REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 5 OF 2017

MASHA CHENGO NGOWA...................................PETITIONER/RESPONDENT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..................1ST RESPONDENT

THE ATTORNEY GENERAL..2ND RESPONDENT

AND

OKOMBOLI ONG'ONG'A....INTENDED INTERESTED PARTY/APPLICANT

Coram: Hon. Justice R. Nyakundi

Mr. Nyange Sharia for the Petitioner

Mr. Nyoro for the State

Ms. Munyuny for the Attorney General

Mr. Kilonzo for the intended interested party

JUDGMENT

On 6th March, 2017 the petitioner **Masha Chengo Ngowa** approached this court for the following orders:

> ***a) An order that the criminal proceedings before Kilifi Magistrate Court i.e. Criminal Case No. 332 of 2016 against himself and 11 other co-accused as particularized in the petition be declared a nullity and should be quashed.***
>
> ***b) The respondents be permanently restricted from prosecuting the petitioner or any other member of the pubic in respect of offences related to parcel No. 20252/13 CR Case No. 30853 situated in Kilifi.***
>
> ***c) A declaration that Section 91 of the Penal Code is unconstitutional.***
>
> ***d) A declaration that the continued enforcement of Section 91 of the Penal Code by the 1st respondent against the petitioner and 11 co-accused would be unconstitutional.***
>
> ***e) In the alternative an order of stay of all criminal proceedings in respect of offences related to parcel No. 20252/13 and 30853 pending at Kilifi Magistrate Court pending the hearing and determination of other related civil proceedings on the same suit land.***
>
> ***f) Any other further reliefs that the court deem fit to grant***

Background

There is no dispute as outlined in the respective affidavits of the key claims to the petition. On the face of it **Mr. Okomboli Ong'ong'a** is the registered owner of Parcel No. 20252/13 title No. CR – 30853 situated in Kilifi Town. **Mr. Okomboli Ong'ong'a** deponed that he purchased the suit land from one **Peter Njiri Muracia** in January, 2015 and had the transfer effected in the month of February, 2015 after complying with all the necessary registration procedures.

That as at the time of purchase, the land was vacant, but upon completion of the sale on visiting the site specifically on 3rd April, 2015 he noticed several structures already erected without his consent. As if that was not enough **Mr. Okomboli Ong'ong'a** deponed that he was accosted by armed men with machetes demanding to know his interest in the suit property. That became the trigger of a long litigation process with some other persons who claim to have right of occupation and ownership.

The dispute was then reported to the police station culminating in the petitioner, **Masha Ngowa** and 10 (ten) other enjoined in the petition to be arrested on 21st December, 2015 and later charged with the following counts:

> **Count 1 – Forcible detainer contrary to Section 91 of the Penal Code on allegations that on diverse dates between March 2015 and 8th January, 2016 at Sea Horse area in Kilifi Township within Kilifi County being in possession of land Plot No. 20252/13 Kilifi title 30853 registered in the name of Okomboli Ong'ong'a with intent and without color to deprive him of his possession of the said suit land.**
>
> **Count 2 – Malicious damage to property contrary to Section 339(1) of the Penal Code. The particulars of the charge being that on diverse dates between March 2015 and 8th January, 2016 at Sea Horse area in Kilifi County, willfully and unlawfully damaged a fence, trees and building materials all valued at Kshs.650,000 the property of Okomboli Ong'ong'a.**

In response to the above averments, the petitioner deposes in his affidavit that the family has been in occupation of the land since 1995. That thereafter they learnt that **Mr. Okomboli Ong'ong'a** lays claim vide certificate of title, annexed in support of the claim by the registered owner. The petitioner therefore depones that the suit No. 73 of 2015 ELC between the petitioners and one **Okomboli Ong'ong'a** ought to be heard on a priority and a stay of Criminal Case No. 332 of 2016 would be the most plausible decision by this court.

