitution.

27. This Court is therefore urged to find that the Petitioner simply desires to circumvent the criminal justice system and dismiss his case with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

28. In this matter, the Petitioner alleges violation of his constitutional rights under Articles 29, 40, 47 and 49 of the Constitution. He avers that the investigation and subsequent prosecution conducted and initiated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents are marred with malice and should be declared unlawful for abusing the court process and violating his fundamental freedoms and human rights.

29. In a case like this, the Court is called upon to interrogate the evidence tendered by the Petitioner in order to determine whether there is indeed abuse of investigatory and prosecutorial authority by the 2<sup>nd</sup> and 1<sup>st</sup> respondents. The 3<sup>rd</sup> and 4<sup>th</sup> respondents have, however, raised jurisdictional questions which require to be determined at the outset.

30. The 3<sup>rd</sup> and 4<sup>th</sup> respondents contend that in accordance with Rule 8 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which requires that a petition be instituted in the High Court within whose jurisdiction the alleged violations took place, this petition ought to have been filed at Murang'a High Court. They, however, did not file any submissions so as to elaborate on this issue. The Petitioner also never responded to the issue.

31. I agree with 3<sup>rd</sup> and 4<sup>th</sup> respondents that a person claiming violation of constitutional rights and fundamental freedoms should indeed file their claim in the High Court having jurisdiction over the area in which the violations are alleged to have occurred. This requirement ensures that the respondent can quickly have access to the necessary records and respond to the case. Filing the matter at the nearest High Court will also ensure that the petitioner spends less on travel expenses for himself and his witnesses, that is if witnesses will be required.

32. In the case at hand, the petition is already heard. The 3<sup>rd</sup> and 4<sup>th</sup> respondents did not ask the Court in the early stages of the matter to transfer the case to Murang'a High Court for hearing and determination. This Court has jurisdiction to hear and determine the Petitioner's claim and it would be a waste of the Court's valuable time to ask the parties to go to Murang'a High Court and have the matter start afresh. I therefore decline to have this matter transferred to Murang'a High Court this late in the day.

33. Another jurisdictional issue raised by the 3<sup>rd</sup> and 4<sup>th</sup> respondents is that the petition does not meet the competency test laid down in **Anarita Karimi Njeru v Republic [1979] eKLR** and restated in **Mumo Matemu v Trusted Society of Human Rights [2014] eKLR**. The 3<sup>rd</sup> and 4<sup>th</sup> respondents having failed to file submissions did not explain why the petition is incompetent.

34. The principle of precision in constitutional pleadings as stated in **Anarita Karimi Njeru** (supra) requires the petitioner to set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed. I have perused the petition and it is apparent that the same is competent as the Petitioner complains that his arrest and prosecution violated disclosed constitutional provisions. He has stated the circumstances of his arrest and prosecution and how his rights were violated in light of those facts. There is therefore no merit in the 3<sup>rd</sup> and 4<sup>th</sup> respondents' claim that the petition is incompetent.

35. I now turn to the substance of the petition. The parties in their submissions have clearly captured the law as to when this Court can intervene in the 1<sup>st</sup> and 2<sup>nd</sup> respondents' exercise of their mandates. The law as it stands in this country was summarized by the Court of Appeal in the case of **Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR** as follows:

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

**By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.**

**It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR 69.”**

36. The investigatory power vested upon the 2<sup>nd</sup> Respondent and the prosecutorial authority given to the 1<sup>st</sup> Respondent must thus be exercised within the law and any exercise of such power outside the law invites the deployment of the supervisory jurisdiction of this Court so as to protect the constitutional rights and fundamental freedoms of any person who has fallen victim of abuse of power by both of them or any of them.

37. The Petitioner has placed evidence before this Court that the land parcel which has resulted in his being charged in the criminal case at

the Magistrate's Court at Murang'a is and has been the subject of revocation proceedings which he instituted in *Nai HCSC No. 709 of 2002*. According to the Petitioner that case had been inactive until 2018 when he reactivated it after securing *pro bono* legal services.

38. I have perused the pleadings and annexures of the parties in this matter and it is indeed clear that the Petitioner commenced revocation proceedings in the High Court at Nairobi in 2002 in respect of a grant of letters of administration made in *Murang'a PMSC No. 67 of 1998*. The Petitioner's averment that the complainants in *Murang'a Magistrate's Court Criminal Case No. 1061 of 2019*, in which he is the accused person, are the respondents in *Nai HCSC No. 709 of 2002* is also confirmed by the annexures to the pleadings. Indeed, the revocation proceedings had substantively proceeded and the Petitioner and two of his witnesses had testified. The record discloses active participation by the respondents. The same respondents are the complainants in the criminal case facing the Petitioner.

