



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION MILIMANI**

**PETITION NO. 22 OF 2018**

**IN THE MATTER OF ARTICLES 22(1), 23(1) & (3), 159(2) (A, E), 165(3)(B, D), (6)**

**& (7) & 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 3, 10(1),**

**10(2), 19, 20, 21(1), 25, 27(1) & (2), 29, 47(1), 50(1), 50(2) (a, b, c, j, k), 79, 157 (11)**

**& 249 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF NAIROBI CHIEF MAGISTRATE'S COURT ANTI-**

**CORRUPTION CASE NO. 7 OF 2018 – REPUBLIC VS MICHAEL SISTU**

**MWAURA KAMAU & 2 OTHERS**

**BETWEEN**

**MICHAEL SISTU MWAURA KAMAU.....PETITIONER**

**VERSUS**

**ETHICS & ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT**

**(ANTI CORRUPTION COURT) (NAIROBI).....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. Michael Sistu Mwaura Kamau (herein referred to as “the petitioner”) was sometime on 4<sup>th</sup> June 2015 jointly with 8 others arraigned before Nairobi Chief Magistrate’s court vide ACC Case No. 11/2015 facing various charges relating to corruption under the Anti-Corruption and Economic Crimes Act. Subsequently, the petitioner proceeded to the High Court vide Petition No. 230/15 challenging the constitutionality of the charges on grounds that the second respondent herein (EACC) was not fully and properly constituted by the time recommendation to charge him was made.

2. After hearing the petition, the High Court dismissed the same. Dissatisfied with that decision, the petitioner moved to the Court of Appeal through Cr. Appeal No. 102/16 wherein the appeal was upheld on 14<sup>th</sup> July 2017.

3. In its judgment, the court of Appeal held that:

**“this appeal succeeds on the technical ground that the EACC was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP. From the foregoing, anti-corruption constitutional Edicts, the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of the constitution and the law”.**

4. On the basis of the said judgment, the Chief Magistrate’s court mentioned ACC No. 11/15 for further directions. While the petitioner’s counsel urged the trial court to acquit the petitioner, the trial magistrate in his ruling of 28<sup>th</sup> July 2017 rejected the plea and instead discharged him with the obvious implication that the petitioner could be re-arrested and charged afresh. Aggrieved with this ruling, the petitioner moved to the High Court vide Revision Application No. 1/18 seeking to overturn the same and have him acquitted.

5. Unfortunately, his prayer was dismissed culminating to an appeal to Court of Appeal vide Cr. Appeal No. 7/18 challenging the decision of the High Court. The petitioner’s prayers for stay of further proceedings was dismissed.

6. Subsequently, the petitioner was summoned and appeared before Chief Magistrate’s Court on 30<sup>th</sup> May 2018 where he was charged afresh with two counts in Anti-corruption Case No. 7/18. In respect to the first count, he was charged with wilful failure to comply with applicable procedures and guidelines relating to the management of public funds contrary to Section 45 (2) (b) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act 2003. Particulars of the offence are that “on 15<sup>th</sup> day of March 2008 in Nairobi area within Nairobi County being the Permanent Secretary Ministry of roads and being a person whose functions concern the management of public revenue wilfully failed to comply with Chapter 5 of the Government Financial Regulations and Procedures by ignoring the design of the Kamukuywa – Kaptama – Kapsokwony – Sirisia Road which had been done by Enginconsult Consulting Engineers Ltd at the cost of Kshs.33,303,600 and entering into a memorandum of understanding under which the Resident Engineer redesigned the same road”.

7. In respect to count two, he was charged with “abuse of office contrary to Section 101 as read with Section 102A of the penal code. Particulars are that, “between 15<sup>th</sup> day of October 2007 and 15<sup>th</sup> day of March 2008 in Nairobi County being the Permanent Secretary, Ministry of Roads, in abuse of the authority of the said office, arbitrarily (sic) authorised the redesigning of the Kamukuywa – Kaptama-Kapsokwony- Sirisia Road which had been designed by Enginconsult Consulting Engineers Ltd at the cost of Kshs.33,303,600/= without involving the said M/s Enginconsult Consulting Engineers Ltd, an act that resulted to the loss of public funds.

