**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 15 OF 2020**

**SALMA HEMED.....PETITIONER**

**VERSUS**

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

**THE NATIONAL POLICE SERVICE.....2ND RESPONDENT**

**OFFICER COMMANDING BAMBA POLICE STATION....3RD RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Aboubakar Advocate for the petitioner**

**Mr. Alenga for the respondents**

***RULING***

The petitioner herein filed a Petition together with a notice of motion application dated 23rd July 2020. The application moved the Court for orders:

> ***a. Spent***
>
> ***b. Pending the hearing and determination of this application and the petition herein, this Honourable Court do issue an injunction against the 1st, 2nd and 3rd respondents restraining them or their officers acting under them from proceeding with the prosecution of Kilifi Criminal Case Number 69 of 2020 Republic v Salma Hemed.***

The application was grounded upon the grounds espoused therein and by the sworn affidavit in support of the petition of **Salma Hemed** dated 23rd July 2020. The respondents' response was by way of an affidavit sworn by No. 86290 PC Patrick Biwott dated 21st September 2020.

The crux of the matter is that the respondents are in the process of prosecuting the petitioner in **Kilifi Criminal Case No. 69 of 2020 Republic v Salma Hemed** with the intention of intimidating her in violation of the Constitution.

The application was certified urgent and when the matter came up for interparty hearing the Court directed the respondents to not finish the bitumen works as that would render the petition nugatory.

**The Petitioner's case**

The petitioner herein describe herself as the Deputy Executive Director of HAKI Africa and is a human rights defender. The 1st respondent is a constitutional office established under Article 157 of the Constitution. The 2nd respondent is a service established under Article 243 (1) of the Constitution of Kenya. The 3rd is a police station designated by the Inspector general of the National Police Service under Section 40 of the National Police Service Act.

The petitioner alleges that the circumstances that led to the charges against her arose as she sought to know the cause of death of one **Margaret Masha** who had died in police custody at Bamba Police Station. She stated that on 7th February 2020 she went to Bamba town and met with the family of the deceased and headed to Bamba Police Station however they were stopped by a contingent of police officers who dispersed the family members by teargassing them. That she met an enraged officer who accused her of organizing a demonstration and refused to listen to her explanation that she was going to see the OCPD. That the officer proceeded to violently assault her and beat her.

The petitioner stated that she was rushed to Mariakani Health Facility for treatment and later reported the matter at Mariakani Police Station recorded as OB No. 43/07/02/2020. However, the officer advised her to report the issue to the Independent Police Oversight Authority (IPOA). She alleges that on 10th February 2020 she reported the matter to IPOA recorded as IPOA/CMO/365/2020. She further alleged that the officer at Bamba Police Station attempted to have her drop the complaint and when they failed the 1st and 2nd respondent framed trumped up charges against her and applied for summons against her in Kilifi Criminal Case No. 69 of 2020. That Court summons were issued dated 17th February 2020 requiring her to take plea on 17th March 2020.

**Submissions**

On behalf of the petitioner counsel submissions dated 14th August 2020 and filed on the 17th August 2020, advanced the arguments that the charges against her arose out of her quest to seek to know the cause of death of **Margaret Masha** who died while in police custody and that the charges preferred against her are intended at intimidating and discouraging her from seeking the truth.

It was further submitted that the 1st respondent did approve the charges without due regard to public interest in violation of Article 157 (11) of the Constitution. In his instructive submissions counsel submitted that the petitioner was acting in public interest and exercising an oversight role over the police within the objectives of her organization as implied by the preamble and Section 27 of the Public Benefits Organizations Act 2013. He also submitted that the 1st respondent should have directed the 2nd respondent to investigate the complaint before pressing charges against her as required under Article 157 (4) of the Constitution.

Counsel submitted that the right to access justice under Article 48 of the Constitution was infringed noting that the investigations against the 2nd and 3rd respondents by IPOA were ongoing. She further submitted that by denying her access to the records showing the deceased character and treatment while at the police station as well as the cause of death as per the police records, infringed her right to access information under Article 35 of the Constitution. He also submitted that the respondents treated the petitioner in a discriminatory manner by refusing to investigate her claim and instead charging her violated Article 27 of the Constitution. Furthermore, counsel submitted that by assaulting the petitioner while approaching Bamba Police Station the respondents violated her rights under Article 28 and 29 of the Constitution.

