



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC PETITION NO 33 OF 2019

PHILOMENA KAVINYA NZUKI.....1ST PETITIONER

ELIZABETH WANJIRU NDERITU.....2ND PETITIONER

ALICE NJERI MUNDIA.....3RD PETITIONER

EKAYA ALUMASI GHONZOUR.....4TH PETITIONER

vs

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

CHIEF MAGISTRATE ANTI

CORRUPTION COURT MILIMANI.....2ND RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

JUDGMENT

1. The petitioners describe themselves as accountants working with the Nairobi City County Government. They face criminal charges instituted against them, with others, on 29th April 2019 in Nairobi Chief Magistrate's Court at Milimani Anti-Corruption Case No 8 of 2019. They filed their claim as Petition No. 411 of 2019 dated 14th October 2019 at the Constitutional and Human Rights Division. The Petition is lodged against the office of the Director of Public Prosecutions as the 1st respondent (hereafter referred to as the 1st respondent or DPP) and the Chief Magistrate's Court seized of the prosecution of the petitioners and their co-accused. The Ethics and Anti-Corruption Commission (EACC) was joined as an interested party on 5th November 2019 and the Petition was transferred to this Division on the same date. No appearance was entered on behalf of the 2nd respondent.

2. The petitioners' case is premised on the provisions of Articles 2(1), 2(4), and 10 of the Constitution. They allege violation of Articles 27, 47, 50, 157(6) (11), 165 (6) and 236 of the Constitution and seek the following orders from the Court:

a) A declaration that the 1st respondent threatened contravened or violated the petitioner's rights under Article 27, 47, 50 and 236 of the Constitution.

b) A declaration that the institution and the continued prosecution of the petitioners in Anti-Corruption Case No 8 of 2019 Republic –vs- Dr. Evans Kidero & 15 Others is unconstitutional, void and an abuse of the court process.

c) An order of certiorari do issue to move into the High Court the decision by the 1st respondent to charge the petitioners in Anti-Corruption Case No 8 of 2019 for quashing.

d) The petitioner be awarded compensation for violation (of) their rights.

e) That costs of the Petition be awarded to the petitioner.

f) Any other reliefs this Honourable Court may deem fit to grant.