8. Upon being called to take plea, the petitioner declined to plead to the charges thereby raising a preliminary objection alleging that the charges preferred were bad in law as he had been tried and acquitted of the same hence pleaded autrefois acquit. After arguing the preliminary objection, the court delivered its ruling on 6<sup>th</sup> July 2018 dismissing the preliminary objection and directed the petitioner to plead to the charge.

9. However, the petitioner once again raised another preliminary objection alleging that the charge sheet as framed was defective and unconstitutional thus violating Article 50 (2) (b) of the Constitution. In response, prosecution urged the court not to entertain any preliminary objection at that stage until after pre trial conference proceedings. Agreeing with the prosecution’s sentiments, the trial court directed the petitioner to take plea first like his co-accused who had earlier on taken plea on 23<sup>rd</sup> May 2018. Reluctantly, the petitioner gave in and pleaded not guilty. The court then advised all parties to preserve and raise their preliminary objections if any during the pre trial conference in compliance with Chief Justice Mutunga’s rules of 2015 regarding case management.

10. On 1<sup>st</sup> August 2018, the trial court conducted pre trial conference proceedings and gave directions among them, parties to raise their preliminary objections if any within 7 days by filing a notice of motion.

11. Consequently, the petitioner moved to the High Court vide a notice of motion dated 16<sup>th</sup> August 2018 and filed on 17<sup>th</sup> August 2018 and a petition of even date seeking to strike out or annul the pending criminal trial on grounds that the charges as framed were defective. Further, that by the trial court denying the petitioner an opportunity to raise a preliminary objection to challenge the defective charges and the forceful manner in which the plea was taken, amounted to a violation of his right to fair hearing contrary to Article 50. He also alleged discrimination as some tender committee members were not charged despite having been charged together previously in Cr. Case no 11/15.

12. At the same time, on 22<sup>nd</sup> August 2018, he again filed a similar application before the trial court seeking the court to annul and or dismiss the same charges on similar grounds. However, the application before the lower court was withdrawn on 4<sup>th</sup> September 2018 in favour of the prosecution of the High Court petition.

#### **Notice of motion and petition dated 16<sup>th</sup> August 2018 and filed on 17<sup>th</sup> August 2018**

13. On 17<sup>th</sup> August 2018, the petitioner herein filed a notice of motion and petition dated 16<sup>th</sup> August 2018 pursuant to Articles No. 3, 10(1) 10(2), 19, 20, 21(1), 25, 27(1) and (2), 29, 47(1) 22(1) 23(1) (3), 159, 165 (6) & (7), 258, 157, 249 of the Constitution seeking various orders as particularised hereunder:

(i) Spent

(ii) Spent

(iii) A declaration that the 3<sup>rd</sup> Respondent erred by refusing, denying; failing to give the Petitioner's advocate the opportunity to object to the charges in Nairobi Chief Magistrate's Court Anti-corruption Case No. 7 of 2018 -Republic v Michael Sistu M. Kamau, Mwangi Maingi and Nicholas Ndungu Ng'ang'a.

(iv) A declaration that the trial and/ continued prosecution of the Petitioner in Nairobi Chief Magistrate's Court Anti-Corruption Case No. 7 of 2018 Republic v Michael Sistu M. Kamau , Mwangi Maingi and Nicholas Ndungu Ng'ang'a is in bad faith, oppressive and otherwise an abuse of the law and the criminal justice system and therefore in contravention of the Petitioner's constitutional rights and fundamental freedoms guaranteed under Articles 27(1) & (2), 29, 47(1), 50(1) and 50(2) (a, b, c, j, k).

