REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 117 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE CHIEF MAGISTRATE COURT AT NYERI.....3RD RESPONDENT

EX PARTE BONIFACE NGINYO MWAURA

JUDGMENT

Introduction

1. The *ex parte* Applicant herein (hereinafter the Applicant) is Boniface Nginyo Mwaura, an adult Kenyan male citizen. He has filed an application for judicial review orders against the Inspector General of Police (the 1st Respondent herein), which is a state Office established under Article 245(1) of the Constitution, and is the office in charge of the National Police Service including the Directorate of Criminal Investigation.

2. The Director of Public Prosecution, an independent office created under Article 157 (1) of the Constitution that is in charge of public prosecutions and is sued as the 2nd Respondent. The 3rd and last Respondent is the Chief Magistrate's Court in Nyeri, which is established under Article 169 of the Constitution.

3. The Applicant filed an application by way of a Notice of Motion dated the 19th March 2018, seeking the following orders:

1. An order of certiorari to remove into the High Court for purposes of being quashed, the Summons Requiring Attendance

dated 8th March, 2018, notifying that the Applicant is required to appear before the Chief Magistrates Court at Nyeri on 15th March, 2018, to take a plea in Criminal Case No 253 of 2018, on charges of failing to keep safe custody of a firearm, and to quash any charge sheet registered against the Applicant before the said Court, and quash any criminal proceedings pursuant thereto.

4. The application was supported by a statutory statement by the Applicant's Advocates dated 14th March 2018, and the Applicant's verifying affidavit sworn on 16th March 2018. The application was opposed by the 1st and 2nd Respondents through a replying affidavit sworn on 23rd January 2019 by Inspector Maxwell Otieno, a police officer attached to the Directorate of Criminal Investigations and one of the investigation officers in the matter of the Applicant. The 3rd Respondent on its part opposed the application in Grounds of Opposition filed on 4th April 2018.

5. The Application was canvassed by way of written submissions. The Applicant's Advocates on record, Otieno Ogola & Company Advocates, filed submissions dated 18th January 2019, while Chrisy Mwenda, a Prosecution Counsel, filed submissions on behalf of the 1st and 2nd Respondents' dated 25th January 2019. Emmanuel Bitta, Deputy Chief State Counsel in the Attorney General's Chambers filed submissions dated 2nd January 2019 on behalf of the 3rd Respondent.

The Applicant's Case

6. The events giving rise to the said application were stated by the Applicant as follows. The Applicant is employed as a security officer by one Jimi Richard Wanjigi, and he stated that he is also a licensed firearm holder, having been issued with a firearm a certificate on the 4th July 2005 which has been annually renewed since. That on 17th October 2017, the Applicant was disarmed of his firearm by officers of the 1st Respondent during a raid on his employers home in Muthaiga, who took away the said firearm and hold it to date.

7. That on 1st March 2018, his employer instituted **Petition No 520 of 2017 - Jimi Wanjigi vs Inspector General of Police & 3 Others** seeking the return of his own firearm and the Applicant's firearm. Further, that the firearms that are the subject of the criminal proceedings in the Chief Magistrate's Court in Nyeri in Criminal Case No. 253 of 2018 are the same firearms that are the subject of the constitutional petition that is pending before the High Court in **Petition No 520 of 2017 - Jimi Wanjigi vs Inspector General of Police & 3 Others** .

8. It is the Applicant's case that he had not been summoned or questioned by the 1st Respondent in respect to any criminal investigations in relation to the charge brought against him, or at all, as required by section 89 to 98 of the Criminal Procedure Code to warrant the taking of plea, or issuance and service upon him of the Summons Requiring Attendance dated 8th March 2018. He termed the action or decision to summon him as procedurally unfair and therefore erroneous and unlawful, that it was taken with an ulterior motive or purpose calculated to prejudice his legal rights, is unfair and violates his legitimate expectations, and is taken or made in abuse of the Respondents' powers. Further, that the said actions have been carried out in bad faith, and their effect will be to deprive the Applicant of his fundamental rights and freedoms guaranteed in the Constitution, including his right to own property, and his right to safety and security

9. The Applicant averred that he has a legitimate expectation that the Respondent would at all times be guided by the laws of the Republic when executing their mandate including the constitution. It was his case that the under the fair administrative action one should be given an opportunity to make representations before any administrative action is taken. He accused the Respondents of acting unreasonably, irrationally and in blatant disregard of the law and principles of the Constitution.

