



**REPUBLIC OF KENYA**

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

**ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION**

**CORAM: MUMBI NGUGI J**

**PETITION NO 27 OF 2019**

**ELKANA KAITHE NYAGA.....PETITIONER**

**VS**

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

**ETHICS AND ANTI CORRUPTION**

**COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This petition relates to certain investigations carried out by the Directorate of Criminal Investigations (DCI) and the Ethics and Anti-corruption Commission (EACC) the 2<sup>nd</sup> respondent in this matter, relating to the petitioner's educational qualifications and documents tendered to his employer, the Ministry of Education, and prospective employer, the Public Service Commission (PSC). The petitioner is aggrieved by the investigations and intended prosecution. He has filed the present petition dated 16<sup>th</sup> October, 2019 in which he alleges violation of his constitutional rights by the respondents and seeks the following orders from the court:

***(i) A DECLARATION THAT the Respondents violated the Petitioner's fundamental freedoms and rights guaranteed by Article 27(1), 29(a)&(d), 47(1)&(2), 49(1)(a)(i),(f)(i),(g)&(h), 54(1)(a), 57(b)&(c), 73(2)(b),(c),(d),(e) and 157(11) of the Constitution of Kenya, 2010.***

***(ii) AN ORDER OF CERTIORARI to quash the ongoing investigations against the Petitioner, the intended prosecution and the requisitions to compel his attendance.***

***(iii) AN ORDER OF PROHIBITION to prevent the Respondents from investigating or prosecuting the Petitioner on the purported fake Master's degree certificate without new evidence.***

***(iv) AN ORDER THAT the Respondents do pay damages to compensate the Petitioner for contravening his human rights and fundamental freedoms.***

***(v) AN ORDER THAT the Respondents do pay the Petitioner's costs of the Petition.***

2. The petition is lodged against the Director of Public Prosecutions (DPP) who has the constitutional mandate under Article 157 to exercise state powers of prosecution. The 2<sup>nd</sup> respondent, EACC, has the statutory mandate to investigate matters of corruption and economic crimes in Kenya.

**The Pleadings**

3. The facts giving rise to the petition are set out in the petition and the petitioner's affidavit in support. He has also filed a further affidavit and a supplementary affidavit in support of his case and in response to the affidavits filed by the 2<sup>nd</sup> respondent.

4. The petitioner had, sometime in 2015, applied to the PSC for the position of Deputy Director of Education Job Group R. He had attached copies of his academic certificates, was shortlisted and interviewed but had not received the results of the interviews at the time of filing the petition. Sometime in 2017, the PSC advertised for the position of Senior Assistant Director of Education, Job Group Q, which he applied for but was not shortlisted. He inquired from PSC why he was not shortlisted and he was asked to submit his original Master's Degree certificate, which he did.
5. Sometimes thereafter, he was summoned to the DCI headquarters and asked to submit his original Bachelor of Arts (Education) Degree and Master's Degree certificates for verification, which he did. He also received similar summons from the EACC to submit the same certificates, and he complied. He then learnt from the EACC that it was in possession of his personal file from the Ministry of Education and was shown what purported to be a copy of a Master's Degree certificate in the file. He states that the personal file is in the sole custody of the Ministry of Education's Human Resources personnel and they know the source of the purported certificate. He later received a letter from the DCI addressed to the EACC and copied to the Ministry of Education and the PSC clearing him from any wrongdoing.
6. However, a week after clearing him, the DCI summoned him after one Andrew Nyanchoga, the Director of Human Resources in the Ministry of Education, had written to it complaining that the petitioner had two Master's Degree certificates. He states that on 18<sup>th</sup> January, 2018, the DPP informed him that he had closed the inquiry file. On 22<sup>nd</sup> January, 2018, the DCI informed the Ministry of Education, the PSC and the EACC that the petitioner was not to blame for the copy of a fake Master's Degree certificate in his personal file. The PSC also informed the Cabinet Secretary, Ministry of Education, on 10<sup>th</sup> July, 2018 that the investigations against the petitioner had been concluded and he was not found liable.
7. On 31<sup>st</sup> July, 2018 however, one A.A. Okwach, on behalf of the Cabinet Secretary, Ministry of Education, requested the petitioner to submit original certificates of his two purported Master's Degree certificates. He submitted certificate No. 015 02874 dated 7<sup>th</sup> August, 2015, on 6<sup>th</sup> August, 2018.
8. The petitioner thereafter filed a complaint with the Commission of Administrative Justice (CAJ) against the PSC. By a letter dated 1<sup>st</sup> February, 2019, the PSC informed the CAJ that the petitioner had not submitted to it his two Master's Degree certificates as requested. The petitioner states that on 22<sup>nd</sup> March, 2019 he was summoned by the EACC for an interview regarding the copy of the fake Master's degree certificate in his personal file at the Ministry of Education. He declined to honour the summons.
9. The petitioner further states that he appealed against his retirement on account of disability. In order to scuttle his reinstatement, the EACC arrested him in the morning of 23<sup>rd</sup> July, 2019 and locked him at the EACC Police Station and later at Kilimani Police Station where he spent the night. On 24<sup>th</sup> July, 2019, he was taken to the Milimani Law Courts but was not presented in court. He remained in the cells until later in the evening when he was driven to the EACC offices and released. He had since been reporting to the EACC without the reasons for such reporting being explained to him.
10. The petitioner alleges violation of Articles 3(1),10(2)(b), 21(3), 27(1), 29(a)&(d), 47(1)&(2), 49(1)(a)(i),(f)(i),(g)&(h), 54(1)(a), 57(b)&(c), 73(2)(b),(c),(d),(e) and 157(11) of the Constitution. He asserts that as a result of the violation of these provisions of the Constitution, the respondents have failed to respect, uphold and defend the Constitution in so far as he is concerned. They have also failed to uphold the values and principles of national governance by failing to uphold the rule of law and good governance.
11. He alleges that the respondents have further breached their duty to address his needs as a person living with disability and an elderly member of the society; his right to equal benefit of the law by failing to comply with section 35 and 36 of the Anti-Corruption and Economic Crimes Act, 2003; and his right from being deprived of his freedom arbitrarily and without cause. In addition he alleges violation of his right against psychological torture by arresting and releasing him without preferring charges and by compelling him to report to the EACC.
12. The petitioner further alleges that the respondents violated his right to fair administrative action by investigating and arresting him on a case that the DPP had closed and without any new evidence. They also violated his right to be taken to court within 24 hours of arrest and by denying him bond while in custody. Further, that they had breached the Constitution by acting on the whims of one Andrew Nyanchoga and A.A. Okwach of the Ministry of Education without objectivity and accountability.
13. In response to the petition and the affidavit in support, the DPP filed grounds of opposition dated 19<sup>th</sup> December 2019. The DPP's position is that he acted within the confines of his constitutional mandate under Article 157 of the Constitution and all other laws incidental thereto. He exercises State powers of prosecution personally or by persons under his control and direction, and is subject only to the Constitution and the law. He does not require the consent of any person or authority to prosecute, and is independent and not subject to the direction or control of any person or authority. The court would be crossing into the line of his independence and descending into the arena of finding whether there is a *prima facie* case against the petitioner should it issue the orders the petitioner seeks.
14. It is the DPP's contention, further, that the petitioner has not demonstrated that the DPP has failed to act independently or has acted capriciously, in bad faith or has abused the process in a manner to trigger intervention of the court. The DPP cites Article 157(6) and (10) with respect to his constitutional mandate. He asserts that he has not instituted proceedings against the petitioner for extraneous or ulterior purposes or to circumvent justice but with sincere intention to serve justice.
15. He asks the court not to grant the orders that the petitioner seeks as this would deny his office the statutory and constitutional mandate to investigate and prosecute a pure criminal matter of high public interest under the Anti-Corruption and Economics Crimes Act to its logical conclusion. The investigations into the charges the petitioner faces are still underway by both his office and the EACC and a clear decision is yet to be reached on whether the charges meet the evidentiary, public interest and threshold test. It is his position that the petition is premature in totality.
16. EACC filed two affidavits sworn by Jackline Makena, an investigator with the EACC appointed under section 23 of the Anti-Corruption