From these facts the petitioners have pleaded that their constitutional rights as premised under Article 2, 19, 20, 21, 22, 23, 24, 25 and 40 of the Constitution, have been infringed and violated. That their protection of fundamental rights and freedom are being violated by the decision taken to prosecute them with the criminal charges in Criminal Case No. 332 of 2016 at Kilifi Magistrate Courts.

In addition to the factual matrix as postulated in the affidavits, it was also agreed that both counsels do file written submissions. The crux of the petition as identified by the parries revolve around the following issues:

> ***1. That whether or not Section 91 of the Penal code is unconstitutional.***
>
> ***2. Whether or not the court can curtail the 1st respondent constitutional mandate.***
>
> ***3. Whether or not the proceedings before the Magistrate in Kilifi Criminal Case No. 332 of 2016 are a nullity and an abuse of the court.***

The petitioners counsel submissions

Mr. Nyange Shara submitted on the first issue that it is not necessary to have the offence of forcible detainer in our Penal code for reason that there are other satisfactory remedies in civil law to proportionately redress the elements of the offence under Section 91 of the Penal Code.

Learned counsel contended that criminalization of the act and conduct under the ingredient of Forcible detainer runs in contravention with Article 24(c) of the Constitution. In urging to this court to declare the section unconstitutional learned counsel cited the principles in the case of **Coalition for reforms and Democratic v R 2014 eKLR** where the court held interalia that the limitation of freedoms must be on grounds permitted under Article 39 and 40 of the Constitution. That in the instant petition, there is overwhelming evidence that the grounds by the respondent to charge the petitioner lacks merit.

On the constitutional mandate of the police and office of the Director of Public Prosecution counsel submitted that the scope and exercise of discretion particularly under Article 244 and 157(6)(10) and (11) of the Constitution by the Director must be within the bounds of the same constitution. Counsel submitted by the Director of Public Prosecutions initiating a criminal charge against the petitioners he erred in not considering the alternative forum of a civil remedy on the disputed land.

Counsel further submitted and cited the following authorities to fortify his legal proposition on the court's jurisdiction to entertain such petitions in matters confirmed that the prosecution was initiated on the basis of extraneous matters and not for the interest of justice. Counsel argued and urged this court to be guided by the principles from the Superior Courts in reference to **Kuria & 3 Others, Attorney General 2002 2KLR, Peter D'Costa v Attorney General & another Petition No. 83 of 2010** and **Mwanthi Kimani v the Director of Public Prosecutions and Others Criminal No. 161 of 2014.**

Counsel for the petitioner armed with these legal tools challenged the respondents' decision to investigate and prosecute the petitioners under Section 91 of the Penal code as being entirely unconstitutional.

Mr. Nyoro, learned senior prosecution counsel for the 1st respondent submitted that contrary to the assertion by the petitioner, the impugned

criminal proceedings can run concurrently with the civil proceedings. According to **Mr. Nyoro** all the alleged violations do not apply to the facts of this petition.

In his submissions, **Mr. Nyoro** put the petitioner on notice to prove that the case in part has been instituted with ulterior motives or improper purpose. The essence of it, he vehemently denied on the part of the prosecution. In this aspect of the law he relied on the principle in the case of **Midlands Limited & 2 others v Director of Public Prospections & 7 Others 2015 eKLR**.

In a nutshell **Mr. Nyoro** contended that the key decision of initiating a prosecution in itself is not an infringement of the Constitutional rights of the petitioners.

From that submissions **Mr. Nyoro** opposed the position taken by the petitioners counsel that Section 91 of the Penal Code is unconstitutional.