10. Mr. Otieno referred the Court to the pleadings in **Nairobi High Court Petition No. 520 of 2017** in his submissions during the hearing, and urged that the attempt to charge the Applicant with a criminal offense when the substance of the charge is the subject of proceedings before the High Court amounts to an abuse of the powers to prosecute and defeats the legitimate expectation of the Applicant that the Respondents will respect the authority of the Courts. Further, that in the said Petition before the High Court, the Petitioner is seeking for return of the confiscated firearms ,including the firearm that is the subject of the charge against the Applicant, and compensation for the violations of rights and freedoms. The Applicant submitted that in any event the state has an opportunity to defend the petition before the High Court for the return of the firearms and to demonstrate that the firearms were confiscated because they were not kept in safe custody.

11. Mr. Otieno pointed out that there was a judgment quashing the decision to revoke the Applicant's employer's firearm licence, and relied on the case of **Republic vs Director of Public Prosecutions & 3 Others ex-parte David Mathenge Ndirangu** where the dictum in **Kuria & 3 Others vs Attorney General (2002) 2 KLR 69** that the court has the power indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation was upheld. Reliance was also placed on the case of **Republic vs Attorney General ex parte Kipngeno Arap Ngeny, High Court Civil Application No 406 of 2001,** for the same proposition.

12. Mr. Otieno also cited sections 66 and 71 of the Criminal Procedure Code on the jurisdiction of magistrates courts, and submitted that the 2nd respondent did not disclose any reasonable ground or basis why they chose to register the charge sheet in Nyeri and not in Nairobi where the alleged offence occurred. Further, that to try the case in Nyeri in the manner attempted by the state is a contravention of the law, and may equally undermine the Applicant's rights to fair hearing and equal protection of the law.

13. Mr. Otieno distinguished the decision in **Maina wa Kinyatti vs Republic (1984) e KLR** on the ground that it was made during a repressive time after an attempted coup and in the absence of a progressive Constitution, and did not give the 2nd Respondent a blank cheque to commence criminal proceedings anywhere, as held in **Director of Public Prosecutions vs Perry Mansukh Kansagara & 8 Others, (2018) e KLR.** The Applicant in closing submitted that he has elected to invoke the supervisory jurisdiction of the High Court, and that the same is not limited by statute or any other Act, Therefore, that it is this Court that is presently seized of the matter and is competent to deal with the issues.

The 1st and 2nd Respondents' Case

14. It was the 1st and 2nd Respondents case that on 15th March 2018 the Police received information that illegal firearms were kept at the residence of the Applicant's employer, Jimi Wanjigi, in Muthaiga estate within Nairobi County. That the police proceeded to the Applicant's employer's residence on the 16th March 2018 with a view of interviewing him, and on 17th October 2017 the 2nd Respondent filed Miscellaneous Application No 3352 of 2017 before the Chief Magistrates Court in Milimani for a search warrant which was granted. They then went to the premises of the Applicant' employer, introduced themselves, but the occupants declined to open the house. Further, that acting on the relevant provision of the Criminal Procedure Code and the National Police Service Act, the 1st Respondent applied reasonable force to gain entry in order to execute the search warrants, and thereupon served them upon the Applicant's employer's spouse in the presence of the Applicant's advocate.

15. The officers of the 1st Respondent thereafter embarked on a search of the premises and found several firearms namely a Glock Pistol serial No UAB 630, an Assault Rifle Mini Archer Serial No 2013 IM 111, an Assault Rifle CQ serial No CNOO5433-13, a Glock Pistol serial no UAB 632, a Smith and Wesson SW99 serial No SAE 0332,a Glock Pistol serial No URG 798, a Glock Pistol serial No UAB 646 and 688 rounds of ammunition. That after the search an inventory was prepared and signed by the police officers as well as the counsel for the Applicant, a copy of which was annexed. The 1st Respondent pointed out that the Glock Pistol Serial No UAB 632 which was amongst the weapons they found belonged to the Applicant.