and Economic Crimes Act 2003. Her duties include the conduct of investigations into complaints received by the EACC and making recommendations pursuant to such investigations. She was one of the investigators involved in the investigation of the matters giving rise to this petition. The position of the EACC is that this petition is devoid of merit and should be dismissed. The investigations sought to be quashed have been concluded, a fact that the EACC avers the petitioner confirms in his affidavit.

17. With regard to the facts forming the basis of the petition, EACC states that it had received a letter dated 23<sup>rd</sup> June 2015 requesting it to investigate allegations against the petitioner with respect to his academic qualifications as set out in the said letter. It had carried out investigations and made recommendations to the DPP pursuant to its constitutional and statutory mandate under section 11 of the Ethics and Anti-Corruption Commission Act (EACC Act). The recommendations had been made pursuant to section 35 of the EACC Act. Its recommendations were for the prosecution of the petitioner and the Dean of the School of Education, Mount Kenya University, for the offences disclosed by the investigation.

18. The EACC had recommended their prosecution for the offence of deceiving the Ministry of Education contrary to section 46 (1) (b) and section 46 (2) of the Leadership and Integrity Act and for giving false information to a person employed by the public service contrary to section 129 (a) of the Penal Code. According to the EACC, the particulars informing the offences were that the petitioner had stated in his PSC 2 form that he had earned a Master's Degree between the years 2012-2013 whereas he obtained the said degree on 7<sup>th</sup> August 2015. He had also presented a letter dated 16<sup>th</sup> December 2013 to the interview panel showing he was awaiting graduation having completed his Master's Degree. This, according to the EACC, was not true, but it gave the petitioner an advantage over other candidates. The EACC asserts that contrary to the petitioner's averments, it was not investigating the same offence as the DCI.

19. It is the case of EACC that upon receipt of its report under section 35 of the ACECA, the DPP agreed with its findings and gave his consent to the prosecution of the petitioner by a letter dated 14<sup>th</sup> March 2019. It is therefore not true, as deposed by the petitioner, that the DPP had closed the case which EACC was investigating.

20. EACC had thereafter arrested the petitioner on 23<sup>rd</sup> July 2019 and booked him at 1520 hours at the police station at Integrity Centre for presentation in court in the morning of 24<sup>th</sup> July 2019. This was as soon as was reasonably practicable, and it denies the petitioner's contention that he was arrested at 10.00. He was not detained for more than 24 hours before being taken to court as he alleged. The EACC states that it could not grant him bond as he had previously absconded while being interviewed at Integrity Centre. He had also failed to appear when called upon during the investigation, which rendered him a flight risk who would fail to appear in court on 24<sup>th</sup> July 2019.

21. Regarding the failure to charge him as scheduled on 24<sup>th</sup> July 2019, EACC avers that it received communication from the DPP recalling the file for the purposes of briefing the DPP on the matter. This was on the basis that the DPP had received information that the investigation by the EACC involved the same subject matter as the matter previously investigated by the DCI. It was therefore not possible for the petitioner to take plea on the said date. He was therefore released from EACC custody and issued with a notice requiring him to attend its offices pending further instructions from the DPP.