Counsel for the petitioner further submitted that a primafacie case has been satisfied under the provisions of Article 23(3)(C) of the Constitution for the Court to grant conservatory orders. That if the Court failed to grant the orders the petitioner may lose her liberty and shall be intimidated in the carrying out her duties as a human rights defender exposing the public to police excesses. That if the respondents proceeds with the hearing and determination of the criminal matter at Kilifi it would render the petition nugatory.

For these submissions the petitioner relied on the cases of; **Gatiru Peter Munya v Dickson Mwenda Kithinji & 2 others {2014} eKLR** and **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court Petition No. 16 of 2011 {2011} eKLR** to seek the Court intervention on the subject matter before the Magistrate at Kilifi.

**The respondents' case**

Learned counsel for the respondents opposed the grant of the orders sought and argued that the criminal case against the petitioner was well founded. Its stated that on 7th February 2020 the petitioner led an illegal demonstration in Bamba Township without the permission of the regulating officer contrary to the Public Order Act and caused the Mariakani-Bamba road to be barricaded with burning tyres and stones interfering with normal activities of the general public.

Further, counsel stated that the Ganze sub-county police commander tried to peacefully stop the demonstration but the crowd was rowdy, turned violent, and the demonstrators started hurling stones at the police necessitating the police to use tear gas and shoot in the air to disperse the demonstrators. Because of the violent demonstrations some police officers were injured and property belonging to two members of the public, a car registration number KCN 141P and a pool table, were destroyed which led to filing of malicious damage reports at Bamba Police Station.

Counsel alleged that the investigating officer conducted his investigations, gathered sufficient evidence and forwarded the police file reference number 318/24/20202 to the 1st respondent who certified that with the weight of the evidence and approved the charges against the petitioner. That the petition was served with summons dated 14th September 2020 but she had failed to attend Court willfully disobeying Court orders which should not be condoned by a Court of Law.

The respondents allege that the officer of the 2nd and 3rd respondent never harassed, detained, arrested, intimidated or assaulted the petitioner and that her contention that she was assaulted was an afterthought that had no bearing on the case. That the petition was full of conjecture, subjective opinions and personal convictions not supported by any documents or real facts.

Counsel further alleged that the petitioner committed offences against both the state and private citizens and cannot be determined by a constitutional Court as the right forum remains the Magistrate Court at Kilifi also a creature of the Constitution. In absence of the any infringement or violations the petition is tantamount to an abuse of the Court process. Furthermore, counsel alleges that the petition is fatally defective, as the Kilifi Senior Principal Magistrate's Court has not being enjoined.

In their submissions dated 28th September 2020 the respondents reiterated the contents of the replying affidavit as summarized hereinabove. It was submitted that the petitioner had not clearly stated which of her rights were bound to be infringed if the orders sought were not issued. Further, it was submitted that the Courts have to weigh an individual rights versus the greater public interest that the Constitution and Acts of Parliament seek to address and regulate. That in the instant case it would be prejudicial to the public to stop the continuance of the criminal case when the petitioner knew she had committed the offence. Counsel cited and relied on the case of **Petition No. 16 of 2011, Nairobi Centre for Rights Education and Awareness (CREAW) & 7 others**.