16. It was the 1st and 2nd Respondent's case that the said firearms and ammunition were concealed and hidden in the kitchen ceiling which is not the ordinary safe place for storing them, as section 18 of the Firearms Act stipulates the manner in which firearms should be stored. It was further their case that investigations established that the ex-parte applicant is a licensed firearms holder having been issued with a certificate No. 3623.That after the conclusion of the investigations, charges were preferred against the Applicant in Nyeri in **Criminal Case No 253 of 2018** with respect to offences related to the failure to keep in safe custody a firearm in contravention of the Firearms Act. The investigators thereupon obtained summons requiring the attendance of the Applicant before the said Chief Magistrate's Court on 1st March 2018 which were served on the Applicant's spouse.

17. It was in this respect denied by the 1st Respondent that its officers disarmed the Applicant in a violent and destructive manner, and reiterated that the manner in which the firearm was recovered was lawful, and that the charges facing the Applicant are in no way related to the service of summons upon his employer. In addition, it was stated that there is no requirement that a suspect or an accused person must be summoned and questioned by investigators before plea taking takes place, or before the issue of service of summons requiring attendance in court. The 1st Respondent also stated that it has not sought to either detain or arrest the Applicant, and no evidence has been furnished on the allegations that the charges against the Applicant are due to his employer's political connections.

18. The 1st and 2nd Respondents contend that the Chief Magistrate's Court in Nyeri has jurisdiction to hear the pending criminal case against the Applicant as the Applicant's rural home falls within the jurisdiction of the said court. Further, that the function and duties of the Directorate of Criminal Investigations and of the Office of the Director of Public Prosecutions are set out in the Constitution and in the National Police Service Act, , and averred that when executing their functions they are bound by and observe the constitutional provisions. It was averred in this respect that the police have the mandate and power to investigate any crime, while the Office of the Director of Public Prosecutions is empowered to undertake state powers of prosecution. They asserted that the Applicant has not demonstrated that in carrying out their functions in investigations and charging him, the 1st and 2nd Respondents acted without or in excess of powers conferred on them or infringed or violated any law.

19. It was further averred that the decision to prosecute by the 2nd Respondent was based on reliable information for the commission of an offense; and was made on the basis of evidence and the public interest, and that it would be improper and inappropriate for the Court to prohibit or stop the Respondents from discharging their legal mandate under the Constitution and other enabling legislation. Lastly, that as it has not been demonstrated that the 2nd Respondent acted in excess or without powers, the Applicant is culpable for offences under the Firearms Act and the criminal proceedings against him should be allowed to proceed to their logical conclusion.

20. The 1st and 2nd Respondents submitted that the 2nd Respondent has power to institute, undertake and take over prosecutions in all criminal proceedings under Article 157(6) of the Constitution. Further, that under Article 157 (10), the 2nd Respondent does not require consent from any person to commence criminal proceedings, and shall not be under the direction and control of any person or authority. It was also their submission that it is only the 2nd Respondent who can direct the Inspector General to inspect a matter under Article 157(4) and Article 245(5) of the Constitution.

21. The said 1st and 2nd Respondents cited the case of **Matalulu vs DPP (2003) 4 LRC 712**, for the grounds upon which the powers of the 2nd Respondent may be subject to review. They submitted that the Applicant had failed to demonstrate that the 2nd Respondent lacked the requisite authority, acted in excess of jurisdiction or departed from the rules of natural justice in directing that the Applicant be charged with the offences disclosed by the evidence. Relying on **Thuita Mwangi & Another vs the Ethics and Anti-Corruption Commission & 3 Others (supra),** the said Respondents reiterated that the acts of the 2nd Respondent can only be interfered with by Court where its proved that the same has been exercised in excess of jurisdiction resulting in abuse of office. Reliance was also placed on the definition of abuse of process in **Nicholas Mwaniki Wawere & Another vs Attorney General & DPP, Petition No. 394 of 2016** as something so unfair and wrong with the prosecution, that the court should not allow a prosecutor to proceed with what is in all other respects a perfectly supportable case.