(v) A declaration that the charges laid against the Petitioner in Nairobi Chief Magistrate's Court Anti-Corruption Case No. 7 of 2018 -Republic v Michael Sistu M. Kamau, Mwangi Maingi and Nicholas Ndungu Ng'ang'a are unlawful, defective , discloses no offence and that they violate, contravene /threaten the Petitioner's rights and fundamental freedoms guaranteed under Articles 10(1), 10(2), 19, 25, 27(1) & (2), 29,47(1), 50(1), 50(2)(a, b), &157(11) of the Constitution of Kenya.

(vi) A declaration that the prosecution of the Petitioner in Nairobi Chief Magistrate's Court Anti-Corruption Case No. 7 of 2018-Republic v Michael Sistu M. Kamau, Mwangi Maingi and Nicholas Ndungu Ng'ang'a is tainted with illegalities and is contrary to constitutional, public policy and interest.

(vii) An order of certiorari to remove into the High Court and quash the charges against the Petitioner contained in the charge Sheet dated 23/05/18 CR.NO.148/10/2018 charging the Petitioner with the offences and counts contained in the said Charge Sheet.

(viii) An order of prohibition against all the Respondents barring the continuation of proceedings and or the prosecution of the Petitioner in Nairobi chief Magistrate's Court Anti-Corruption Case No. 7 of 2018 -Republic v Michael Sistu M. Kamau, Mwangi Maingi and Nicholas Ndungu Ng'ang'a.

(ix) Any other orders the Honourable Court deems just and fit to grant and /or as may arise or commend themselves as just and appropriate in the course of the proceedings.

(x) Costs of the Petition.

14. The petition and notice of motion are premised upon grounds set out on their respective bodies thereof and a replying affidavit sworn by the petitioner on 16<sup>th</sup> August 2018 and a further affidavit sworn on the 27<sup>th</sup> August 2018.

15. The application and petition were certified urgent on the 17<sup>th</sup> August 2018 and directions to serve the respondents made but with no orders staying the lower court proceedings. Parties were directed to file written submissions as well. Upon being served, the 1<sup>st</sup> respondent filed a replying affidavit on 28<sup>th</sup> August 2018 sworn the same day by Alfred Mwendwa Joel terming the application as an abuse of the court process and that the same ought to have been filed before the trial court.

16. Equally, on 22<sup>nd</sup> August 2018, the 2<sup>nd</sup> respondent filed their response vide a replying affidavit sworn by Vera Omollo Hamisi on the same day. The 3<sup>rd</sup> and 4<sup>th</sup> respondents also filed their grounds of opposition on 14<sup>th</sup> November 2018. Subsequently, the petitioner in a rejoinder, filed a further affidavit on 28<sup>th</sup> September 2018 in response to the 1<sup>st</sup> respondent's replying affidavit. In response to that rejoinder, the first respondent filed also a further affidavit sworn by Alfred Mwendwa on 21<sup>st</sup> November 2018. Further, the petitioner filed a supplementary affidavit in support of the petition and notice of motion on 21<sup>st</sup> November 2018.

17. Due to the urgency of the matter, parties agreed to compromise on the hearing of the notice of motion in favour of the hearing of the petition.

### **Petitioner's Case**

18. The petitioner's case is anchored on the grounds set out on the face of the petition and affidavit in support. Basically, the petitioner is aggrieved with the trial court's directive to defer raising a preliminary objection challenging the defective charge sheet until pre trial conference a move he termed as vexatious and oppressive thus offending Section 282 of the Criminal Procedure Code( CPC). He averred that, his client's constitutional rights for a fair trial as enshrined under Article 50 (2) (b) was violated by being forced to take plea on a defective charge sheet thus affecting the integrity of the entire criminal proceedings.

19. The petitioner further contended that the charges as framed were similar to the charges in ACC No. 11/15 previously declared by the Court of Appeal as tainted with illegalities.