The 2nd respondent counsel **Ms. Munyunyi** for the attorney General submitted and cited Article 259(1) of the Constitution which lays down the principles of interpretation of the Constitution. Further she cited the case by the Supreme Court of Kenya in the matter of interim independence **Electoral Commission Constitutional Application No. 2 of 2011 eKLR** expressed the background of interpretation tools and cannons in broader constitutional context. The canvas of interpretation are discernible from the case of **Ndyanabo v Attorney General 2001 EA 485 at 493, Tukero Ole Kina v attorney General & Another 2019 eKLR, Apollo v Attorney General Petition No. 472 of 2017, Olum & Another v Attorney General (2002) 2 EA, EG & 7 Others v Attorney General; DKM & 9 Others**. One of the key principles from the above authorities is that each tool and canon of interpretation of Constitution provides its own perspective and different views can give different insights into the making of what is observed as unconstitutional.

Learned Stated Counsel further asserted that the petitioner has not discharged the legal and evidential burden that Section 91 contravenes and or limits the constitutional rights of the petitioners in terms of Articles 10, 22, 23, 25(c), 28, 29, 40(1) and 43 of the constitution.

On whether the court can curtail the 1st respondent constitutional mandate, learned State counsel affirmed the position that by the 1st respondent prosecution counsel that the ODPP, under Article 157(6)(10)(11) of the Constitution enjoys autonomy in the decision making process to initiate, continue, takeover, discontinue any criminal proceedings without any direction or control from any person or authority. In support of her submissions learned State counsel relied on a number of authorities which included **Shamsher Kenya Limited v Director of Public Prosecution & 2 Others [2018] eKLR, ELC Malindi Case No. 73 of 2015 Okomboli Ong'ong'a v Masha Ngao & others** and **R v P.C. Okello & P.C. Fondo Criminal Case No. 28 of 2011.**

Determining how the criminal proceedings could be handled by virtue that there exist civil proceedings on the issue to do with title, appropriate reference was made by learned counsel to Section 193A of the Criminal Procedure Code. The words and phrase of the provision has the effect of both civil and criminal proceedings to be initiated and determined concurrently.

In applying the provision learned counsel observed that there is no prejudice the petitioner has placed before court to warrant interference by way of a constitutional petition.

On whether the charge was instituted for ulterior motives learned State counsel persuaded the court to go beyond the affidavit by the petitioner and apply the broader purpose in **Midlands Limited & 2 Others v Director of Public Prosecutions 2015 eKLR (Kuria Case (supra).**

The learned State counsel argued and contended that the acts of decision making by the respondents was in accordance with the Constitution and enabling statutes to charge the petitioners.

Analysis and determination

Issue No. 1

To move to an unconstitutionality based approach against a section of a statute it means that parliament in enacting the impugned provision infringed the guaranteed rights in the Constitution in circumstances that would constitute a pointer of it being held unconstitutional.

The jurisdiction provision for this court to exercise jurisdiction to review a provision in a statute is found under Article 2(4) of the Constitution that states:

"Any law, including Customary Law that is unconstitutional is void to the extent of the inconsistence, and any act or omission in contravention of its Constitution is invalid."

When the High Court is called upon to interpret the Constitution, and the impugned statute it is clear from Article 259 that the interpretation must be weighed down by the translating a bias to achieve the following structure:

a) That promotes its purposes, values and principles

b) That advances the rule of law, and the human rights and fundamental freedoms in the Bill of rights

c) Permits the development of the law and

d) Contributes to good governance.

Similar to our voluminous Constitution is the Indian constitution. The court in the **State of West Bengal v Ali Sarkan 1952 S.C. J 55, 95** and **A.K. Gupalon v the State of Madras 1950 S.C.J. 174** the court in a speech made to lay the foundation on the sanctity of the Constitution stated as follows:

> ***"It is useful to remember that the provisions of the Constitution are not mathematical formulae which have their essence in mere form, that they are not just dull, lifeless words, static and hide bound as in some mummified manuscript, but living names intended to give life to a great nation and order its being tongues of dynamic fire potent to mould the future as well as guide the present. In terms of <u>Article 2(4) of the Constitution</u> there are certain features with this principle of a statute that must be spelt out ordinarily for it to be declared unconstitutional. Thus the transgression complained of touches on the bill of rights, or the legislature has not complied with the Constitution while enacting the law, or on grounds of public policy or its onus and purposes is for the benefit of private individuals."*** (Underlined emphasis mine)

The court has to construe a statute as constitutional of courses unless it has been shown to be unconstitutional. In essence the aggrieved party on its unconstitutionality has the burden of proof under Section 107(1) of the Evidence Act to discharge both the legal and evidential burden.