22. Mr. Muteti in his oral submissions contended that no legitimate expectations of the Applicant had been violated, as he was not a party in **Nairobi High Court Petition No. 520 of 2017,** and was at all material times aware of the said suit but did not seek to be enjoined in the proceedings. That he cannot therefore benefit from the orders made in the said proceedings. In addition, that the quashing of the revocation of the Applicant's employers firearm licence did not affect the charges agains the Applicant and he still remains culpable.

23. The 1st and 2nd Respondents in addition submitted that the application has not met the requisite threshold, and the matter raised therein form the basis of the Applicant's defences before the trial Court, and cannot be raised before the High Court. It was their submission that the High Court has no jurisdiction to decide whether or not the Applicant has a *prima facie* case, or whether there is sufficient evidence against the Applicant. They relied on the case of **Eunice Khalwali Miima vs Director of Public Prosecutions & 2 Others** ,**(2017) e KLR** for the proposition that the judicial review orders are discretionary, and in closing submitted that the application is premature, misconceived, and in abuse of the court process.

The 3rd Respondent's Case

24. The 3rd Respondent stated that the said Respondent has the original jurisdiction to determine the question as to whether Applicant has been charged in the appropriate court pursuant to the provisions of the Magistrates Courts Act and the Criminal Procedure Code, and specifically as provided for under the provisions of sections 66, 74, 79, and 80 of the Criminal Procedure Code. Further, that no allegation has been made that the 3rd Respondents is incapable of determining the questions as regards the proper place of trial of the alleged offenses in issue, and there is no allegation of incompetence or impartiality on the 3rd Respondent's judicial officers as to merit the prohibition of the 3rd Respondents from exercising its legal adjudicatory mandate over the matters in issue.

25. Mr. Munene submitted for the 3rd Respondent, and contended tha the said Respondent has the initial capacity to determine whether or not it has the jurisdiction to hear and determine a case coming up before it. For this proposition they relied on the case of **Nicholas Randa Owano Ombija vs Judges and Magistrates Vetting Board, (2015) e KLR**. It was the 3rd Respondents submission that it is competent to determine questions of law the legality or otherwise of the charges and that it will be impartial in doing so which presumptions they submitted have not been disabused by the presentation of cogent evidence by the applicant. They relied on the case of **Republic v Independent Electoral & Boundaries Commission & another Ex-parte Coalition for Reforms and Democracy (CORD) 2017 eKLR** for this proposition.

The Determination

26. I have considered the parties' pleadings and submissions, and three issues arise for determination. The first is whether the 1st and 2nd Respondents' decisions to investigate and prosecute the Applicant was in abuse of their powers, and/or motivated by extraneous considerations. The second is whether the 3rd Respondent has jurisdiction to hear and determine **Nyeri Criminal Case No 253 of 281.** Lastly, whether the Applicant is entitled to the relief sought.

27. On the first issue, I have considered it necessary to lay down the applicable principles of law at the outset, to illustrate the fine line that exists between the unfettered exercise of the prosecutor's powers, and countenancing abuses of these powers by way of judicial review of charging decisions. As far back as 1935, the Supreme Court of the United States of America in **Berger vs United States, 295 U.S. 78 (1935** did point out the balance to be maintained in this regard when it asserted that the government's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done," and that it is therefore a prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction even as it is to use every legitimate means to bring about a just one."

28. This duty of prosecutors as stated in **Berger vs United States (supra)** furnishes the basis for courts to intervene when investigating, prosecuting and adjudicating agencies in the criminal justice system cross the line between proper and improper methods, as the courts cannot avoid and abdicate their authority to oversee the fairness of such an important process, and to review prosecutorial charging decisions in circumstances when there is abuse of prosecutorial powers.

29. The traditional grounds on which this Court will exercise its judicial review jurisdiction were laid down in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
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> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
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> **Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."**

30. In addition, it was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of**

the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action.