22. EACC had also briefed the DPP on the matter that it had investigated vis a vis the investigations undertaken by the DCI in its letter to the DPP dated 31<sup>st</sup> July 2019. It was not pursuing investigation into the existence of a fake certificate or the utterance thereof by the petitioner as was evidenced by the nature of the charges it had recommended that the petitioner should be charged with. It is its case therefore that it had not breached any of the petitioner's rights as alleged. Its actions and investigations were done in accordance with the law.

23. EACC concedes that the petitioner was cleared of the allegations of forgery. These allegations, which were not the subject matter of its investigation, were, investigated by the DCI. Its investigations were also not informed by any other matter, nor was it acting on the whims of any person but in response to a complaint and in accordance with its mandate.

24. EACC denies that it had any knowledge of or interest in the petitioner's appeal against his retirement, and his contentions that its actions were intended to scuttle the appeal are false and unsubstantiated. The petitioner had also not demonstrated how it disregarded the needs of a person with disability or the elderly nor has he set forth what the duty entails. The petitioner is therefore not entitled to any damages as against the EACC.

25. The petitioner filed an affidavit sworn on 24<sup>th</sup> December 2019 in response to the EACC's affidavit sworn on 20<sup>th</sup> November, 2019. He deposes that the EACC delegated the investigation of the complaint dated 23<sup>rd</sup> June, 2015 to the DCI by a letter dated 30<sup>th</sup> August, 2017 which is in its custody and within its knowledge. It has accordingly come to court with unclean hands by concealing the letter.

26. The petitioner reiterates his previous averment that the DCI had investigated the complaint and had found that there was no offence as far as the academic certificates are concerned, which the DCI had stated in a letter addressed to the EACC. It had not informed him that it contested the conclusion reached by the DCI or that it intended to carry out further investigations.

27. He maintains that the investigations by the EACC were based on the allegations set out in the letter dated 23<sup>rd</sup> June 2015 in which it was alleged that he had been uttering and presenting forged undergraduate and Master's Degree certificates and had obtained promotions while using the said certificates which he had presented while applying for jobs with the PSC and the TSC.

28. It is his averment that there is nothing presented to the court by the EACC to show that it was investigating something different from what was investigated by the DCI. It had also not challenged the decision of the DPP not to pursue prosecution of the petitioner pursuant to the letter from the DCI. He contends that the EACC has abused its powers by unjustifiably resurrecting Inquiry No. 131 of 2017.

29. According to the petitioner, the DPP had, in his letter dated 10<sup>th</sup> January, 2018, been unequivocal that there was no evidence to support charges against the petitioner as the evidence did not disclose that it was the petitioner who presented the fake certificate or that he relied on

the certificates to get job promotions. The DPP had also directed that there is need for further investigations to establish how the fake document was introduced into the Ministry of Education's Human Resources file system. He had also called for the officers who had exclusive access to the file to explain in order to maintain the integrity of the officers charged with confidential matters, and for the file to be forwarded to his office.

30. The EACC had not explained why it refused to investigate one Andrew Nyanchoga and Andrew Okwach as directed by the DPP. It had also not explained why it discriminated against the petitioner by not investigating the said Andrew Nyanchoga and Andrew Okwach or failing to charge Dr Ruth Thinguri.

31. The petitioner insists that he was arrested at 10.00 a.m. but that the EACC officer entered the arrest time as 15.20 hours in the OB. He further maintains that the EACC was used by the said Andrew Nyanchoga and Andrew Okwach to ensure that he was out of employment in spite of his entitlement by reason of his disability.

32. In a further replying affidavit sworn by Jackline Makena on 13<sup>th</sup> March, 2020, the EACC responds to the petitioner's affidavit sworn on 24<sup>th</sup> December 2019. Ms. Makena reiterates that an investigation had been carried out and recommendations made for the prosecution of the petitioner. After his release, the petitioner had been issued by the EACC Police Station with a requisition to compel attendance under section 52 of the National Police Service Act requiring him to present himself on 7<sup>th</sup> August 2019 as EACC waited for a response from the DPP before the taking of plea. As there was no further response from the DPP, the petitioner was informed during a subsequent attendance that he would be contacted to present himself when he was required.

33. It was also the EACC case that it was not required to supply investigation reports to persons under investigations. The petitioner would have been supplied with all documents and witness statements at the opportune time for purposes of preparing his defence in observance of his constitutional right to a fair trial.

34. To the petitioner's averment that it had referred the complaint to the DCI, EACC confirmed that it had indeed done so initially when forgery of academic certificates was reported as the subject matter on the face of the complaint. The PSC had, however, provided further information and confirmed that the petitioner was promoted on the basis of information he provided in its 'PSC 2' form on or about 2014 that he possessed a Master of Education (Leadership Management) Degree from Mount Kenya University. This information prompted the EACC to open an inquiry into breaches under Chapter Six of the Constitution. It conceded that the DCI had stated that there was no evidence to sustain the offence of forgery of the academic certificates. EACC was not, however, investigating the issue of forged certificates but rather whether the petitioner was promoted on the basis of false information he had filled in his PSC 2 form and provided to the PSC.

35. According to EACC, the offences of forgery and providing false information to a public entity are distinct criminal offences. Its mandate is to oversee and enforce implementation of Chapter Six of the Constitution and the Leadership and Integrity Act, 2012 which seeks to ensure that State and public officers uphold high standards of integrity and ethical conduct while discharging public duty. It did not dispute the findings or recommendations of the DCI but conducted its own investigations in accordance with its constitutional mandate. It had not resurrected the previous investigations by the DCI under Inquiry No. 131 of 2017.