The court in **Faultin v Attorney General 1978 30 WIR 351** it was held:

> ***"Nullification of enactments and confusion of public business are not likely to be introduced, unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organ hand of the constitution, it must be declared to stand as the true expression of the National Will."***

The first observations to make is that the jurisprudence surrounding interpretation of a statute are as diverse as the effect parliament introduced to achieve in adopting the phrases, words in specific section or statute. The matter is not so much as to the letter of the statute but rather the spirit and substance thereof.

Grabble's view in understanding statutes using idiomatic maxim **"that the who sticks to the letter of the law, only gets the bird of the tree"** and went further to state as follows:

> ***"The principle here is that substance of the law, the effect of the, are matters for the weightier than the niceties of form or circumstances. The reason behind the law makes the law what it is. For reason is the sole of the law, and when the reason of any particular law ceases, so does the law itself, laws are not enacted for the mere purpose of enactment. They are intended in their application to achieve a purpose. That should be borne in mind when interpreting or construing an Act of parliament."***
>
> ***Nothing is better settled than that a statute is to be expounded, not according to the letter, but according to the meaning and spirit of the statute is as much law as what is not within the very letter of it and that which is not within the meaning and spirit, though it seems to be within the letter is not the law, and is not the statute. That effect should be given to the object, spirit and meaning must be collected form the words used in a statute. Confronted with the same situation.***

Supreme Court of India in **Reserve Bank of India v Peerless General Finance and Investment Co. 1987 SCC 441** in their discerning judgement observed:

> ***"Interpretation must depend on the text and context. They are the basis of interpretation. One may well say if the text is the texture/context is what gives the color. Neither can be "ignored. Both are important. That interpretation is best which makes textual interpretation match the contextual."***

One of the issues that arises is whether the text, words and phrases under Section 91 of the Penal code is an affront to the intrinsic elements of the constitutional values embodied in fundamental rights and freedoms in chapter 4 of the bill of rights of the constitution?

I echo **The Privy Council in Minister of Home Affairs v fisher 1979 44 WKR 107** in the extensive analysis of the actual text and approaches to the interpretation of fundamental rights provisions, where his Lordship Wilberforce said:

> ***"The first would be to say that, recognizing the status of the Constitution, as, in effect, an act of parliament, there is room for interpreting it with less rigidity and greater generosity, than other Acts, such as those which are concerned with property or succession or citizenship.***
>
> ***The second would be more radical: It would be to treat a constitutional treatment such as this as sui generis calling for principles of interpretation of its only suitable to its character as already described without necessarily acceptance of all the presumptions that are relevant to legislation of private law. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition, that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms of the Constitution of which the Constitution commences."***

The point I take from the above principles is that Section 91 of the Penal Code creates an offence of Forcible detainer setting out the

elements that qualify the breach upon which the scheme of prosecuting the crime is based.

One of the challenges made by **Mr. Nyange Shara** for the petitioner is that under Section 91 there is real risk that a person charged with the offence of forcible detainer majority, suffers the setback of entitlement of his rights under Article 39 and 40 of the Constitution. Further counsel contended that there are other adequate remedies for redress of an aggrieved party who finds herself or himself within the following provisions of Section 91 of the Code.