**Determination**

I have considered the application which is the subject of this Ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited. I am duly guided that this Court is vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165 (3) of the Constitution. Further it has the duty and obligation to intervene in actions of other arms of Government and Stage Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In **Harrikssoon v Attorney General of Frinidad & Tobago {1979} 31 WIR 348,** the Court laid down the principles that ought to be followed when hearing petitions of this nature in the High Court in which **Diplock** stated:

> ***"the right to apply to the High Court ….. for redress when any human right or fundamental freedom is or likely to be contravened is an important safeguard of those rights and freedom, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for making judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court ……. If it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of key human right or fundamental freedom."***

The **United States Supreme Court in Ashwander v Tennessee Valley Authority {1936} 297 U.S. at 348** echoed this position as well as per justice blenders thus:

> ***"The Court will not pass upon a Constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has formed most varied application. thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory constitution or general Law, the Court will decide only the latter."***

In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court. The issue before the Court at this interlocutory stage is:

**Whether the conservatory orders should issue pending the determination of the main petition?**

The guiding principles upon which Kenyan Courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are now fully settled. The Law is that, in considering an application for conservatory orders, the Court is not called upon and is indeed not required to make any definitive finding either of fact or Law as that is the province of the Court that will ultimately hear the petition.

The principles of granting conservatory orders are well settled.

In **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others {2015} eKLR Onguto J** (as he then was) stated:

> ***"In summary, the principles are that the applicant ought to demonstrate an arguable primafacie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decided whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order."***

**In Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & Others Nairobi High Court Constitutional Petition No. 154 of 2016** the Court summarized the principles as follows:

> ***(a). An applicant must demonstrate that he has a primafacie case with a likelihood of success and that unless the Court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.***
>
> ***(b). Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and***
>
> ***(c). The public interest must be considered before grant of a conservatory order.***

On whether the petitioner has established a primafacie case that warrants the grant of conservatory orders, it has been held in various

decisions that a primafacie case is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, an applicant has to show that he or she has a case which discloses arguable issues and in a case alleging violation of rights, arguable constitutional issues. **Odunga J** in **Kevin K. Mwiti & Others v Kenya School of Law & Others stated:**

> ***"the first issue for determination is whether the petitioner has established a primafacie case. A primafacie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the petitioner has to show that he or she has a case which discloses arguable sues and in this case arguable constitutional issues. It has been held that in considering an application for conservatory orders, the Court is not called upon to make any definite finding either of fact or Law as that is the province of the Court that will ultimately hear the petition. At this stage the applicant is only required to establish a primafacie case with a likelihood of success."*** *(emphasis is mine).*

Furthermore, the Court in **Kenya Association of Manufacturers & 2 others v Cabinet Secretary – Ministry of Environment & Natural Resources & 3 others {2017} eKLR** had this to say about the grant of conservatory orders:

> ***"In an application for a conservatory order, the Court is not invited to make any definite or conclusive findings of fact or Law on the dispute before it because that duty falls within the jurisdiction of the Court which will ultimately hear the substantive dispute. The jurisdiction of the Court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The Court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public Law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the Court in the public interest."*** *(Emphasis is mine)*

It is this Court's view, for the petitioners to raise a primafacie case with a probability of success, they need at least to demonstrate that there is a possibility that the decision to prosecute her had ulterior motives. On the same line of principle, the respondents bear responsibility to demonstrate that the decision attributable to charge the petitioner was justified.

In the case of **Randu Nzai Ruwa & 2 others v Internal Security Minister & another HC Misc No. 468 of 2010 {2012} eKLR** it was held:

> ***"although, the state is not required to give a detailed account of its action it must do more than merely assert that the action has met the threshold set by the Constitution. It must place some evidence before Court that will enable the Court make judicial assessment in the case."***

It is also important for the constitutional Court to buttress this requirement of constitutional protection in a manner which effectuates the right or fundamental freedom in the bill of rights. For purposes of determining whether a right has been violated by the state, tribunal or authority vested with discretion the Court in **Samwel Manamela & another v The Director General of Justice CCT 25/99** held:

> ***"the exercise it noted should be approached substantively by balancing the rights and limitations against the values underlying the constitution and the bill of rights, ….. In essence, the Court must engage in a balancing exercise and arrive at a global Judgment and proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of this legislative and social setting."***