36. EACC states that no complaint was placed before it concerning the said Andrew Nyanchoga and Andrew Okwach. The letter from the DPP dated 10<sup>th</sup> January 2018 was not addressed or copied to it. Accordingly, no investigations could have been instituted in the absence of such a report. In any event, the letter does not mention the persons named by the petitioner. It is, however, an independent body and does not act under the direction or control of any person.

37. The petitioner filed a supplementary affidavit in response to the Further Affidavit by EACC. The affidavit is in many respects a reiteration of previous averments. With regard to his contention that he had been required to report to the EACC, he avers that EACC only stopped the requirement after the court (Onyiego J) expressed its displeasure during a mention of the matter on 4<sup>th</sup> November, 2019.

38. The petitioner concedes that he did submit form PSC 2 form. He avers, however, that he did not mention or provide information that he possessed a Master of Education (Leadership Management) degree from Mount Kenya University. He had no reason to present a forged certificate as he had a letter of completion from the University and was awaiting the graduation ceremony as evidenced in a copy of a letter dated 16<sup>th</sup> December, 2013. He maintains that the investigations by the EACC were not distinct from those by the DCI which had investigated whether he had forged his academic certificates and whether he had used forged academic certificates to secure employment and promotions in the Ministry of Education.

39. In response to the DPP's grounds of opposition, the petitioner filed his own grounds of opposition dated 24<sup>th</sup> December 2019 which are somewhat unclear. He alleges that the DPP was '*barred by the doctrine of approbation and reprobation*'; that the DPP's grounds were '*barred and vitiated by the letter dated 23<sup>rd</sup> July, 2019*'; that there was no new evidence to warrant new investigations, arrest or prosecution, and that (the prosecution) was an abuse of the court process.

#### **The Petitioner's Submissions**

40. In his written submissions, the petitioner reiterates at length the facts set out in his petition and affidavits that form the basis of his petition. He submits that the EACC charge sheet dated 24<sup>th</sup> July, 2019 was based on a PSC Form PSC 2 dated 30<sup>th</sup> April, 2014 which EACC had not produced or shown to him. The petitioner submits that the EACC alleged that the DCI had focused on the allegation that he had forged certificates to secure promotions while it focused on the process leading to his promotion and established that he provided false information in the PSC 2 form dated 30<sup>th</sup> April, 2014 stating that he had earned a Master's Degree between 2012-2013 whereas he had obtained the degree on 7<sup>th</sup> August, 2015.

41. He submits, however, that the PSC form PSC 2 dated 30<sup>th</sup> April, 2014 which he had placed before the court did not show that he had

indicated that he was in possession of a Master of Education (Leadership Management) Degree or a Master of Education (Leadership Management and Administration) Degree from Mount Kenya University, nor had he attached copies of any of his academic certificates.

42. The petitioner submits that the respondents discriminated against him and subjected him to psychological torture. They also violated his right to fair administrative action by subjecting him to lengthy, inefficient and unreasonable investigations, and also violated his rights during and after arrest. He further contends that they violated his rights as a disadvantaged member of the society on account of disability and age. These violations were in breach of his constitutional rights under the Articles set out in the petition.

43. The petitioner further submits that whereas the respondents were clear in annexure “JM 2” and annexure “JM 2” that the persons to be prosecuted were the petitioner in respect of Form PSC 2 dated 30<sup>th</sup> April, 2014 and one Dr. Ruth Wangui Thinguri in respect of the letter dated 16<sup>th</sup> December, 2013, it was only the petitioner who was subjected to investigations and arrest. He observes that according to the charge sheet dated 24<sup>th</sup> July, 2019, the respondents intended to prosecute him as they did not annex any evidence to demonstrate that they intended to prosecute the said Dr. Ruth Wangui Thinguri.

44. The petitioner contends that while the DPP had directed that the DCI should investigate how the alleged fake certificate had found its way into the petitioner’s personal file at the Ministry of Education, the DPP did not produce any evidence before this court that he followed up on his directions or the findings in respect of such investigations. While the petitioner had brought the said letter to the attention of EACC and mentioned the persons whom he thought should be investigated. EACC did not present any evidence before this court to show that it conducted the investigations envisaged by the DPP.

45. According to the petitioner, the respondents demonstrated their discrimination against him by listing one of those persons, Andrew Nyanchoga, as a state witness in the intended prosecution against him. In his view, this means that the respondents have ensured that the truth about how the forged Master’s Degree certificate was introduced into his employment file, which was in the exclusive custody of the two persons he deems of interest, will never be established. He argues that the respondents have not demonstrated why they discriminated against him in the matter of the investigations and prosecutions, which is a denial of his right to equality before the law under Article 27(1) of the Constitution.

46. The petitioner submits that he was subjected to unnecessarily long investigations because the DPP approved his prosecution following the EACC investigation despite the DCI having concluded that no offence was disclosed. This subjected him to psychological torture, and he lost opportunities for promotion and extension of his working years due to the said investigations.

47. According to the petitioner, he had never been shown the forged certificate or invited to make any representations on it. There is therefore no factual or evidential basis for the investigations or prosecution. He argues that the complaint on the basis of which he was investigated was spent once the DPP closed the investigations on 18<sup>th</sup> January, 2018. It is his submission that the investigations or intended prosecution serve no public interest and are not in the interests of the administration of justice, and they should be quashed. Support for this submission is sought in the case of **Stanley Munga GiThinguri v Republic [1986] eKLR**.

48. The petitioner relies on Article 23 of the Constitution and Rule 26 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** to submit that the court is empowered to grant the orders that he seeks, including an order for costs. He is also entitled to the declaratory order sought as he has satisfied the test for grant of declarations set out in the case of **Aussie Airlines Pty Ltd V Australian Airlines Ltd [1996] 139 ALR 663 at 670-671**.