20. The petitioner raised concern with the DPP's (2<sup>nd</sup> respondent) directive to the 1<sup>st</sup> respondent (EACC) vide his letter dated 6<sup>th</sup> October 2017 asking the commission for review and reconsideration of an inquiry file against the petitioner and to submit the same within 21 days. That under Section 35 of ACECA, that act is illegal and unconstitutional as EACC is an independent body not subject to any direction.

21. Lastly, the petitioner raised the issue of discrimination thus violating his rights under Article 27 of the Constitution claiming that whereas in Criminal Case No. 11/15 he was charged with eight others, in criminal case No.7/18 he was charged with two others. He therefore questioned the rationale in charging him and two others instead of being nine accused persons as originally charged. Further, that the charges as drawn amounts to duplicity hence unconstitutional.

22. In conclusion, the petitioner alleged that the trial court failed to appreciate five crucial stages in plea taking as provided under Sections 89, 90, 134, 137, 207 and 382 of the CPC. That he failed to appreciate Article 50 (2) (b) of the Constitution on a fair trial which includes right for accused to be informed of the charge with sufficient detail to answer it.

23. The petitioner claimed that the charges as framed were omnibus and unconstitutional, vague and ambiguous in that the breach of financial regulations chapter 5 is too wide hence one needs to know which regulation within Chapter 5 of the Financial Regulations was violated. That lack of specificity in the charge sheet is sufficient reason to quash the proceedings by dismissing the charge sheet. He termed lack of specificity as an act of irrationality, unreasonableness and untenable.

### **1<sup>st</sup> Respondent's Case**

24. The 1<sup>ST</sup> respondent opposed the Petition vide a replying affidavit dated 28<sup>th</sup> August 2018 sworn by Alfred Mwendwa in his capacity as an Engineer and also an investigator working with the 1<sup>st</sup> respondent. He averred that he was part of the team of investigators that was tasked to investigate allegations reported at the 1<sup>st</sup> respondent regarding some officials from the Ministry of Roads (herein after referred to as **“the Ministry”**) who had disregarded road designs that had been drawn by an independent consultant, contracted by the Ministry, with respect to the 60-kilometres Kamukuywa-Kaptama-Kapsokwony-Sirisia Road project which the Ministry had earmarked for construction and substituted them with their own designs leading to massive misappropriation and loss of public funds to the contractor, M/s Kundan Singh Construction Limited.

25. That upon conducting investigations, the same revealed that there was indeed change of road design with significant cost implications after the tender for the works had been concluded and a contract signed between the Ministry of public works and the contractor, Kudan Singh Construction Ltd, thereby circumventing competition and leading to loss of public funds. He stated that, as a result of the change of design, only 41.9 % of the original scope of works was completed at a cost of **Kshs. 2,437,851,837.92** constituting **90%** of the contract sum of **Kshs. 2,699,623,83** expended. That the net effect of those changes was that, the section between Kapsokwony-Kopsiro-Namwela-Chwele was abandoned altogether. He further explained that the redesign of the road meant that the Government lost **Kshs. 33,303,600** paid to Enginconsult Consulting Engineers Limited, a private consultant, engaged to do the road design. He attached copies of letters demonstrating the effect of the changes in the road design marked as **‘AMJ 1’**.

26. On allegations that the petitioner was denied an opportunity to raise a preliminary objection to the charges before taking plea, he asserted that the same was justified and conducted in accordance with the law governing case management and no prejudice was suffered by the petitioner who is hell bent to delay prosecution of this case through multiple proceedings both in the lower court, High Court and Court of Appeal. She gave a chronology of events touching on litigation on the same subject.

27. On Allegations of discrimination and oppression, he contended that after deliberations between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent, this error has since been rectified and the 2<sup>nd</sup> respondent vide his letter dated 28<sup>th</sup> May 2018 directed the 1<sup>st</sup> respondent to charge the 6 outstanding suspects with the same offences preferred in ACC No. 11 of 2015. A copy of the said letter by the 2<sup>nd</sup> respondent was marked **‘AMJ 5’**.