To that extent making reliance in Article 22 and 23 of the constitution he was of the view that the section is unconstitutional. Though, learned counsel never made reference to it, rights to protection against Arbitrary arrest and detention without due process of the law is a serious infringement of an individual liberty clearly expressed by dint of Article 49 of the constitution. Thus, the person arrested would upon reasonable sufficient evidence be required to be charged before a court of law. The constitutional provisions on right to a fair trial under Article 50 are mandatory minimum rights, to come into effect and the trial court when faced. With a similar case like that of the petitioner's exercises discretion that sternly accomplishes the letter and spirit of the provisions to a right to a fair hearing. From the above, the law postulates that the petitioners discharges the burden of proof to place such evidence capable of convincing a constitutional court that Section 91 provision adversely infringes his fundamental rights under the Constitution. It is also necessary to prove that prosecuting the petitioner the right to a fair hearing and the comity that governs the administration of justice it would be difficult for the petitioners to secure justice in the criminal trial. Everyone has the right not to be maliciously prosecuted in a manner that undermines the fundamental Rights and Freedoms in the constitution. That is what fashions the constitution more so under the bill of rights.

To get to unfair prosecution, there must be a prosecution and its only after that the nature of the right and breach can be determined.

I am saying this because in my view, the rights to a fair hearing under Article 50 are of a wider scope than the fears or threats to a violation the petitioners have against Section 91 of the Penal Code.

In this regard, the court in **Zimbabwe Township Developers Ltd V Luis Shoes PUT (ltd) 1984 2 SA 778** addressed the issue on locus standi and the burden of proof as follows on the **"Presumption of Unconstitutionality"** thus:

> ***"Is a phrase which appears to me to be pregnant with the possibilities of misunderstanding. Clearly, a litigant who asserts that an act of parliament or a regulation is unconstitutional must show that it is. In such a case, the judicial body charged with deciding that issue must interpret the constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position, then if one possible interpretation falls within the meaning of the Constitution and others do are then the judicial body will presume that the law makers intended to are constitutionally and uphold the piece of legislation so interpreted. This is one of the basis in which a presumption of constitutionality can be said to arise.***
>
> ***One does not interpret the Constitution in a restricted manner to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above.***
>
> ***Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution.***
>
> ***Even where the Constitution does not make it clear, where the onus lies, the onus lies on the challenger to prove that the legislation is not reasonably justifiable in a democratic state, and not on the state to show that it is in that sense there is a presumption of unconstitutionality."***

In **Giffens & Valter v The King (1955) DLR 620** stated:

> ***"It is not to be forgotten that the first inference is that a word comes the same connotation to all places when it is found in a ...."***

This means in overall a law enacted by parliament is presumed be in conformity with the Constitution.

I hold the view that when it comes to the unconstitutionality of a statute or any of the sections therein, the ultimate touch stone of its constitutionality should be tested in the light of the Constitution itself.

It can hardly be disputed that a central feature of every statute interpretation and its conformity with the Constitution both must be considered in their entirety.

In regard to the petition before this court the petitioners counsel submitted that Section 91 of the Penal Code grossly violates the fundamental rights of the petitioners because the purpose and substance of it can be achieved by an entirely different process, under Civil Law. To counsel the criminal process is an affront of the Constitution and protection of the petitioners' rights to liberty and freedom. I am not persuaded to agree with counsel on this matter to the contrary. The guiding principles therefore as postulated in the persuasive authorities of **Harrison v Attorney General of Trinidad and Tobago (1979) 3W.LR 348** where Lord Diplock stated:

> ***"The right to apply to the High Court for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedom, but its value will be demonstrated if it is allowed to be misused as a general substitute for the criminal procedures for making judicial general of administrative action. In an original application to***

the High Court the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court. If it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for purpose of awarding the necessity of applying in the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

In Ashwander v Tennessee Valley Authority 1936 (297) V.S. 299) the pragmatic purpose of such a direction of the judicial process was echoed by the court by Justice Bhanders as follows:

"The court will not pass upon a constitutional question although property presented by the record, if there is also possible some other grounds upon which the case may be disposed of. This rule has freed most raised applications. Thus, if a case can be decided on either of two grounds, one invoking a Constitutional question, the other a question of statutory construction or general law, the court will decide the latter."