49. It is also his submission that he is entitled to an order for damages. Such an order, he submits, is intended to penalize the respondents for failing in their duty to protect his rights and will compensate him for the wrongs done to him. He submits that he is entitled to a sum of Kshs 7 million for the said violations.

50. The petitioner submits, finally, that he is entitled to the order of certiorari to quash the investigations by the EACC, its reports and recommendations to the DPP, and the DPP’s approval of the recommendations as well as the charge sheet against him. He relies on the case of **Joram Mwenda Guantai vs. The Chief Magistrate (2007) 2 EA 170** to submit that the High Court has the inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court if he is a victim of oppression such as abuse of court process or vexatious prosecution in order to secure fair treatment for the petitioner and prevent abuse of the court process. In his view, the circumstances under which he was investigated and arrested are oppressive, in total violation of the Constitution, an abuse of the criminal justice process and the intended prosecution should be prevented.

#### **The DPP’s Submissions**

51. The DPP notes that the EACC, DCI, PSC and the Judiciary ombudsman had received an anonymous letter dated 6<sup>th</sup> July 2015 requesting them to investigate the petitioner on an issue relating to fake or forged academic certificates. The allegation was that he had used the said forged certificates to obtain promotions and in applying for positions in the public service. Both the EACC and the DCI had commenced their investigations simultaneously and independently, a fact that was not known by his office.

52. In accordance with its mandate, the DCI had conducted investigations into the allegations that the petitioner uttered forged certificates including Master’s Degree certificates. Through Inquiry No. 131 of 2017 and the letter dated 28<sup>th</sup> September 2017, the DCI submitted to the DPP its recommendation that no offence was detected in as far as the academic certificates are concerned. Upon reviewing the inquiry file in relation to the investigations by the DCI, the DPP reached a finding that there was insufficient evidence to support charges against the petitioner, which his office communicated in the letter dated 10<sup>th</sup> January, 2018.

53. EACC had also received an anonymous letter dated 23<sup>rd</sup> June 2015 to investigate the petitioner in relation to his academic certificates. It had carried out its own investigations in accordance with section 11 of the EACC Act. On conclusion of its investigations, EACC had made

its recommendations to the DPP under section 35 of ACECA. Its recommendation was the prosecution of the petitioner as set out in the charge sheet.

54. The DPP submits that based on the EACC recommendation which, in his view, addressed issues independent of the DCI investigations, his office had consented to the prosecution of the petitioner by his letter dated 14<sup>th</sup> March 2019. The basis of his decision was that the petitioner had stated in his PSC2 form that he had earned a Master's degree between the years 2012/2013 whereas he obtained the Master's degree on 7<sup>th</sup> August 2015. He had also presented to the interview panel a letter dated 16<sup>th</sup> December, 2013 indicating that he had completed his Master's degree and was awaiting graduation, a fact which he knew was not true and that enabled him to get advantage in the interview.

55. The DPP submits that these facts were the basis of his recommendation in the letter dated 14<sup>th</sup> March 2019. The EACC recommendations were distinct from the recommendations of the DCI, and different and distinct offences were investigated by different investigative authorities as permitted by law and the issue of conflicting directives does not arise. It is the DPP's case therefore that it had not closed the case which the EACC was investigating.

56. The DPP notes that he had, on 23<sup>rd</sup> July, 2019, written to the EACC with a view to recall the file after noting the nexus in the DCI and EACC investigations involving the petitioner. The petitioner was released from the custody of the EACC and has not taken plea or been prosecuted by the respondents pending further directions from the DPP.

57. According to the DPP, there has been communication between his office and EACC on the way forward regarding the petitioner. However, before a final decision could be made, the petitioner had filed this petition on 16<sup>th</sup> October 2019, thereby stalling the respondents' actions on the matter. It is the DPP's submission that his office has not breached any of the petitioner's rights. His recommendations and review of the matter was done in accordance with the law, and the petitioner's claim for damages has no basis.

58. It is the DPP's case that he has the mandate, under Article 157 of the Constitution and section 6 of the Office of the Director of Public Prosecutions Act to institute and undertake criminal proceedings against any person before any court of law. For the court to issue orders of certiorari or prohibition would be to curtail these powers and would be detrimental to the public interest and the rule of law. The court can only interfere with or interrogate the DPP's actions where there is contravention of the Constitution, reliance for this submission being placed on **Paul Ng'ang'a Nyaga v Attorney General & 3 others (2013) eKLR**.

59. It is also the DPP's submission that in exercising his constitutional and statutory mandate, the DPP cannot be said to be infringing the constitutional rights of any person, support for this submission being sought in the case of **Francis Anyango Juma vs The Director of Public Prosecutions and Another (2012) eKLR** in which the court held that it cannot interfere with the exercise of the DPP's prosecutorial powers unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself. The petitioner had not demonstrated any violation of any of his rights under the Constitution, or of the Constitution, to warrant interference of the court.

60. The DPP concedes that he had directed the DCI to conduct further investigations to establish how the said fake document was introduced in the Human Resource file system in the Ministry of Education. He submits that this was intended to maintain the integrity of the officers charged with confidential matters. The inquiry file was to be forwarded to the DPP upon completion of investigations for further directions, and the results of the investigations are still awaited by his office. The said Andrew Nyanchoga, according to the DPP, is a witness to the charges proposed against the petitioner by the EACC and he will be subjected to cross-examination in the trial.

61. The DPP denies that his office is guilty of reprobating and approbating the matters related to the petitioner. He submits that the EACC and DCI were investigating different offences and made different recommendations. His office is yet to give conclusive directions on the matter. In any event, different circumstances give his office the jurisdiction to review its own decision.