3. The Petition is supported by an affidavit sworn by Philomena Kavinya Nzuki and is based on the grounds set out in the petition and the supporting affidavit. The petitioners state that they are all accountants working in the Nairobi City County Government. Their work on a daily basis involves processing and approving payments on behalf of the County Government in accordance with the provisions of the Public Finance Management Act, guidelines from the National Treasury and Central Bank of Bank as well as the County Government's established internal processes and procedures.
4. According to the petitioners, the EACC investigated a complaint of a fraudulent payment made by the County Government to the firm of Wachira, Mburu, Mwangi & Co Advocates on account of legal fees amounting to Kshs 68,000,000. This amount had been incurred by the predecessor of the Nairobi City County Government, the Nairobi City Council, in respect of legal services rendered by the said firm in **HCCC No 875 of 2010- Kyavee Holdings Limited –vs- Nairobi City Council**. The plaintiff in the case had made a claim of general damages to the tune of Kshs 3,151,700,000. The Advocates had raised a fee note for the sum of Kshs 68,761,169 which was approved by the Assistant Director of Legal Services at the Nairobi City Council on 13th May 2011. On 3rd June 2011, a payment of Kshs 10,000,000 was made to the Advocates to defray the debt and the balance of Kshs 58,000,000 was paid on 7th June 2014.
5. The petitioners state that once approved by the legal department, the fees became due and owing and is a liability of the Nairobi City County Government. The quantum of fees has never been challenged in court as by law required and in the absence of an order from court varying the fees or setting it aside, the debt was legally due and owing.
6. The petitioners argue that at the time the fees were approved and the initial payment made, none of them was working in the accounts department. Further, that none of them participated in processing or making the payment of Kshs 10,000,000.
7. The petitioners state that the investigations by the EACC established that the payments were fraudulent and revealed an offence of corruption. It recommended charges against the petitioners and others, leading to the charges against them in respect of which they took plea on 29th April 2019 in Milimani Chief Magistrate Court Anti-Corruption Case No 8 Of 2019.
8. The petitioners, who are accused numbers 6, 13, 12 and 10 respectively, face two counts in the criminal case against them. In the first count, they are charged with conspiring to commit the offence of corruption namely to defraud the Nairobi City County Government of Kshs 58,000,000. At count 6, it is charged that the 1st petitioner, being an accountant, abused her office to improperly confer a benefit to Steven Kariuki Mburu trading as Wachira, Mburu, Mwangi & Co Advocates in the sum of Kshs 58,000,000 by unlawfully approving the said payment. Counts 2, 3 and 4 charge that the 2nd, 3rd and 4th petitioners, being accountants at the Nairobi City County Government, abused their office to improperly confer a benefit of Kshs 58,000,000 to the said Advocate by unlawfully processing the said payment.
9. The petitioners assert that the statement by Mulki Umar, an investigator with the EACC dated the 28th March, 2019 which formed the basis of the criminal charges does not disclose any adverse findings against them. It is also their contention that the statement does not recommend that they should be charged, and there is no factual basis or reasons for such a recommendation. It is the petitioners' contention that in the absence of such a specific recommendation or a factual basis for recommendation to charge them, it is impossible for the petitioners to understand the charges against them in sufficient details to be able to prepare their defence.
10. The petitioners state that at the time the payment was made, it was the work of the 2nd, 3rd and 4th petitioners to process payments at the various stages of making payments in accordance with the internal accounting processes and procedures. It was the duty of the 1st petitioner to approve the work of the 2nd, 3rd and 4th petitioners. They assert that since the payments were made in the lawful discharge of duty, it is paramount that the acts of unlawfulness as alleged in the charge sheet be made out in sufficient details to enable them understand the nature of the case against them and make a defence.
11. The petitioners contend that the absence of a recommendation to have them charged and the factual basis for the charges renders the criminal trial against them a trial by ambush and smacks of ulterior motives and malice. They argue that the decision of the 1st respondent to charge them was arrived at illegally, unreasonably, improperly, irrationally, in bad faith and is a breach of the principles of natural justice. In their view, the actions of the 1st respondent in the absence of reasonable probable cause for mounting the prosecution against them criminalizes the normal discharge of processing and approving payments in the normal course of duty by accountants.
12. The petitioners allege violation of Articles 2(1) and (4), 27 and 157 (11) of the Constitution. It is their contention that the 1st respondent, being a public body, is bound by the Constitution and any of its acts or omissions that contravene the Constitution are null and void and subject to the supervisory jurisdiction of the High Court. It is also their case that the respondents have violated their right to equality before the law and non-discrimination guaranteed under Article 27. They contend that the 1st respondent is obligated to discharge his functions in an independent and impartial manner that guarantees all persons equal protection of the law. In their view, by charging them for merely performing their duty, the 1st respondent has violated their right to equal protection of the law.
13. The petitioners further allege violation of their right to fair administrative action. They contend that the 1st respondent is required by the National Prosecution Policy to independently evaluate the evidence and only make the decision to charge upon establishing that the evidence discloses a case with a realistic prospect of conviction, and that it is in the public interests to prosecute. It is their contention that the failure by the 1st respondent to apply this test is a violation of Article 47. Farther, it renders his decision irrational, illegal and unprocedural.
14. The petitioners further allege violation of their right to fair hearing guaranteed under Article 50 (a), (b) (c) and (j) of the Constitution. It is their contention that the 1st respondent has gone against the petitioners' presumption of innocence by charging them merely for discharging their official function, failing to disclose in sufficient details the acts that constitute criminal elements in the processing and approval of the payments, engaging the petitioners in a trial by ambush in which they do not know the specific criminal elements charged against them and

failing to supply them with a recommendation or factual basis for the charges against them.

15. The petitioners further allege violation of Article 236 which contains protections of public officers. It is their case that the Constitution protects public officers from being victimized for having performed the functions of their office in accordance with the Constitution and the law. They contend that the payments at issue were made in accordance with the law and the internal accounting processes of the Nairobi City County Government. They therefore term the acts of the 1st respondent as victimization of accountants for merely making the payment. They assert that their work enjoys the presumption of legality as long as it is done within the confines of the law and the established internal accounting processes and procedures.

The Response by the 1st Respondent

16. The 1st respondent opposes the petition and has filed grounds of opposition dated 5th November 2019. It argues, first, that the prayers sought by the petitioners are unconstitutional as they seek to prevent it from exercising its mandate. Should the court grant the prayers that the petitioners seek, the result would be greater injustice in the criminal justice system and would be against the public interest.

17. It is also its argument that the petitioners have not adduced reasonable evidence to show that the criminal proceedings against them are mounted for an ulterior purpose, nor have they demonstrated how the 1st respondent has acted without or in excess of its powers. The 1st respondent further argues that the petitioners must demonstrate that substantial injustice would otherwise result if the criminal charges against them proceed. In its view, the arguments made by the petitioners before this court can be raised at the trial court. This is because the accuracy and correctness of the facts or evidence gathered by the 1st respondent can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered in support of the charges.

18. The 1st respondent argues that Article 157 of the Constitution empowers it to institute criminal proceedings only where a criminal offence has been committed. It contends that Article 24 (1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. It notes that the petitioners have merely stated their rights without demonstrating how each of the rights have been or will be infringed, violated or threatened. In its view, the petition is without merit, an abuse of the court process and should therefore be dismissed with cost to the respondents.