31. Specifically, with respect to the review of decisions to charge and to prosecute in criminal cases, it was held as follows in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,**:

> **"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious…The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute".**

32. The Court went further to hold that:

> **"It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings."**

33. In the case of **R vs. Attorney General Ex Parte Kipgneno Arap Ngeny, High Court Misc. Civil Application No.406 of 2001**, the Court observed as follows on this ground:

> **"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."**

34. Lastly, in **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003, [2007] 2 EA 170,** the Court of Appeal held as follows as regards review of proceedings in subordinate courts proceedings:

> **"It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court."**

35. What this Court cannot do in exercise of its judicial review powers over criminal proceedings, is to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the power and discretion conferred upon that office under Article 157 of the Constitution. In the case of **Republic vs Commissioner of Police & Another Ex-Parte Michael Monari &**

Another, (2012) e KLR Warsame J. (as he then was) observed as follows in this regard:

> **"It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed 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 not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."**

36. Similar sentiments were expressed in **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

> **"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."**

37. Likewise, it is also not the duty of the judicial review Court to engage in an examination of the merit or otherwise of the charges to be preferred. The sufficiency or otherwise of the charges or evidence is left to the trial Court if the same does reach there.

38. Coming to the facts of the present case, it is common ground that the 1st Respondent did search and recover several firearms from the Applicant's employer's residence in Muthaiga in Nairobi County between 16th and 17th October 2017. It is also common ground that the constitutionality and legality of the said search and seizure is the subject of **Petition No 520 of 2017 - Jimi Wanjigi vs Inspector General of Police & 3 Others** that was filed on 17th October 2017. The following relief is sought by the Applicant in the said Petition, copies of which he annexed to his application:

> **"(i) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents have breached and continued to be in breach of the Petitioner's fundamental rights under Articles 10(1), 10(2), 26(3), 27(1), (2), (4) & (5), 28, 29, 31(a) & (b), 32(1), 33(1), 38(1), 39, 45(1), 47(1), & (2), 48, 49, 50 and 51 of the Constitution of Kenya, 2010.**
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> **(ii) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents' conduct and actions which are complained of in the Petition, jointly and/or severally, singularly and/or cumulatively against the Petitioners are oppressive, unfair, unreasonable, irrational , illegal and an abuse of power and the criminal justice system and process.**
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> **(iii) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents' breach of the Petitioners' fundamental rights singularly and cumulatively has caused loss and damage to the Petitioners.**
>
> **(iv) A declaration be and is hereby issued that the Petitioners are entitled to pecuniary compensation for such loss and damage as they have suffered on account of the Respondents' violations of their fundamental rights.**
>
> **(v) General damages for the violation/contravention of the Petitioners' rights and fundamental freedoms.**
>
> **(vi) General damages for the malicious, wanton and reckless destruction of the Petitioners' property.**
>
> **(vii) A further declaration be and is hereby issued that the Petitioners are entitled to exemplary and aggravated damage in view of the 1st, 2nd and 3rd Respondents' conduct and actions and breach of the Petitioners' fundamental rights and freedoms.**
>
> **(viii) An Award of exemplary and aggravated damages to be quantified by the court.**
>
> **(ix) An order directing the 1st, 2nd and 3rd Respondents to forthwith restore and/return to the 1st Petitioner all firearms, ammunition and items taken from the Petitioners' private residence and in particular the following:**

a. One pistol make Smith and Wesson serial Number SW 99:

b. One Glock pistol serial Number UAB 630:

c. One assault rifle make mini Archer serial number 2013/MIII attached with a laser serial number W3043907:

d. One Glock 19 pistol serial No. UAB 646:

e. One assault rifle make serial M4CQ serial number CN 005433/13:

f. One Glock 19 Pistol serial number URG 798:

g. One Glock 19 pistol serial number UAB 632

(x) Any other relief or such other orders as this honourable court shall deem fit and just to grant to the Petitioners.

(xi) Costs of this Petition be awarded to the Petitioners."