62. According to the DPP, EACC had recommended that the petitioner should be charged with two counts of deceiving the Ministry of Education contrary to section 46 (1) (b) and section 46 (2) of the Leadership and Integrity Act, and with giving false Information to a person employed by the public service contrary to section 129 (a) of the Penal Code. The DPP had never found the petitioner culpable of forgery in respect of any forged Master's Degree certificate.

63. The DPP submits that though the complaint with respect to the fake certificates was spent with the letter dated 18<sup>th</sup> January 2018 to the extent of the DCI investigations, it had been forwarded to several investigative agencies and it covered several issues, and the DCI and EACC had focused on different offences. In the DPP's view, the petition has no merit, the prayers sought should not be granted, and the petition should be dismissed with costs.

#### **Submissions by the EACC**

64. The EACC submits that it had received a request on 6<sup>th</sup> July 2015 to investigate the petitioner on an issue relating to forged academic certificates. The petitioner was alleged to have forged Masters and undergraduate degree certificates to obtain promotions and in applications for various positions in the public service. The request was also directed at the DCI, the PSC and the Judiciary ombudsman.

65. Upon receipt of the request, it had initially referred the matter to the DCI as the complaint related to forgery of academic certificates. The PSC had, however, confirmed that the petitioner was promoted on the basis of fake certificates, which prompted the EACC to open an inquiry on breaches under Chapter 6 of the Constitution. It had concluded its investigations and forwarded its report to the DPP in accordance with section 35 of ACECA. In its report, EACC recommended that the petitioner and the Dean School of Education at the Mount Kenya University, be charged with the two counts of deceiving the Ministry of Education contrary to section 46 (1) (b) and section 46 (2) of the Leadership and Integrity Act and giving false information to a person employed by the public service contrary to section 129 (a) of the Penal Code.

66. According to EACC, its investigations were distinct from those of the DCI as it did not investigate whether the certificates were forged or were uttered. Its investigations related to the giving of false information in a PSC 2 form and giving false information to public servants during an interview. EACC found that the petitioner stated in the form that he had earned a Master's Degree in 2012/2013 while he had obtained the degree in 2015. He had also presented a letter in an interview in 2014 stating he had completed his Master's Degree in December 2013 and was awaiting graduation, which was also untrue.

67. The DPP had agreed with the EACC recommendations and consented to the preferring of charges against the petitioner and the said Dean. It had arrested the petitioner on 23<sup>rd</sup> July 2019 and immediately placed him in custody at 3.50pm the same day. He was taken from custody the following day, 24<sup>th</sup> July 2019, at 8.50 am with the intent of taking him to court for plea taking. EACC relies in this regard on a copy of the occurrence book extract annexed to its affidavit in opposition to the petition.

68. EACC had, while in the process of taking the petitioner to take plea, received communication from DPP requiring a halt to the process of taking plea and to await further directions. The petitioner was accordingly released from custody on the same day at 4pm as the occurrence book extract indicates. Upon his release, the petitioner was issued with a requisition to compel attendance under section 52 of the National Police Service Act requiring him to present himself on 7<sup>th</sup> August 2019 as EACC awaited a response from the DPP on when to present the petitioner to take plea. EACC submits that the prayers for an order of prohibition to stop the investigations and for certiorari to quash the investigations are spent as it has completed its investigations and forwarded its report to the DPP.

69. EACC relies on the principles set out in the case of **Anarita Karimi Njeru v Republic (1979)eKLR** and **Meme v Republic & another [2004] 1 KLR 637** with respect to what a party alleging violation of constitutional rights needs to place before the court, that is to set out with a reasonable degree of precision what he complains about, the provisions said to be infringed and the manner of infringement. Its submission is that the petitioner has merely listed Articles of the Constitution under which the rights he deems to have been breached have been provided for but has not stated with precision that which he complains of or the manner in which they are alleged to be infringed.

70. EACC notes that the petitioner has alleged breach of Article 27 (1) which guarantees to every person equality before the law but has not demonstrated how the law was not applied equally to him. He had also alleged violation of Article 29 (a) and (d) which guarantees the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause. Its submission is that the petitioner was never arbitrarily deprived of freedom and that his being placed in custody was pursuant to a lawful arrest in the course of execution of the EACC mandate.

71. EACC argues that Article 24 of the Constitution provides for instances where rights and freedoms of an individual can be limited, one being by operation of the law. Its case is that it had investigated the petitioner for breaches of the Leadership and Integrity Act. On conclusion of its investigations and with the consent of the DPP, it had proceeded to arrest the petitioner for purposes of charging him in court.

72. There was also no violation of the right to fair administrative action guaranteed under Article 47. This Article guarantees administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Its submission is that the petitioner has not demonstrated how the respondents failed to exercise their functions as required.

73. Regarding alleged breaches of Article 49 which guarantees the rights of arrested persons, it is the EACC's submission that it took the petitioner to court within 24 hours, and he was thereafter released on the instructions of the DPP on the same day. There was therefore no breach of the petitioner's rights under Article 49. EACC cites the case of **Lewis Njogu Ndirangu v Republic (2017) eKLR** in which it was held that there is no law which expressly bars the prosecution of an accused person brought to court after the expiry of the 24 hours as provided under Article 49 (f)(i) of the Constitution, that the right protected is a right to be taken to court as soon as is reasonably practicable, and that it was not designed to avoid trials on the merits but to deter the unconstitutional extra judicial detention of suspects by the police. There was no extra judicial detention of the petitioner by EACC in this case and it had acted fairly and reasonably in the circumstances. It had also required the petitioner to appear before it on 7<sup>th</sup> August 2019 and not every so often as he alleged.