Response by the Interested Party

19. The EACC filed grounds of opposition to the petition in which it argues that under Article 157 (6) of the Constitution, the decision to institute criminal proceedings lies with the 1st respondent. Under Article 157 (10) of the Constitution and section 6 of the Office of The Director of Public Prosecutions Act, 2013, the 1st respondent is independent of control from any party in the exercise of its duties. EACC further argues that the Court can only intervene in the 1st respondent's decision to charge if there are cogent allegations of violation of Constitutional rights or threat to violation of the rights or in clear circumstances where it is evident that the accused will not be afforded a fair trial or the right to a fair trial has been infringed or threatened.

20. It is its case that for such an inquiry, the court would be required to establish whether there has been an irregularity or an illegality that departs from the formalities, rules and principles of procedures for institution or conduct of criminal trials. EACC contends that it is not for this court to determine the veracity of the evidence or accused persons defence as this is a matter for the trial court.

21. EACC argues that the petitioners have revealed in the petition the factual basis for the charges against them. This is that the subject matter of the charges, being Kshs. 58,000,000 alleged to have been defrauded from Nairobi City County Government, was paid out; that the petitioners worked for the Nairobi City County Government at the time the monies were paid out; and that their duties at the time encompassed, *inter alia*, processing of payments. EACC notes that the petitioners have confirmed being supplied with copies of witness statements and documentary exhibits intended to be relied upon by the 1st respondent in the trial. It contends that the statement of its investigating officer, Mulki Umar, is but the basis of her testimony, which would aid to stitch together evidence to be adduced by other witnesses at the trial. It urges the court to dismiss the petition with costs.

The Submissions

22. The petitioners note in their written submissions that the respondent and interested party have not filed affidavits in response to the petition, so that the factual contents thereof are unchallenged. They reiterate that they are accountants by profession working for the Nairobi City County Government. They submit that the Legal Department of the then City Council of Nairobi, through an internal memo dated 13th May, 2011, had approved and determined fees to be paid to the firm of Wachira, Mburu, Mwangi & Co Advocates at Kshs 68,761,160. These fees were in respect of proceedings filed against the City Council of Nairobi in High Court Case No 875 of 2010 by Kyavee Holdings Limited. The internal memo authorized the payment of Kshs 10,000,000 out of the approved sum leaving a balance of Kshs 58,761,160. None of the petitioners were involved in processing any aspect of the first payment of Kshs 10,000,000.

23. The petitioners submit that they were involved in processing and approving the payment of the balance of Kshs 58,000,000 which was made to the firm of Advocates that had received the initial payment of Kshs 10,000,000. The petitioners further state that they were involved in the various stages of processing and approving the payment, which they did in their official capacity and in accordance with the operating procedures at the Nairobi City County Government.

24. The petitioners submit that the recommendations of the EACC investigator did not make any adverse findings against them, nor did it recommend that they should be charged. They reiterate the contents of their petition and affidavit in support that the 1st respondent is a creature of the Constitution. As such, it shall not be under the direction or control of any other person in exercising its constitutional powers. It is their submission that this court can therefore examine its actions to ensure that they are within the four corners of the Constitution and

that they uphold public interest, the interests of the administration of justice and avoid abuse of the legal process.

25. The petitioners rely on the case of **Republic v Attorney General ex parte Kipngeno Arap Ngeny High Court Civil Application 406/2001** with regard to the test to be applied in determining if a criminal prosecution has been mounted with ill motive or for improper purposes. They submit, however, that it is now well settled that the court will not usurp the constitutional mandate of the DPP to undertake prosecutions in the exercise of discretion conferred upon the office under Article 157. They concede that the mere fact that the ongoing criminal prosecution may in all likelihood fail or that the accused has a good defence are not grounds upon which to halt criminal proceedings. They also submit that a party challenging a prosecution must prove that the ongoing criminal proceedings constitute an abuse of process for the proceedings to be halted.

26. The petitioners rely on the Court of Appeal decision in **Prof Njuguna Ndungu v- Ethics and Anti-Corruption Commission & 3 Others (2018) eKLR** for the proposition that the DPP is not only bound by the Constitution but also by the National Prosecution Policy in the exercise of his powers. They submit that the Prosecution Policy obligates the DPP to make the decision to charge upon an objective and independent analysis of the evidence and to apply the two test stage of the 'evidential test' and the 'public interest' test. The petitioners submit that the former test requires the DPP to independently review the evidence and to be satisfied that it discloses a reasonable prospect of conviction. They submit that a failure by the DPP to apply this test will render any trial improper and subject to the supervisory jurisdiction of this Court.

27. The petitioners further cite the decision in **Kagane –Vs- Attorney General (1969) E.A 643** which they submit set the the benchmark for making the decision to charge and in which the court had stated that

“to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution..... must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty”.