Given the primacy of the constitution the cardinal rules of interpretation should be drawn upon as necessary with its various Articles being interpreted holistically in a manner that furthers constitutionalism. The superior courts in the various precedents have often laid down the set rules, cannons and principles of interpretation based on Article 10 and 259 of the Constitution itself. The court in the maker of **IEBC constitutional Application No. 2 of 2011 eKLR Olum & Another v Attorney General 2002 2 E.A., Constitutional Court of Uganda EG & 7 Others v Attorney General, DKM & 9 Others 2016 eKLR** and **In the Matter of the Kenya National Human Rights Commission**.

In the above cases the courts seized the opportunity and addressed too for the interpretation the Constitution. On this court shall apply a holistic approach:

a) Promote the values and principles of governance under Article 10 of the Constitution.

b) The Constitution in Article 259 that does not negate constitutional safeguards.

c) The Constitution must be construed in broad and purposive approach for which its makers founded it, so that fundamental rights provided for the citizens enjoy those reliefs; without unjustifiable limitation.

Besides the above approach illustrated by both local and comparative jurisprudence the other cannon of fundamental nature on constitutional interpretation is as laid down in the case of **R v Oakes 1986 ISCR** on proportionality test where the court framed it as follows:

"in contrast Canadian Supreme Court has chartered different course while using proportionality test by stating that the objective must be of sufficient importance to warrant overriding a constitutionality protected right or freedom. There must be a rational connection between measure and objective; The means must impair as little as possible, the right to freedom in question, and finally there must be a proportionality between the effects of the measures and the objective which has been identified as of sufficient importance. Under this test arguably more issues are addressed at the earlier stages. Instead of accepting any legitimate goal, oaks requires a goal of sufficient importance to warrant overriding a constitutionality protected right of freedom."

These essentials on proportionality test may be confounded from the fact of a particular case to justify the severance of a provision as unconstitutional. These facts of fundamental rights have to be balanced and decided to induce a legitimate inference that there can be no other proportionate remedy, less intrusive save to declare the statute or a provision unconstitutional. From a legal perspective under Article (2) of our Constitution, the Constitution is the supreme law of the republic and the anchor of our legal system, it is at the top of the hierarchy of laws, which means all other legal sources statutes, international treaties, Customary Law and regulations must be in adherence to the Constitution. It cannot be denied that the effect of this Article, all other Laws that contravene the constitution are void to the extent of their unconstitutionality.

In response to Section 91, of the Penal Code, a person charged with a criminal offence of forcible detainer has the connotation of use of force to unlawfully remain in occupation of the property without color or right. Asserting one's right to property against a trespasser is my view defence to property.

The concerns attributable by the petitioner is that he has a claim of right over the suit land. That while the civil case pends adjudication before the environment and Land Court he will suffer significance prejudice and violations of his rights of being subjected to a criminal process. The petitioner seeks redress pursuant to Article 22, 23, 25(c) more so under Article 39 and 40 of the Constitution on the right to private property. The nature of the infringement asserts the petitioner are in regard to the circumstances of this particular section which can be sufficiently remedied in civil court other than criminal trial as an offence.

As submitted by the learned counsels for the respondents Section 91 of the Penal Code does not offend the fundamental rights and freedoms under Chapter 4 on the bill of rights.

I agree with that position for Article 27 on Equality before the law is guaranteed to the petitioners. In this case there has been no evidence that Section 91 is discriminatory and the measure designed to achieve the objective of the provision is arbitrary, unfair, or unconstitutional. What the petitioners failed to address is the whole scheme of Article 50 on the right to a fair trial. It is expressly stated in Article 50(1) that in criminal charge, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. In fact possibly the best principle that resonates with the respondents case is in the case **Attorney Generals Reference No. 2 of 2001 Lord Bingham** stated that **"it will not be appropriate to stay or dismiss, the proceedings unless:**

a) There can be no longer be a fair hearing or it would otherwise be unfair to try the defendant.

b) The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed.

c) The prosecutor and the court have not acted incompatibly with the defendants' rights and or the constitution.