28. Concerning the allegations that the Commission is only acting on 2<sup>nd</sup> respondent's directions, he detailed a step by step analysis of how the 1<sup>st</sup> respondent independently investigated the subject complaint and gathered evidence that established the facts of criminal conduct on the part of the Petitioner and the co-accused persons.

29. In any case, the 1<sup>st</sup> respondent accused the petitioner of re-litigating issues he had raised in Petition 230 of 2015 through this petition with a sole objective of frustrating the hearing and determination of corruption charges against him. He attached a copy of the amended Petition No.230 of 2015 and supporting affidavit marked as **‘AMJ 13’**.

30. Lastly, he contended that a comprehensive perusal of petition demonstrates that there is no defect in the charges brought against the Petitioner as claimed on the 6<sup>th</sup> July 2018 and that none had been pointed out in this petition.

31. In his further replying affidavit, the 1<sup>st</sup> respondent's affidavit sworn by Alexander Mwendwa on allegations of discrimination and oppression, he reiterated that on 5<sup>th</sup> October 2018, the following members of the Ministerial Tender Committee were charged before the Anti-Corruption Court in ACC No. 44 of 2018:

- i. Philip Onyango Sika**
- ii. Gilbert Mongare Arasa**
- iii. Raphael Weche Okubo**
- iv. Cyrus Wachira Gitau**
- v. Charles Oike Mubweka**
- vi. Kata Matemu Kithyo**
- vii. Kenneth N. Mwangi**

He attached a copy of the charge sheet marked as “AMJ 1”

### **2<sup>nd</sup> Respondent's Case**

32. The 2<sup>nd</sup> respondent in opposing the Petition filed a replying affidavit dated 22<sup>nd</sup> August 2018 sworn by Vera Omollo Hamisi a Principal Prosecution Counsel. She termed the allegation that the 2<sup>nd</sup> respondent's decision to charge members of the Ministerial Tender Committee amounted to discrimination against him as unfounded since the 2<sup>nd</sup> respondent's decision was based on review of the evidence as provided for under section 5 of the Office of Director Public Prosecutions Act.

33. She further averred that in accordance with Article 157(10 & 11) of the Constitution and section 5 of the ODPP Act, the DPP reserves the right to review evidence and in so doing he does not require the consent or authority of anyone in exercise of those powers.

34. That the DPP in exercise of the authority vested upon him under the constitution Article 157 and section 35 of the Anticorruption and Economics Crimes Act (ACECA), analyzed the evidence on the file and made a decision to re-institute charges against the petitioner pegged on sufficiency of evidence and on the basis of a properly constituted 1<sup>st</sup> respondent.

35. Lastly, she averred that the petition herein only seeks to curtail the mandate of the respondents as enshrined in the Constitution of Kenya as the petitioner had failed to demonstrate any violation of his rights.

36. In a further affidavit dated 22<sup>nd</sup> August 2018 sworn by Henry Kinyanjui, the 2<sup>nd</sup> respondent averred that the petitioner had failed to disclose that he had filed a parallel application before the Chief Magistrate seeking to challenge the legality and propriety of the charges yet in this petition he alleges that he has been denied audience by that Court on that matter and that the issues of propriety of charges is a matter for the trial court and will be canvassed before that Court.

37. He further contended that the fact that there is a matter pending before the Supreme Court filed by the 2<sup>nd</sup> respondent, it cannot aid the petitioner in this Petition since the Supreme Court did not grant any stay orders of the decision of the Court of Appeal thereby leaving the matter purely at the discretion of the respondents to proceed in the manner they deemed fit.

38. In a replying affidavit sworn on the 27<sup>th</sup> August 2018 by the petitioner, he reiterated that the charge sheet and the charges therein are the foundation of a criminal trial and once tainted with illegality every step or action thereafter that is founded upon the impugned charges is tainted.