28. The petitioners submit that the statement of the EACC investigator, Mulki Umar, does not disclose any allegations of culpability on their part. Their culpability, they submit, lay only in paying the sum of Kshs 58,000,000. They reiterate that they are accountants whose day to day role is mainly processing and approving payments. In their view, they can easily be charged in any transaction where money has been paid if the transaction becomes subject to criminal investigations. This, in their view, denies them equal protection and equal benefit of the law contrary to Article 27 of the Constitution.

29. The petitioners further rely on the case of **Diamond Hasham Lalji & Another v Attorney General & 4 Others (2018) eKLR** with regard to what the court should consider on the application of the evidential test by the DPP. They submit that the DPP is obligated to review the recommendations made by EACC to charge and independently make the decision to charge on the basis of the analysis of the evidence. In the absence of a recommendation to charge, the DPP must be able to demonstrate the evidence he considered in arriving at the decision.

30. The petitioners ask the court to hold a proper scrutiny of the evidence and ask itself how the decision to charge them was arrived at in the absence of a recommendation by the EACC. They suggest that the decision to charge them was made only because they discharged their official duty. They further submit that their right to a fair and impartial trial is violated as they cannot prepare their defence in the absence of a specific recommendations to charge them, as well as a basis for such recommendations. It is their contention that the information supplied to them is not in sufficient detail to enable them prepare adequately for their defence, and their rights under Article 50 have therefore been violated.

31. The petitioners concede that they have an obligation to demonstrate how their rights have been threatened or violated. Once they do this, the burden shifts to the respondents. Reliance for this submission is sought in the case of **Diamond Hasham Lalji & another v Attorney General & 4 others** (supra). The petitioners contend that by failing to file a replying affidavit, the 1st respondent had failed to discharge its burden. They urge the court to find that the 1st respondent failed to subject their case to the 'evidential test' and their trial is, accordingly, an abuse of the court process as the DPP violated their right to fair administrative action as set out under Article 47. The petitioners rely on the case of **Republic v DPP & 2 Others ex parte Praxidis Namoni Saisi (2016) eKLR** to submit that the DPP has failed in his duty to the court to place before it material upon which it can feel that his office is justified in mounting the prosecution.

32. The petitioners further submit that the public interest test obligates the DPP to consider whether it is in the interests of the wider administration of justice to charge a suspect. They submit that the principle recognizes that not every criminal investigation should lead to a criminal prosecution. Further, that the public interest test is only applicable where the evidential test has been fully met and satisfied. Where it has not been, as in the present case, the DPP should not prosecute no matter how serious the public interest could be in the matter. The petitioners submit that whereas there is considerable public interest in having corruption cases tried, such cases should not be mounted if the evidential burden is not discharged. Reliance is placed on the case of **Communications Commission of Kenya v The Director of Public Prosecutions & Another (2018) eKLR**.

33. The petitioners urge the court to find that they have made out a case in sufficient detail that the DPP has mounted a trial against them in wanton disregard of the Constitution. He has also failed to discharge his mandate within the confines of the Constitution. They ask the court to find and hold that their continued prosecution would lead to a miscarriage of justice and to quash the decision of the DPP to prosecute them. They further ask the court to assess and award them damages for the inhuman manner of their arrest and the trauma experienced during their trial.

Submissions in Reply

34. The 1st respondent submits that the petitioners have not established violation of their constitutional rights. It further submits that the prayers sought in the petition are unconstitutional as the petitioners seek to prevent the respondents from exercising their mandate as provided in law. If granted, the prayers would result to a greater injustice in the criminal justice system and public interest. The 1st

respondent submits that it is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and demonstrate how such rights have been or will be infringed in respect to him. Reliance is placed on the case of **Anarita Karimi Njeru vs the Republic (1976-1980) KLR 1272** for this submission. The DPP submits that the principles established in the case are that the constitutional violations must be pleaded with a reasonable degree of precision; that the Articles of the Constitution at issue must be precisely enumerated, and the manner of violation must be particularized in a precise manner, as must the manner and extent of violation.

35. It is the DPP's submission further that in any event, Article 24 (1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

36. The DPP further submits that the independence of the judiciary is a key tenet in the administration of justice and that the Court is independent and impartial. That Article 160 of the Constitution provides that in the exercise of judicial authority, the judiciary, as constituted by Article 161, shall not be subject to the control or direction of any person or authority. It is its submission that the petitioners shall enjoy the right to equal protection in any court of law and a fair administrative process as matters are decided on merit.

37. The 1st respondent further submits that the National Police Service draws its authority to investigate from Article 245 of the Constitution and section 35 of the National Police Services Act 2013. It is the 1st respondent's submission that in the exercise of its power of investigation, the police are functionally independent and can only take directions to investigate from the DPP and no other authority. The Constitution further requires the directives from the DPP to be in writing for the Police to give effect. It is the DPP's submission that in this case, the petitioner has not presented any written directive to the Police by any other authority to justify their claim that the investigations have been commenced for a collateral purpose. According to the DPP, in the absence of such evidence, the court can only presume that the police are purely acting in the discharge of their lawful authority.