Bearing in mind the above principles, the Court when exercising jurisdiction should ensure that determining existence of a primafacie case does give effect to the various rights and freedoms of the petitioners. What can be said of a prosecution mounted on ulterior motive vis a viz the public interest, start from the fundamental principle on the mandate of the judiciary as the independent and impartial arbiter of the citizens rights in relation with the executive arm of the government. The concept of abuse of the process or a prosecution initiated by ulterior motives calls for stay of proceedings to ensure the judicial system is not used in a manner that is inconsistent with the constitution. In **Williams v Spautz {1992} 174 CLR 509 Mason C. J. Cawssin, Tooheg & McHugh JJ** stated two key reasons for the underlying context of the above doctrines:

> ***"the first is that the public interest in the administration of justice requires that the Court protect its ability to function as a Court of Law by ensuring that its processes are used fairly by state and citizen alike. The second is that, unless the Court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the Court's processes may lead themselves to oppression and injustice."***

The issue raised by the petitioner herein was clearly addressed in **Hul Chiming {1992} 1 AC 34** held and described:

> ***"the abuse of process as something so unfair and wrong that the Court would not allow a prosecutor to proceed with what is in all other respects a regular proceeding."***

Indeed, at the hearing of this application, the petitioners counsel submitted arguments alleging that the inculpatory facts to charge the petitioner are compatible with his innocence and incapable of securing a conviction at the conclusion of the trial.

The view I take of the point in issue at this interlocutory stage has been fully dealt with by the English Court in **Moti v The Queen {2011} HCA 50** where it was set out succinctly as follows:

> ***"the fundamental policy contradictions affect abuse of process in criminal proceedings. First, the public interest in the administration of justice requires that the Court protect its ability to function as a Court of Law by ensuring that its processes are used fairly by the state and citizen.***
>
> ***Second, unless the Court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the Courts processes may lead themselves to oppression and injustice. Public confidence in this context refers to the trust reposed constitutionally in the Courts to protect the integrity and fairness of their processes. The concept of abuse of process extends to a use of the Court's processes in a way that is inconsistent with those fundamental requirements."***

What is clear from these observations in the above case Law is the general imputation that there are discrepancies to show the proposed launch of a prosecution was not furthered by the pursuit of public interest. It is not clear from the replying affidavit of the respondents whether the question on the likely prejudice that may arise would be cured during the trial process of the petitioner.

The petitioner stated that she was assaulted on her way to Bamba Police Station on 7th February 2020. She has demonstrated through the P3 form medical evidence that she was injured on 7th February 2020. Also, she has provided the OB number 43/07/02/2020 of the report of the assault she made to Mariakani Police Station on the same day and further attached the statement she recorded at Mariakani Police Station on 10th February 2020. The petitioner further attached the report number IPOA/CMO/365/2020 from the report she made to IPOA on the 10th February 2020.

From the replying affidavit for the respondents it is not in doubt that the petitioner was indeed heading to Bamba Police Station and that the police shot in the air and used tear gas to disperse the crowd. The respondents claim that they did not assault the petitioner and that her claim to have been assaulted is an afterthought does not hold any water. From the evidence adduced its is clear that the petitioner was assaulted and that she made her report on the same day the assault is alleged to have taken place raises credibility that she was injured on the said day.

On the decision to charge the petitioner, the respondents unfortunately did not avail the investigation report forwarded to the 1st respondent neither did they attach a copy of the complaints made by the two citizens whose property was destroyed nor the P3 form of **PC Brian Mutsoli** the injured police officer. In the circumstances, it is quite probable that the decision to charge the petitioner was made due to the report she made against the police officers to IPOA. This issue cannot be decided at this interlocutory stage as the Court needs to interrogate whether a nexus was made between the petitioner and the demonstration and the destruction of property before the decision to charge her was made. I find that the petitioner has proved a primafacie case.

Before granting conservatory orders, the Court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant as was stated in the case of the **Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General, Nairobi High Court Petition No. 16 of 2011; {2011} eKLR**

> ***"At this stage, a party seeking a conservatory order only requires to demonstrate that he has a primafacie case with a likelihood of success and that unless the Court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

What amounts to real danger was dealt with by **Mwongo J** in **Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 others {2014} eKLR**, where expressed himself as follows:

> ***"To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the Court's attention."***

The question that arises is whether in the circumstances of this case that burden has been discharged.