39. That following the decision by the Court of Appeal in Civil Appeal No. 102 of 2016, it was the 2<sup>nd</sup> respondent who directed and prompted the 1<sup>st</sup> respondent to review and reconsider the files and to submit the same within 21 days. However, he contended that the 2<sup>nd</sup> respondent has no power to issue such a directive to the 1<sup>st</sup> respondent under section 35 of the Anti-corruption and Economic Crimes Act (ACECA).

40. He stated that the onus lies on the 1<sup>st</sup> and 2<sup>nd</sup> respondents to show a proper factual foundation or basis for the allegations/charges that are made against him.

### **3<sup>rd</sup> and 4<sup>th</sup> Respondents' Case**

41. The 3<sup>rd</sup> and 4<sup>th</sup> respondents in opposing the Petition by the petitioner filed Grounds of Opposition dated 27<sup>th</sup> August 2018 stating:-

**a) That the 3<sup>rd</sup> respondent acted strictly in accordance with the Constitution, the Criminal Procedure Code, Cap.75 of the laws of Kenya, Anti-Corruption & Economic Crimes Act, 2003, the Penal Code and all the applicable laws in the conduct of proceedings involving the petitioner herein.**

**b) That the instant Notice of motion Application and the Petition are appeals against the directions of the trial court in an ongoing criminal trial process for which the petitioner still has a right to be heard in addition to any other constitutionally and legally guaranteed rights. The Petition is therefore disguised as a constitutional petition whilst in fact it is an appeal that has been proffered contrary to the applicable rules and procedure.**

**c) The scope of this Honourable Court's powers and jurisdiction under Article 22 and 23 of the Constitution have been prematurely and/or unnecessarily invoked under the circumstances of this Petition. This is because the Petitioner is re-agitating and re-litigating issues that have already been judicially determined by courts of competent and concurrent jurisdiction. In any event, an appeal on the same by the petitioner is still pending before the Court of Appeal.**

**d) The evidentiary burden required of the petitioner to prove that the 3<sup>rd</sup> respondent violated any of his rights and fundamental freedoms under the Constitution has not been properly discharged.**

**e) The expeditious trial and/or prosecution of the petitioner before the 3<sup>rd</sup> respondent is a mandatory constitutional requirement by dint of *inter alia* Article 50(2)(d), (e) and (f) of the Constitution. Consequently, a stay of the said proceedings would negate this very constitutional edict.**

**f) That the petitioner has failed to urge compelling reasons to warrant a stay of the criminal proceedings before the trial**

court, the 3<sup>rd</sup> respondent herein.

g) That there can never be an omnibus bar to criminal trial and/or prosecution of the petitioner based on flimsy reasons as urged by the petitioner.

h) The petitioner has misconstrued and misapplied the nature of the constitutional and statutory obligations placed upon the specific respondents herein regarding the investigation, framing of charges, plea taking and the entire trial process.

i) That the instant Petition has been solely instituted with a view to unlawfully frustrate the legitimate public interest considerations with respect to the speedy trial of criminal offenders especially those involving corruption and economic crimes.

j) The instant Petition and application are unmeritorious, as they form a classical description of an abuse of the due process of this honourable court.

42. In a supplementary affidavit dated 20<sup>th</sup> November 2018 sworn by the petitioner, he contended that there can be no reasonable explanation as to why the decision to charge Mr. Philip Onyango Sika and 6 Others could not have been made at the same time that the decision to charge him was made or why the said decision was made well after the filing of this Petition.

### Submissions

#### Petitioner's Submissions

43. M/S Orengo Senior Counsel appearing for the petitioner together with M/s Wambugu and J. Soweto Advocates submitted on the right of a fair trial and quoted Article 50(2)(b) of the Constitution of Kenya 2010 which guarantees every accused person the right to a fair trial, which includes the right:-

b) to be informed of the charge with sufficient detail to answer it.