38. The DPP submits that the law allows the police and any other investigative agency to investigate a person if there is probable cause to do so, regardless of the status of the petitioner.

39. The 1st respondent further relies on the case of **Dr. Alfred N. Mutua v The Ethics and Anti-Corruption Commission & Others, Misc. Application No. 31 of 2016** in which the court held that threat of arrest or arrest where reasons are given is not a violation of fundamental rights. Reference was also made to the case of **Republic v The Commissioner of Police & the Director of Public Prosecution ex parte Michael Monari & another (2012) eKLR** with regard to the duty of police to investigate where a complaint is made regarding the commission of an offence. Further, that police only need to establish reasonable suspicion before preferring charges, leaving the rest to the trial court. It is the 1st respondent's submission that unless the petitioners establish that police are acting *ultra vires* their powers, the court should not unnecessarily inhibit their investigations. The 1st respondent further cites the case of **Cascade Company Limited vs Kenya Association of Music Production (KAMP) & Others, Petition No. 7 of 2014 High Court, Murang'a**, for a similar holding.

40. The 1st respondent submits that it has prosecutorial authority vested in the office under Article 157 of the Constitution and section 5 of the Office of Director of Public Prosecutions Act. It is its submission that in the exercise of this power, the DPP is not subject to the direction or control of any person, body or authority. Reference is made for this submission to the case of **Hon. James Ondicho Gesami v The Attorney General & Others, Petition No. 376 of 2011**.

41. The DPP submits that the primary test in making the decision to prosecute is whether the material gathered meets the evidential and public interest threshold set out in the National Prosecution Policy. Reliance for this submission is sought in the case of **Mohamed Ali Swaleh v The Director of Public Prosecution & Another- High Court Mombasa Petition No. 2 of 2017** where the court held that:

“the decision whether or not to institute criminal proceedings is made based on the evidence collected. Once the investigations establish reasonable suspicion that a person committed a crime he ought to be charged in a court of law.”

42. Reference is also made to the case of **Republic v Commissioner of Police & Another ex parte Michael Monari & Another** (supra) for the proposition that the police need only establish reasonable suspicion before charging, the rest being left to the trial court. The 1st respondent's submission is that the courts have consistently held that it is not the duty of the court to decide who is to be charged and with what offence as to do so would be to meddle with matters that are within the constitutional mandate of the DPP.

43. The 1st respondent finally invokes the doctrine of separation of powers in opposition to this petition. It is submitted that for orderly functioning of state organs, each arm of government should be allowed to exercise its powers without interference from any of the other arms. Where the exercise of powers is abused or exceeded, however, then a check on the responsible organ would be necessary. The DPP submits that too much superintendence by one organ could render the other arms of government dysfunctional, resulting to a threat on the rule of law and a constitutional paralysis or crises in government. Support for this submission is sought in **Dr. Alfred N. Mutua v The Ethics and Anti-Corruption Commission & Others, Misc. Application No. 31 of 2016**. The 1st respondent submits that this petition is an abuse of the court process, meant to circumvent the criminal justice system and hinder the 1st respondent from discharging its constitutional mandate. The 1st respondent prays that the petition should be dismissed with costs.

44. In its submissions dated 9th March 2020, EACC argues that there are three issues for consideration by the court. These are, first, whether there was a factual basis for the decision to prosecute the petitioners; whether there has been disclosure of evidence as required under Article 50 of the Constitution; and whether there has been violation of the petitioners' rights under Articles 27, 47, 157 (11) and Article 236 of the Constitution.

45. EACC submits that it is permitted under Article 252 (1) (a) of the Constitution and section 11 (1) (d) of the Ethics and Anti-Corruption Commission Act, 2011 to carry out investigations and make recommendations to the DPP for prosecution of suspected corrupt conduct under

the provisions of the Anti-corruption and Economic Crimes Act, 2003. Further, that Article 157 (6) (a) of the Constitution empowers the DPP to institute and undertake criminal proceedings against any person before any court in respect of any offence. Further, that at Article 157 (10), the DPP is required, in the performance of his functions, not to act under the direction or control of any person or authority.

46. EACC further submits that the court may intervene in a prosecution where the DPP has committed constitutional excesses in the exercise of his powers. The power of the court in this regard is provided for under Article 165. In exercising this power, however, the Court must bear in mind, as held in the case of **Stephen Oyugi Okero vs. Chief Magistrate's Court at Milimani Law Courts (Criminal) & another [2018] eKLR**, that it is not for the court but for the prosecution to decide whether a prosecution should be commenced, and whether it should continue. According to the EACC, as was held in the case of **Republic vs. Director of Public Prosecutions & another ex parte Patrick Ogola Onyango & 8 others [2016] eKLR**, the rationale for this approach is to ensure that the prosecutorial powers of the DPP are not unnecessarily interfered with by the court.