In the instant petition I have found no evidence to prove let alone suggest that the criminal justice comprising of the investigating agency, the Director of Public Prosecution and the Court in their respective roles under the constitution have acted improperly in execution of their mandate required of them under Article 244, 157 and 159 of the Constitution.

The problem whether before the police registers a charge against a suspected criminal should conduct a preliminary inquiry to whether the complaint is purely civil or criminal is a matter left to the discretion of the constitutional organs and the credibility of the information and evidence made in respect of the complaint.

If the substantial information provided the subject analysis has no criminal element, the choice to be taken is to have the dispute resolved through a civil court. It is also true in the converse.

The submission by learned counsel that Section 91 of Penal Code has an alternative forum to litigate individual rights and achieve the intended purposes is neither here nor there. Again by way of contrast where there is extrinsic evidence to justify both criminal and civil proceedings, the law imposes a duty for concurrent trials under Section 193 of the Criminal Procedure Code.

For the High Court to invoke a judicial review remedies of prohibition and certiorari to stop or quash any criminal proceedings, the thrust of the test is in **R v Attorney General ex-parte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, Joram Mwewa Gaitariai v The Chief Magistrate – Nairobi, Civil Appeal No. 228 of 2003 {2007} 1 EA 170, Kuria & 3 Others v Attorney General {2002} 2KLR 69.**

I am of the same opinion that although this petition was plainly founded on a misapprehension as to the state of the Law in Section 91 of the Penal Code. The duties vested on judicial or quasi-judicial bodies of the constitution have not been shown to have acted unfairly or in breach of the principles of natural justice. As for this court, the impugned proceedings have been examined. The petitioners have not shown that in initiating an investigations and subsequent prosecution of the respondents acted in excess of the jurisdiction nor for the same reasons there are errors on the face of the record to prohibit or quash the decision.

One prominent characteristic of this petition was unconstitutionality of Section 91 of the Penal Code and that its provisions are inconsistent with and or in contravention of Articles 2, 19, 20, 21, 22, 23, 24, 25 and 39 and 40 of the Constitution.

Far from being taken through length submissions, the petitioner failed the legal and evidential burden to prove that the provisions of Section 91 of the Penal Code is offensive and against the fundamental rights and freedoms guaranteed under the bill of rights of our constitution.

There is therefore no justification to apply the severance principle to have it deleted from the Penal Code. That its enactment was unconstitutional.

In **Outa Okello & 4 others {2014} KLR SCK** the apex court held interlia other principles that a statutory provision could be said to be unconstitutional only if it contravened an express provision of the constitution.

> ***"Analogizing on Section 91 of the Penal Code showed that there was nothing in it that ran into conflict with the constitutional provisions to allow the impugned Section to be declared unconstitutional without cogent forensic ground, would open up improper avenues for contests to yet other statutory provisions ………"****(underlined emphasis mine)*

On sustainability and quality of the principle, the decision by the Supreme Court taken together is said to be the icing in the cake on matters to do with challenging unconstitutionality of a statute or any of its provisions.

On this precedent setting decisions I stand, all other grounds submitted by the petitioner are on sinking sand. What then are the consequences of the petition.

(a). I am of the view that Section 91 of the Penal Code is not unconstitutional and any form of such severance would offend the constitution itself including the doctrine of separation of powers.

(b). The prerogative orders of prohibition and certiorari cannot be granted against the respondents for the remedies are not applicable to the facts and circumstances raised in the petition.

(c). The trial court has both the constitutional and statutory duty to carry out the mandate of trying the ex-parte applicant with finality and conclusively on the merits.

(d). The costs borne by the parties.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF FEBRUARY 2020

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R. NYAKUNDI

JUDGE

In the presence of:-

1. Ms. Sombo for the State

2. Juaje for the Interested Party