The petitioner has stated that if the orders sought are not granted she would be charged in a Court of Law. Is there any danger of a person being charge in a Court of Law? Our constitution provides that every person has a right to a fair trial under Article 50 (1) which provides that:-

> ***"Every person has the right to have any dispute that can be resolved by the application of Law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body."***

Additionally, Article 25 of the Constitution secures the right to free trial and states:-

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited:

> ***(a). ….***
>
> ***(b). ….***
>
> ***(c). the right to a fair trial; and***

***(d). ….***

The above provision are meant to protect the right of any person to approach a Court so as to have any dispute that can be resolved by the application of Law so resolved. Despite the fact that a criminal charge is instituted by the 1st respondent the fact remains that a criminal charge is a dispute that is resolved by the application of Law once all the facts are presented before a Court. It does not mean that one shall be found guilty if presented before a Court of Law to answer to Criminal charges. In any event it presents an opportunity to the petitioner to prove her innocence. Further, Article 50 (2) (a) provides for the presumption of innocence throughout the trial period and can only be done away with if she is found guilty at the end of her trial.

She has further alleged that her rights under Article 48 of the Constitution will be infringed as IPOA is currently investigating the 2nd and 3rd respondents. From her own evidence, IPOA are conducting investigations into her assault by the police officers.

The petitioner further contends that her rights under Article 27 of the Constitution have been infringed as the 1st and 2nd respondent discriminated against her by failing to investigate her complaint. Unfortunately, this position has not been controverted by the respondents. The petitioner reported the matter at Mariakani Police Station which is under the 2nd respondent. At the said police station, the petitioner's statement was recorded by the police.

The Court also has to consider whether or not to grant conservatory order is whether it would be in public interest. The Supreme Court in **Gitau Peter Munya v Dickson Mwenda Kithinji & 2 others {2014} eKLR** expressed itself on the matter as follows:

> ***"Conservatory orders' bear a more decided public Law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the Constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes…. The principles to be considered before a Court of Law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal …. These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely….. That it is in the public interest that the order of stay be granted. This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution."***

The applicant contends that the 1st respondent failed to direct the 2nd respondent to investigate the charges before she was charged under Article 157 (4) of the Constitution. She further faulted the 1st respondent for failing to adhere to the administration of justice as she was making an inquiry into a public interest case.

The powers and duties of the 1st respondent are found in Article 157 of the Constitution and which of relevance are:-

> ***"Article 157 (4)***
>
> ***The Director of Public Prosecution shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction.***
>
> ***Article 157 (6):***
>
> ***The Director of Public Prosecution shall exercise state powers of prosecution and may:***
>
> ***(a). Institute and undertake criminal proceedings against any person before any Court (other than a Court martial) in respect of any offence alleged to have been committed.***
>
> ***Article 157 (11):***
>
> ***In exercising the powers conferred by this Article, the Director of Public Prosecution shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process."***

The petition seeking conservatory orders against the 1st respondent is akin to seeking to curtail his powers as provided for under Article 157 of the Constitution. I can do no better than to quote the holding of the Court of Appeal in:

> ***"44. In considering public interest as a criterion for determining whether we should grant conservatory orders as prayed for in this application, we have asked ourselves whether as a general rule it is in public interest to stop the DPP from investigating any criminal offence on the basis that such investigation is a threat to fundamental rights and freedoms because it may lead to arrest and prosecution of an individual. The raison deter for the existence of the Office of Director of Public Prosecution is investigation and prosecution of any and all alleged criminal offence. The functionality of the Office of DPP is ensured interalia through Article 157 (4), (6), (10) and (11) of the Constitution. If this Court is to grant the conservatory orders sought by the applicant, the Court would be imposing a restriction on the Constitutional powers of the Office of DPP and thus violating Article 157 (10) of the Constitution. Under Article 157 (10), the DPP does not require the consent of the Court to undertake any investigation or prosecution of an individual. The instant application is an indirect application to this Court to grant or decline***

***consent to the DPP to investigate and prosecute the alleged offences relating to procurement of motor vehicles for Machakos County Government. One of the instances in which a court can intervene in relation to the powers of the DPP is if Article 157 (11) is violated. In such a case, an applicant has to prove that public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process demand intervention by the Court."***

Guided by the above decision the question is whether the petitioner has proved that public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process demand this Court's intervention. It should be assumed that the right to a fair trial as required under Article 49 and 50 of the Constitution can only be achieved by securing the various fundamental freedoms in the bill of rights.