47. EACC submits that it carried out investigations of suspected corruption at the Nairobi City County Government. The investigations led to the charging of the petitioners, which they acknowledge in their petition. It submits that while the petitioners complain that the charges against them lack a factual foundation, they acknowledge such foundation in their pleadings. This foundation, according to the EACC, is that it conducted investigations on the allegation of irregular payment of Kshs. 58,000,000 made by the Nairobi City County Government to Wachira, Mburu, Mwangi & Co. Advocates on account of alleged legal fees. It further submits that the petitioners have acknowledged that at the time that the said amount was paid, they worked for Nairobi City County Government, and their duties encompassed, *inter alia*, processing of payments at various stages. EACC submits that its investigating officer, Mulki Umar, had made a statement to this effect and, to that extent therefore, the petitioners cannot allege a lack of a factual foundation in the charges against them.

48. To the contention by the petitioners that Mulki Umar's statement does not disclose any adverse findings against them, EACC submits that Ms. Umar's statement is one that is ordinarily made by an investigating officer in the normal conduct of investigations. It submits that the investigating officer is among the witnesses who aid in stitching together evidence to be adduced during a trial, and the petitioners will have an opportunity to cross-examine her in the course of the trial.

49. With regard to the complaint by the petitioners that the investigating officer had not made a recommendation for their prosecution, EACC invites the court to be guided by the decision in **Joshua Owuor vs Director of Public Prosecutions & another [2019] eKLR** in which the court held, with regard to recommendations contained in a statement made by the investigating officer, that the recommendations made to the DPP are not binding on him, and upon a review of the evidence, he can institute a prosecution against a person not recommended by the investigator for prosecution. EACC urges the court not to interfere with the DPP's decision to prosecute the petitioners as a prima facie basis for so doing exists.

50. EACC further observes that the petitioners have acknowledged in their petition that the DPP has supplied them with copies of witness statements and documentary exhibits that he intends to rely on at the trial. The requirement for disclosure under Article 50 of the Constitution has accordingly been complied with.

51. EACC agrees with the DPP's contention that the petitioners have not pleaded with precision the alleged violation of their rights under Articles 27, 47, 157 (11) and Article 236 of the Constitution. Reliance for this submission is placed on the decision in **Anarita Karimi Njeru vs Republic [1979] eKLR**.

52. With regard to the petitioners' contention that their prosecution is a violation of Article 236, EACC submits that the protection envisaged in the Article pertains to due process of the law, which the petitioners in this case have been accorded. In its view therefore, this petition is without merit and should be dismissed.

Analysis and Determination

53. I have read and considered the pleadings and submissions of the parties which I have summarized above. They ask the court to issue orders prohibiting their prosecution in ACC No. 8 of 2019 in which they are charged, with others, with various offences. The first count charges them with conspiring to commit the offence of corruption namely to defraud the Nairobi City County Government of Kshs 58,000,000. At count 6, the 1st petitioner is charged with abuse of her office as an accountant to improperly confer a benefit to Steven Kariuki Mburu trading as Wachira, Mburu, Mwangi & Co Advocates in the sum of Kshs 58,000,0000 by unlawfully approving the said payment. At count 2, 3 and 4, the 2nd, 3rd and 4th petitioners are charged, with abuse of office in their capacities as accountants at the Nairobi City County and improperly conferring a benefit of Kshs 58,000,000 to the said Advocate by unlawfully processing the said payment.

54. The petitioners allege violation of their constitutional rights under Articles 27, 47, 50 and 236 of the Constitution. They invoke the court's jurisdiction under Article 165 of the Constitution to check the exercise of prosecutorial powers by the 1st respondent conferred by Article 157 of the Constitution.

55. The core of the petitioners' case is that the recommendation of the EACC set out in the statement of its investigator, Mulki Umar, dated 28th March, 2019, does not disclose any adverse findings against them. Accordingly, since this is the statement which formed the basis of the criminal charges against them, the charges lack a factual foundation or basis. They therefore ask the court to allow their petition and grant the orders that they seek.

56. The DPP and EACC make a three-pronged response to the petition. First, that the petitioners have not established violation of rights to warrant the grant of the orders that they seek. Secondly, that the court should respect the doctrine of separation of powers and allow the DPP to carry out its constitutional mandate without interference by the court. The third argument is that the petitioners' rights under Article 50 have been safeguarded and they have been accorded due process. A fourth argument advanced by EACC is that the provisions of Article 236 require that public officers be accorded due process, which has been done with regard to the petitioners.