39. The charge in Criminal Case 253 of 2018 at the Nyeri Magistrates Court iis on the other hand shown to have been registered with the Chief Magistrates Court in Nyeri on 27th February 2018 and is as follows:

FAILING TO KEEP SAFE CUSTODY OF A FIREARM CONTRARY TO SECITON 18(3) AS READ WITH SECTION 18(4) OF THE FIREARMS ACT CAP 114 LAWS OF KENYA

BONIFACE NGIYO MWAURA: On the 17th day of October, 2017 within the Republic of Kenya being a holder of a firearm certificate number 3623 and licenced to possess Glock 19 Pistol Serial No. UAB 632 failed to keep secure the said firearm in your safe custody and in a safe condition and without reasonable precaution to ensure that the said firearm is not lost or stolen and was not at any time available to any person not lawfully entitled to possess it.

40. A perusal of the charge sheet shows that the firearm that is the subject matter therein, namely the Glock 19 Pistol Serial No. UAB 632, is also one of the firearms that is the subject matter of **Petition No 520 of 2017 - Jimi Wanjigi v Inspector General of Police & 3 Others.** . It is trite law that facts constituting the basis of a civil suit may similarly be a basis for criminal offence and proceedings. In addition, the concurrent existence of the criminal proceedings and civil proceedings does not , *ipso facto*, constitute an abuse of the process of the court, unless the commencement of the criminal proceedings is meant to force an applicant to submit to the civil claim. See in this regard the decisions in **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another, [2002] 2 KLR 703** and **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others, Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR.**

41. In the present case, however, the legality of the 1st Respondent's access to the firearm giving rise to the said charges in **Nyeri Criminal Case No 253 of 2018** was the subject of the pending constitutional case in the High Court in Nairobi, in which there are specific prayers for return for the said firearm to the Applicant's employer. If the constitutional case is decided in the Applicant's favour, the said charges will be rendered redundant. Therefore, by bringing the charges against the Applicant in **Nyeri Criminal Case No 253 of 2018.**, the 1st and 2nd Respondent were in effect seeking to preempt and force the High Court's hand in **Petition No 520 of 2017 - Jimi Wanjigi v Inspector General of Police & 3 Others.**

42. The said charges and proceedings in **Nyeri Criminal Case No 253 of 2018** would also as to render whatever decision may be made by the High Court in favour of the Applicant's employer and by extension the Applicant nugatory, by mounting a collateral challenge with respect to the said firearm. This in my view is clear evidence of bad faith and malice on the part of the 1st and 2nd Respondents, who also clearly acted in abuse of the Court process and therefore acted unfairly, unreasonably and abused their prosecutorial powers.

43. On the second issue as regards the jurisdiction of the 3rd Respondent to hear and determine **Nyeri Criminal Case No. 253 of 2018**, the Magistrates Courts Act in section 6 provides that magistrates courts shall have and exercise such criminal jurisdiction as may be conferred on it by the Criminal Procedure Code or any other written law. Sections 66 and 67 of the Criminal Procedure Code in this regard provides for the authority of Courts to try accused persons within their limits of jurisdiction as follows:

"66. General authority of courts

Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within Kenya, or which according to law may be dealt with as if it had been committed within Kenya, and to deal with the accused person according to its jurisdiction.

67. Accused person to be sent to district where offence committed

Where a person accused of having committed an offence within Kenya has escaped or removed from the province or district within which the offence was committed and is found within another province or district, the court within whose jurisdiction he is found shall cause him to be brought before it, and shall, unless authorized to proceed in the case, send him in custody to the court within whose

jurisdiction the offence is alleged to have been committed or require him to give security for his surrender to that court there to answer the charge and to be dealt with according to law."

44. Section 72 of the Criminal Procedure Code specifically provides as follows as regards the place of trial of a criminal case:

> **"When a person is accused of the commission of an offence by reason of anything which has been done or of any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued".**

The place of commission within a court's local limits of the relevant action giving rise to a charge is thus a condition precedent for the exercise of territorial jurisdiction by a magistrate's court. In the present case, the actions giving rise to the charges against the Applicant are indicated in the particulars of the counts that were brought against him in **Nyeri Criminal Case No 253 of 2018.** These were in summary that the Applicant failed to keep a firearm in safe custody on 17th October, 2017, while in an undisclosed location in Kenya.