74. With regard to the alleged breach of Article 54 which guarantees the rights of persons with disabilities, EACC submits that the petitioner has not disclosed how he was treated without dignity and respect. He has also not pleaded the nature of his disability and treatment to warrant a finding that the respondents have breached his right. EACC submits that he was arrested and placed in custody with due regard being had to his rights under the Constitution.

75. EACC makes similar submissions with respect to the alleged breach of the petitioner's rights under Article 57. It is its submission that the duty under Article 57 with regard to the rights of the elderly is placed on the State, not on the EACC. It is also its case that it has not breached Article 73 which contains the guiding principles of leadership and integrity. It had acted on a request to investigate and it did so without any malice and in accordance with the provisions of Article 73. In its view, the petitioner has not made out a case to warrant the intervention of the court as prayed in the petition. Reliance is placed on the case of **DPP vs. Crossley Holdings Limited & 2 others (2016) eKLR**.

76. EACC urges the court to find that the petitioner has not made out a case for the award of damages noting that while a party claiming breach of rights ought to prove the damage suffered for which compensation is sought, the petitioner has merely stated breaches but has not shown what damage he suffered as a result. Reliance for this submission is placed on the Court of Appeal decision in **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR** for the proposition that a party must place evidence of damage before the court in order for the court to consider and assess an award in damages. Its submission is that a case for an award of damages has not been made by the petitioner. Further, that the respondents are public entities who acted within their respective mandates and without malice and consequently to condemn them to damages on a case of breach of rights which has not been made out would be contrary to the public interest.

## **Analysis and Determination**

77. I have read and considered the respective pleadings and submissions of the parties in this matter. The petitioner contends that the respondents have violated his constitutional rights, and he asks for orders to quash the investigations against him, and to prohibit his prosecution by the DPP. The issues for determination in this matter are therefore fairly straightforward. The first is whether the respondents have violated any of the rights of the petitioner as alleged; and if the answer is in the affirmative, whether he is entitled to the orders that he seeks.

### **Violation of Constitutional Rights**

78. The EACC has cited the case of **Anarita Karimi Njeru v Attorney General (1979) KLR 154** with respect to the obligation on a party alleging a violation of his constitutional rights. A more recent exposition of this obligation is to be found in the case of **Trusted Society of Human Rights Alliance v Attorney General & 2 others [2012] eKLR** in which the High Court stated:

*“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”*

79. See also **Mumo Matemu v Trusted Society of Human Rights Alliance and others [2013] eKLR**.

80. At a minimum therefore, a party alleging violation of constitutional rights is required not just to cite the provisions of the Constitution that have been violated, but to show how they have been violated. This is particularly important in a matter where, as in the present petition, the petitioner not only seeks to halt investigations and prosecution, but also seeks damages for alleged violation of constitutional rights.

81. In considering whether there has been violation of the petitioner’s rights, it is important to evaluate the facts forming the basis of the petition. An anonymous complaint dated 23<sup>rd</sup> June 2015 alleging that the petitioner had used fake Master’s Degree certificates and had obtained promotions on the basis of such certificates was sent to the DCI, EACC, PSC and the Judiciary ombudsman. The DCI had investigated the allegation of forgery and had come to the conclusion that there was no evidence to support the allegation against the petitioner. The DPP had concurred that there was no evidence of forgery by the petitioner, and had closed the file on the matter.

82. That, however, was not the end of the matter, for the EACC was also carrying out its own investigations. The outcome of its investigations was that the petitioner, in completing an application form for employment by the PSC, had indicated that he had obtained a Master’s Degree in 2012-2013. The petitioner had indicated this in 2014. He had also, according to the EACC, attached a letter from the Dean of the School of Education in Mount Kenya University, a Dr. Ruth Thinguri dated 16<sup>th</sup> December 2013 which indicated that he had completed his Master’s degree programme and was awaiting graduation. This, according to the EACC, was untrue. It recommended to the DPP that he should be charged with the offence of deceiving the Ministry of Education contrary to section 46 (1) (b) and section 46 (2) of the Leadership and Integrity Act and for giving false information to a person employed by the public service contrary to section 129 (a) of the Penal Code.

83. The petitioner had been arrested on 23<sup>rd</sup> July 2019 and was taken to court on 24<sup>th</sup> July 2019 for purposes of taking plea. The DPP had, however, because of concerns that the petitioner was being charged in relation to matters that the DPP had ruled there was insufficient evidence in respect of, asked the EACC to hold off on the arraignment for further consultation. Thereafter the petitioner had filed the present petition alleging violation of his constitutional rights.

84. The petitioner alleges violation of his rights under Articles 27, 29, 47, 49, 54 and 57 of the Constitution. With respect to Article 27, he contends that he is being discriminated against as the respondents seek to prosecute him only and are not seeking to charge the Dean of the Mount Kenya University Faculty of Education who gave him a letter to tender to the PSC fraudulently stating that he had a Master’s degree obtained in 2012-2013. I note from the pleadings and submissions of the respondents that the intention was to charge both the petitioner and the said Dean, Dr. Ruth Thinguri, with the offences related to the said letter. Further, that since the petitioner has not yet been charged in court, he does not know whether the DPP intends to charge the said Dean or not. However, it must be noted that the law is that the DPP will prefer charges against the person in respect of whom he finds sufficient evidence to prefer charges. It is not discrimination and a violation of Article 27 to prefer charges against one person and not another.

85. The petitioner also alleges discrimination against him since the respondents did not carry out investigations against one Andrew Nyanhoga and A.A. Okwach. The respondents’ reply is that the said Nyanhoga is set to be a witness in the prosecution of the petitioner. This complaint also, in my view, has no merit. There is no requirement in law that the respondents should investigate persons that a person against whom charges are intended insists they must. The respondents are an independent constitutional office and body respectively, and they are required to exercise their respective constitutional mandates independently. The exception is where they are found to be in breach of a person’s constitutional rights, in which case the court can intervene. In this case, I am not satisfied that there is violation of Article 27 as alleged on the basis that the EACC has not investigated the officers from the Ministry of Education whom the petitioner insists they should investigate in respect of the two Master’s Degree certificates said to be in his personal file.