57. I will deal first with the argument based on the doctrine of separation of powers. This argument, I believe, is no longer tenable to bar a consideration by the court of an allegation that the State or any of its organs has violated the rights of a citizen. The provisions of Article 165 (3) (d) are, I believe, no longer subject to debate. The Constitution provides with regard to the jurisdiction of the High Court that:

(3) Subject to clause (5), the High Court shall have—

d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

...

58. There is also a plethora of judicial precedents on the circumstances under which the court may enter into an examination of the exercise of prosecutorial powers by the office of the DPP. A consideration of a few of these decisions will, I believe, suffice.

59. In **Republic v Director of Public Prosecution & another ex parte Patrick Ogola Onyango & 8 others** Onguto J stated as follows:

“116. The courts’ twin approach in ensuring that the discretion to prosecute is not abused if only to maintain public confidence in the criminal justice system and the same time balancing the public interest in seeing that criminals are brought to book has led to rather contradictory principles.

117. On the one hand the courts have consistently held that suspects investigated and charged before trial courts can only have their way before the trial court. It is stated that the trial court is the appropriate forum where evidence is to be tested and all defences raised: see the cases of Thuita Mwangi & 2 Others vs. The Ethics and Anti-Corruption Commission Petition No. 153 of 2013 [2014] eKLR and also Republic vs. Commissioner of Police & Another Ex p Michael Monari & Another [2012] eKLR where Warsame J (as he then was) stated as follows:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

60. Onguto J went on to consider the decisions in which courts have taken a more liberal approach to the review of the decisions of the DPP and concluded as follows:

“118. On the other hand, the courts have also been consistent that a prosecution which lacks a foundational basis must not be allowed to stand. The DPP is not supposed to simply lay charges but must determine on sound legal principles whether the evidence can sustain a charge prior to instituting the prosecution: see the cases of Republic vs Director of Public Prosecutions Ex p Qian Guon Jun & Another [2013] eKLR, Republic vs. Attorney General Ex p Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, Githunguri vs. Republic (Supra) and Republic vs. The Judicial Commission into the Goldenberg Affair and 2 Others Ex p Saitoti HC Misc. Application No. 102 of 2006.

119. In Republic vs. Attorney General Ex p Kipngeno Arap Ngeny (Supra), the court observed as follows:

“It is an affront to our sense of justice as a society to allow the prosecution of individuals on flimsy grounds. Although in this application we cannot ask the Attorney General to prove the charge against the accused, there must be shown some reasonable grounds for mounting a criminal prosecution against an individual. There must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will achieve nothing more than embarrass the individual and put him to unnecessary expense and agony. The Court may, in a proper case, scrutinize the material before it and if it is determined that no offence has been disclosed, issue a prohibition halting the prosecution.” (emphasis mine)

120. The same rather oxymoronic tide appears to obtain outside our jurisdiction. In Australia, in the case of William vs. Spautz [1992] 66 NSWLR 585 the High Court was of the view that proceedings lacking in any proper foundation amount to abuse of process and ought to be stayed. Yet in England, the House of Lords was emphatic in the case of Director of Public Prosecutions vs. Humphrey [1976] 2 ALL ER 497 at 511 that:

“A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval...If there is a power...to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.” (Emphasis added)

61. The court concluded as follows with regard to the exercise of the powers of the Court:

122. Thus while it appears true that the court has authority to prevent abuses of its process and safeguard an accused person from oppression and prejudice on basis of baseless charges, the courts have also been quick to observe and hold that where an indictment is properly drawn in accordance with established practice and pursuant to a decision by the DPP to institute the prosecution the rest must be left to the trial court clothed with jurisdiction to deal with it and the accused is thereat to present its defence.

123. It is these two principles in the context of challenges to prosecutorial powers of the DPP which lead to the inevitable inference that in matters of judicial review, it is not merely a question of process but also merit. How else would a court ascertain the presence of or lack of a foundational basis without questioning the merit of the DPP's decision." The court must reflect on both the law and the evidence to ascertain the foundational basis and in the process undertake a more substantive review of the decision by the DPP."

62. The powers of the Court in circumstances such as are presently before me were also considered by the Court of Appeal in **Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR**. In that case, the Court stated that:

"[23] I have referred to the reasoning of the High Court in paras. 9, 10 and 11 above. It is apparent that the High Court left the matters raised by the appellant and the respondents to the trial court for determination without making any tentative and objective finding on the legality of the charges and the prospect of a conviction.

The jurisprudence shows that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise of discretion sparingly. (Emphasis added)

63. The extent to which the court should analyse prosecution evidence in considering a challenge to the exercise of prosecutorial discretion was also considered in **Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others [2019] eKLR**. In its decision, the five judge bench of the High Court, after considering various authorities on the issue, stated as follows:

"243. We agree that there is a real danger of courts overreaching if they were to routinely question the merit of the DPP's decisions. However, there are circumstances where the type of scrutiny set out in the majority decision of Njuguna S. Ndungu (supra) is called for. Should there be credible evidence that the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, then a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled.