45. This charge was brought in the said manner notwithstanding that the 1st and 2nd Respondents do acknowledge and admit that the subject firearm was recovered on 17th October 2017, at the house of the Applicant's employer in Muthaiga in Nairobi, as evidenced by the replying affidavit sworn on 23rd January 2019 by Inspector Maxwell Otieno, where the said deponent stated as follows in paragraphs 13 and 14 thereof:

> **"13. THAT the firearms and ammunition were concealed and hidden in the ceiling within House No. 44 along Muthaiga Road which belongs to the ex parte applicant's employer and which is not the ordinary safe for keeping or storage of firearms.**
>
> **14. THAT the firearm, Glock Pistol Serial No UAB 632 which was amongst the weapons recovered concealed and hidden in the cielings belonged to the ex parte Applicant.** "

46. While section 72 of the Criminal Procedure Code gives discretion as to the place of trial, it must be borne that Article 50(2) of the Constitution provides certain constitutional safeguards as regards criminal trials, including the right to have a trial begin and conclude without unreasonable delay, to be present when being tried and to adduce and challenge evidence. These constitutional provisions inform the requirement that the trial should be held at a venue which is easily accessible by the Accused person and the witnesses, and are the justification for the territorial limits of courts' jurisdiction in criminal cases.

47. I am in this regard persuaded by and in agreement with the Supreme Court of Philippines in the case of **Union Bank of The Philippines and Desi Tomas** vs **People of The Philippines, G.R. No. 192565** where it was held as follows:

> **"Venue is an essential element of jurisdiction in criminal cases. It determines not only the place where the criminal action is to be instituted, but also the court that has the jurisdiction to try and hear the case. The reason for this rule is two-fold. *First,* the jurisdiction of trial courts is limited to well-defined territories such that a trial court can only hear and try cases involving crimes committed within its territorial jurisdiction. *Second,* laying the venue in the *locus criminis* is grounded on the necessity and justice of having an accused on trial in the municipality of province where witnesses and other facilities for his defense are available."**

48. The reasons given by the 1st and 2nd Respondents that Nyeri is the Applicant's rural home is not supported by their own averments as to the location of the alleged offence, by the law on the territorial jurisdiction of magistrates courts in criminal cases, nor by the constitutional imperatives of an expeditious trial. This Court acknowledges that there may be factors of the public interest or safety, or even of the Accused's own safety that may necessitate a change of the venue of a trial, some of which are provided in section 81 of the Criminal Procedure Code. However, these factors were neither raised by the Respondents, nor do they apply in the present application.

49. It is instructive in this respect that the 2nd Respondent is required in exercising its powers to avoid abuse of the legal process under Article 157(11) of the Constitution, and by charging the Applicant in Nyeri Chief Magistrate's Court, it violated the Applicant's legitimate expectation that the Respondents would follow the correct legal process set out by law. The said action of the 2nd Respondent also leads to the inescapable conclusion that the said action was made in bad faith and intended to prejudice and oppress the Applicant.

50. On the last issue as regards the relief sought, the Applicant has sought an order of certiorari. The Court of Appeal held in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards the nature of the said remedy:

> **….Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

51. I find that as the 1st and 2nd Respondents have been found to have acted in abuse of the Court process and in bad faith, and were motivated by extraneous factors in the decision made to charge the Applicant at the Nyeri Chief Magistrates Court, the Applicant is entitled to the order sought of certiorari to quash the impugned summons and charges.

52. In the premises, the Applicant's Notice of Motion dated 19th March 2018 is merited, and I accordingly order as follows:

1. An order of Certiorari be and is hereby issued to remove into this Court for quashing, the Summons Requiring Attendance dated 8th March, 2018, notifying that the Applicant is required to appear before the Chief Magistrates Court at Nyeri on 15th March, 2018, to take a plea in Criminal Case No 253 of 2018, on charges of failing to keep safe custody of a firearm, and to quash any charge sheet registered against the Applicant before the said Court in Criminal Case No 253 of 2018.

2. The 1st and 2nd Respondents shall meet the Applicant's costs of the Notice of Motion dated 19th March 2018.

53. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF MARCH 2019

P. NYAMWEYA

JUDGE