86. The petitioner also alleges violation of Article 47 of the Constitution, which guarantees to everyone the right to administrative action that is efficient, lawful and procedurally fair. The respondents submit that he has not demonstrated how they have not exercised their mandates properly. I have not been able to discern, from the petitioner’s pleadings and submissions, a violation of Article 47.

87. The petitioner further contends that there was a violation of his rights under Article 49 which requires that a person who is arrested should be presented in court within 24 hours. He contends that he was arrested on 23<sup>rd</sup> July 2019 at 10.00 a.m. But was not taken to court until 24<sup>th</sup> July 2019. Confronted with the Occurrence Book extract that shows that he was arrested by EACC officers at 1520 hours, or 3.20 p.m. in the afternoon of 23<sup>rd</sup> July 2019, he alleges that the EACC falsely indicated the wrong time of arrest.

88. Article 49 of the Constitution requires that an arrested person should be brought to court as soon as is reasonably practicable, and not later than 24 hours. EACC submits, and I agree with this submission, that the mischief that the Constitution sought to address was detention for unreasonably long periods before arraignment in court under the former Constitution. In this case, nothing has been placed before me to support the contention that the EACC indicated the wrong time in the OB extract. In the absence of such evidence, I have no basis for disbelieving the averment that the petitioner was arrested and taken to court within the time frame stipulated by the Constitution.

89. An allegation is made that the respondents have violated the petitioner's rights as a person with disabilities guaranteed under Article 54 of the Constitution which states that:

***A person with any disability is entitled—***

***(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;***

***(b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;***

***(c) to reasonable access to all places, public transport and information;***

***(d) to use Sign language, Braille or other appropriate means of communication; and***

***(e) to access materials and devices to overcome constraints arising from the person's disability.***

90. While the petitioner annexes to his affidavit a card from the National Council for Persons with Disability which was issued on 29<sup>th</sup> May 2019, he does not expound further on the nature of his disability, or the manner in which the respondents have violated his rights in respect of such disability. What he does say is that he had applied for extension of his term of service on the basis of his disability which had not yet been determined, but has not demonstrated how the respondents have interfered with this application.

91. The petitioner has also alleged violation of his rights as an elderly person. Article 57 provides as follows with respect to the rights of older members of society:

***The State shall take measures to ensure the rights of older persons—***

***(a) to fully participate in the affairs of society;***

***(b) to pursue their personal development;***

***(c) to live in dignity and respect and be free from abuse; and***

***(d) to receive reasonable care and assistance from their family and the State.***

92. The petitioner has not, in his pleadings, demonstrated how the respondents have violated his rights as an older member of society, unless such alleged violation is predicated on the investigations and intended prosecution. However, while the Constitution does contain provisions for the protection of persons with disabilities and older members of society, it must always be borne in mind that neither disability nor age render anyone immune from investigation or prosecution should the facts and circumstances so warrant.

93. An allegation has also been made that the respondents have violated the provisions of Article 73 of the Constitution, which sets out the principles of leadership and integrity. Aside from the broad generalities of violation made by the petitioner, I have not been able to discern any violation of this Article.

94. Finally, the petitioner alleges violation of Article 157 of the Constitution. This Article vests the DPP with the State powers of prosecution. Under Article 157 (10), he is required, in exercising these powers, to *'have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.'* When it is alleged that he has failed to exercise his powers as demanded by the Constitution, the High Court has the jurisdiction to inquire into the decision to prosecute and quash it should the circumstances so require.

95. However, the court's inquiry 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. This is what emerges from various decisions in our courts, as a few cases will illustrate.

96. 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.”**

97. After considering the decisions in which courts have taken a more liberal approach to review of the DPP’s exercise of prosecutorial discretion, Onguto J went on to observe 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, GiThinguri 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)**

98. He concluded as follows with regard to the exercise of the Court’s power to check the exercise of discretion by the DPP:

**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.”**

99. In Njuguna S. Ndung’u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR, the Court of Appeal observed 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)

100. In **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others [2019]eKLR**, the court stated that:

*“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)

101. As I have already found with respect to this petition, there is no evidence that the office of the DPP has violated any of the rights of the petitioner. Indeed, the material before me shows that the DPP has been keen to safeguard the petitioner’s interests and to ensure that there is a proper basis for the intended prosecution. The DPP agreed with the view of the DCI that there was no evidence that the petitioner was involved in forgery of the two Master’s Degree certificates said to be in his personal file at the Ministry of Education. The DPP also asked the EACC not to proceed with the intended plea taking by the petitioner on 24<sup>th</sup> July 2019 as his office wished to ascertain that he was not being charged on the same facts that his office had found did not disclose an offence.

102. It is not possible, therefore, to discern a violation of the provisions of Article 157. Should the DPP find, upon considering the evidence that the EACC has presented, that the petitioner did indeed commit a criminal offence in holding himself out to have completed his Master’s Degree in 2012/2013 when he had not, and, in relying on a letter that falsely made this claim, to have an advantage either in seeking an appointment in the public service or as a candidate for promotion, it would be within his prosecutorial powers to proceed with the arraignment and prosecution of the petitioner.

103. In the result, I find that this petition has no merit. It is hereby dismissed but with no order as to costs.

**Dated Signed and Delivered at Nairobi this 18<sup>th</sup> day of September 2020.**

**MUMBI NGUGI**

**JUDGE**