244. To be underscored is that judicial review of the foundational basis of a charge should only be undertaken when an applicant has first established that there are reasonable grounds that the challenged proceedings are a vehicle for a purpose other than a true pursuit of criminal justice. To allow a willy-nilly and casual review of the foundational basis of criminal charges would be to turn judicial review proceedings into criminal mini-trials, a prospect that anyone keen to stop a criminal trial would relish." (Emphasis added)

34. In **Diamond Hasham Lalji & another v Attorney General & 4 others** (supra) relied on by the petitioners, the Court of Appeal conceded that there was room for scrutiny of facts when it held that:

"[45] In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative. State of Maharashtra Ors v Arun Gulab Gawall & Ors – Supreme Court of India – Criminal Appeal No. 590 of 2007 para 18 and 24, Meixner & Another v Attorney General [2005] 2 KLR 189."

64. The position in law, then, is that the court has the jurisdiction to inquire into the decision of the DPP to prosecute. Its inquiry, however, must be undertaken sparingly, in exceptional circumstances and in the clearest of cases. In order for the court to enter into such an inquiry, the petitioner must first satisfy it that there are reasonable grounds to believe that the proceedings the subject of challenge before the court are a vehicle for a purpose other than a true pursuit of criminal justice.

65. In this case, the petitioners have been charged alongside others with the alleged fraudulent payment of Kshs 58,000,000 from the Nairobi City County Government to a firm of Advocates. There is no dispute that the payment was made when they were all accountants working within the accounts department of the County Government. I note from the investigation report of Mulki Umar annexed to the affidavit in support of the Petition that a prior attempt to make the payment had been stopped, but the payment was made on 7th January 2014. The petitioners concede that the payment in 2014 was made under their watch, and that they approved or processed the payment. EACC had carried out investigations and in the report, had recommended the prosecution of various persons.

66. The petitioners contend that in the recommendation to the DPP, the EACC investigator did not recommend that they should be prosecuted. They therefore contend that without such a recommendation, they are unable to understand the charges against them in sufficient details to be able to prepare their defence.

67. Article 50(2) provides as follows with respect to the right to a fair hearing guaranteed to all accused persons:

2) *Every accused person has the right to a fair trial, which includes the right—*

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

....

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

68. The petitioners concede that they have been supplied with witness statements and the charges against them. This is what Article 50(2)(j) and judicial precedents on the interpretation thereof require. The petitioners are not complaining, therefore, that the disclosure necessary before a trial can proceed has been denied.

69. My understanding of the petitioners' complaint is that the EACC did not recommend their prosecution. Accordingly, the DPP should not have included them among the persons to be prosecuted in respect of the alleged fraudulent payment of funds to the firm of Wachira, Mburu, Mwangi & Co Advocates.

70. This complaint is, I believe, answered by the holding of the court in the case of **Joshua Owuor v Director of Public Prosecutions & another [2019] eKLR**. In this case, the petitioner advanced essentially the same arguments that have been advanced by the petitioners in the present case- that the investigator did not make a recommendation to the DPP for his prosecution. The investigation report at issue in that case was the same as in the present case, relating to the fraudulent payment of Kshs 58,000,000 to the firm of Wachira, Mburu, Mwangi & Co Advocates. In dismissing the contention that the petitioner should not have been prosecuted and that the court should issue a declaration that the charges were unconstitutional, the court (W. Korir J) held as follows:

“37. A perusal of the investigation report of Mulki Umar dated 28th March, 2019 discloses that she did not recommend that the Petitioner be charged. However, as correctly submitted by the DPP the power to prosecute or not to prosecute solely belongs to him. The recommendations of the investigating officer are not binding on the DPP. The DPP can reject a recommendation to prosecute. He can also decide, upon independent review of the evidence, to prosecute a person that the investigator has not recommended for prosecution. (Emphasis added)

71. I fully agree with the holding of Korir J above. This holding is in accord with the constitutional mandate vested in the office of the DPP under Article 157 (10) that:

10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

72. The DPP has the constitutional mandate to determine whom to prosecute, regardless of the recommendations made by investigators in the EACC. He has the mandate to review the evidence presented, and should he not agree with the decision of the investigators with respect to who should be prosecuted, act accordingly. There is nothing in the Constitution or statute to require that only those persons against whom a recommendation for prosecution has been made by investigative bodies should be prosecuted, for this would take away the prosecutorial discretion from the DPP and vest it in these other persons or bodies.

73. In the circumstances, I am unable to find any violation of the petitioners' rights, or abuse of the prosecutorial mandate of the DPP under Article 157. This petition is therefore found to be without merit, and is hereby dismissed but with no order as to costs.

Dated Delivered and Signed at Nairobi this 23rd day of July 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties electronically with their consent.

MUMBI NGUGI

JUDGE