An import feature of the right to a fair trial is for the agencies involved in the administration of justice to ensure innocent persons are not wrongly charged, for that has an adverse bearing to their right to liberty, under Article 29, right to dignity in Article 28, and right to equality and freedom from discrimination under Article 27 of the Constitution.

In relation to the test on a primafacie case and public interest for the Court to decline or grant conservatory orders, it must be acknowledged that the every state officer is under a duty to fulfil the purport and objects of the Constitution found in Article 10 of the Constitution. It lays out the "fundamental national values and principles of governance demanding of state organs, state officers , public officers and all persons whenever any of them enacts, applies or interprets any Law or makes or implements public policy decisions to give effect to it fundamental values consistent with the Supreme Law.

In this regard, the Constitutional Court does have power to have an objective appraisal of the case that some evidence supporting a prosecution including the complainant who is required to give evidence at the impugned trial Court has been properly considered by the respondents.

These evaluation even at the interlocutory stage is directly applicable as illustrated in the Landmark case of **Associated Picture Houses Ltd v Wednesbury Corporation {1947} 1 ALL ER 498.** In my view the Court would have to be satisfied that the respondents:

***(1). In making the decision to charge the petitioner did take into account factors that ought not to have been taken into account or***

***(2). The respondent failed to take into account factors that ought to have taken into account or***

***(3). The decision was so unreasonable that no reasonable authority would ever consider imposing it.***

While it is true that the approach of the High Court to intervene in certain decisions by the police or prosecutor in conformity with the Constitution that power ought to be exercised in line with the test in **R v DPP exparte {1995} ICR APP R 136, 140 "sparingly exercised very rare indeed" (R v Crown Prosecution Service {2004} IMM AR 549). "Highly exceptional remedy" Shamma v Browne – Antoke {2007} 1WLR 780 very rarely (R C Bermingham v Director of the Services Fraud Ofice {2007} 2 WLR 635 "only in very rare cases" (S v Crown Prosecution Service {2015}) EWHC 2868.**

The ideal position may not be whether the petitioner would be prejudiced by such a process but the indignity and ordeal of criminal trial of the possibility of unavailability of primafacie case, likely to place him or her at an unfair and unnecessary trial. The substantial and compelling evidence to warrant the prosecution to mount, initiate, commence and prosecute the petitioner is inevitable for the Court to have before it all the facts relevant to the pending charge.

The obligation under Article 23 of the Constitution for the Court to uphold and enforce the bill of rights to exercise such a discretion for conservatory order necessarily requires as much information as is possible about the indictment, the particulars of the offence committed the primary witness statements.

In the instant case the initial burden lies on the petitioner who must establish a primafacie case contravention with the provisions of the Constitution and criminal process on the part of the Director of Public Prosecution. Certainly from the arguments advanced by the petitioner a primafacie case is made to the effect that she is being subjected to a process entailing infringement of her fundamental rights and freedoms in the bill of rights not as an offender but as a human rights defender working with Haki Africa.

Given the features of the petitioner's case the burden of rebuttal moved to the respondents to offer probative evidence concerning the essential facts raised in the petitioner and applicant for conservatory orders.

Faced with these formulations, I have on my part considered a multitude of questions relating to the decision to charge the petitioner and what might infringe on any of the petitioner's constitutional rights. On reflection the petitioner has met the burden of persuasion and is entitled to no less but a conservatory order in respect of **Criminal Case No. 69 of 2020 at Kilifi Magistrates Court** pending the hearing and determination of the petition.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF NOVEMBER 2020**

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr. Sirma for Mr. Alenga for the respondents