39. Considering the fact that the criminal trial seeks to determine the authenticity of the title deed which the Petitioner claims to be his, a determination, through criminal proceedings, that the Petitioner obtained the title deed fraudulently will resolve the succession matter without affording the Petitioner an opportunity to challenge the grant of letters of administration to those who have now taken him to the police. The criminal case is therefore meant to determine the succession cause through the back door and in that respect the criminal trial amounts to an abuse of the court process. The 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot be allowed to use their respective prosecutorial and investigatory mandates to settle a succession dispute which is already within the jurisdiction of a competent Court.

40. The fact that Section 193A of the Criminal Procedure Code allows for concurrent civil and criminal proceedings in respect of the same facts does not give the 1<sup>st</sup> and 2<sup>nd</sup> respondents the leeway to misuse their powers which must be exercised in good faith. Addressing a case with almost similar facts like the one before this Court, the Court of Appeal in **Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR** held that:

**“Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.”**

41. The Petitioner is right when he claims that the institution of the criminal investigations and his subsequent prosecution were an afterthought. The investigations were commenced over seventeen years after the Petitioner had filed the revocation proceedings in the High Court. The complainants in the criminal case were parties to the revocation proceedings and had all along been aware of those proceedings. Their allegation in 2019 when they reported the alleged crime to the police that they had recently discovered the criminal activities of the Petitioner was therefore incorrect. I therefore agree with the Petitioner that his prosecution is not in the public interest and is an abuse of the constitutional and statutory powers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

42. I have been asked by the Petitioner to find that the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents violated various constitutional provisions and he should therefore be compensated. As already stated, the 1<sup>st</sup> Respondent has prosecutorial powers and the 2<sup>nd</sup> Respondent is vested with investigatory powers. A magistrate has jurisdiction to hear and determine matters that fall within his or her geographical, monetary, civil and criminal jurisdiction. The Petitioner did not adduce evidence to show that any of the named respondents exercised their mandate maliciously. Exceeding one's statutory powers is not equivalent to acting maliciously because for malice to be inferred, the authority holder should exhibit the desire to inflict pain, cause injury or distress to the claimant. None of the three respondents went out of their way to ensure that the Petitioner did not enjoy his constitutional rights. They may have exercised their powers erroneously but there is no evidence that the exercise of power was malicious.

43. The Petitioner seems to read malice in the decision of the 3<sup>rd</sup> Respondent to take his plea a day before the mention of his detention case. The Petitioner also faults the 3<sup>rd</sup> Respondent for not giving him an option of cash bail. No malice can be found in the exercise of the 3<sup>rd</sup> Respondent's discretion when setting bond terms. There was also nothing wrong in the 3<sup>rd</sup> Respondent taking plea on 8<sup>th</sup> August, 2019 instead of waiting to take plea on 9<sup>th</sup> August, 2019 when the miscellaneous case that had placed the Petitioner in pre-trial custody was to be mentioned. Once the charge sheet was presented to the Magistrate he was required to take plea otherwise he would have been accused of detaining the Petitioner without trial. There is no evidence before this Court that the Petitioner sought to defer the plea taking to the next day and the request was declined.

44. In short, the only appropriate finding in this case is that the investigation and prosecution of the Petitioner was an abuse of the court process. The orders which I find suitable and which I issue in this case are as follows:

a) An order of certiorari is issued calling into this Court and quashing the charge sheet dated 8<sup>th</sup> August, 2019 and all proceedings against the Petitioner in *Murang'a Magistrate's Court Criminal Case Number 1061 of 2019, Republic v David Gichugu Gicheru*.

b) An order of prohibition be and is hereby issued against the Inspector-General of Police, the Director of Criminal Investigations and the Director of Public Prosecutions from investigating or commencing any prosecution of the Petitioner in respect of the facts which led to the institution of *Murang'a Magistrate's Court Criminal Case Number 1061 of 2019, Republic v David Gichugu Gicheru*; and

c) Owing to the partial success by the Petitioner, he shall have the costs of the proceedings from the 1<sup>st</sup> and 2<sup>nd</sup> respondents in line with the principle that requires costs to follow the event.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 26TH DAY OF NOVEMBER, 2021**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**