44. Thus, it was counsel's submission that answering to a charge is done at the stage of plea taking and is not a mere formality. That a person can only make an informed answer to a charge when they have sufficient detail of the prosecution's case by perusing the charge sheet together with witness statements. Counsel relied on '**Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**' on 'Notification of charge' which state:-

**a) Any person charged with a criminal offence shall be informed promptly, as soon as a charge is first made by a competent authority, in detail, and in a language which he or she understands, of the nature of the charge against him or her.**

**b) The information shall include details of the charge or applicable law and the alleged facts on which the charge is based sufficient to indicate the substance of the complaint against the accused.**

45. It was counsel's submission that for a person charged with a criminal offence to take an informed plea, the person should have the alleged facts on which the charge is based, sufficient enough to indicate the substance of the complaint.

46. On the right to due process, counsel submitted that the importance of this right as a pre-trial protection is to prevent arbitrary and groundless prosecutions on trumped up charges. According to counsel, it is essential that individuals should not be tried before it has been determined that the criminal charges that the state has filed have merits and justify trial. To support his arguments, Mr. Orengo referred the Court to the case of **R v Attorney General exparte Kipngeno Arap Ngeny the High Court Civil Application No. 406 of 2001** where the Court held that:-

**"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 a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."**

47. On the duty of the Trial Court when taking plea, counsel submitted that the trial court misunderstood 'Guidelines Relating to Active Case Management of Criminal Cases in Magistrates Courts and the High Court of Kenya made under the Judicature Act and Criminal Procedure Code (Gazette Notice No. 1340 hereinafter 'the Guidelines on Criminal Cases). Counsel thus submitted that the trial court misused and misapplied the Guidelines on Criminal Cases which are relevant after plea has been taken since according to counsel, the said guidelines presume that any challenges to the charges cannot come after the pre-trial conference.

48. Thus, it was counsel's submission that it was oppressive and unfair to institute and continue criminal proceedings against the petitioner knowing the allegation cannot be sustained or substantiated. According to counsel, the petitioner has a right to have his objections addressed at the earliest instance.

49. On defective charges, counsel submitted that chapter 5 of the Government Financial Regulations and Procedures which the petitioner is accused of failing to comply with, comprises 5 pages of regulations and procedures covering numerous aspects concerning the appointment and responsibilities of 'the Accounting Officer. According to counsel, this charge lacks sufficient detail that would enable the petitioner to

plead to the charge. Counsel relied on Mativo J's decision in **Republic v Director of Public Prosecutions & 4 Others Ex parte Charles Mwiti Mugambi Nairobi High Court Misc. Civil Application No. 156 of 2017** where he held:-

**“The decision to prosecute or not to prosecute is of great importance, it can have the most far reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.**

**A wrong decision to prosecute, or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system”.**

50. Mr. Orenge asserted that, the charges as drawn in count 1 and 2 and the particulars thereof are similar hence bad in law on account of duplicity. Concerning illegal directive, counsel submitted that the 2<sup>nd</sup> respondent had no power to issue any directive to the 1<sup>st</sup> respondent and therefore acted ultra vires its powers when it issued a directive to the 1<sup>st</sup> respondent on 6<sup>th</sup> October 2017 to review, reconsider and submit the petitioner's file to the 2<sup>nd</sup> respondent.

51. Mr. Orenge submitted that the trial court had no jurisdiction to hear a charge which did not exist as the petitioner had been acquitted by the decision of the Court of Appeal in Cr. No. 102/16. Learned counsel stated that the charges before court are oppressive and vexatious given that the petitioner has already been acquitted hence prosecution herein is an abuse of court process. Counsel relied on the decision in **Peter Anthony D. Casla vs AG and Another Nairobi High Court Misc. Civil Appl. No. 192/2016 (2016) eKLR**. He submitted that the charges before court lacked substantive and actual legal foundation. He referred the court to the case of **Bitange Ndemo vs Director of Public Prosecutions and others Nairobi Misc Civil Application No. 192/2016 (2016) eKLR**.

52. That the charges laid against the petitioner were illegal and irrational with ulterior motive and improper purpose and that there is no proper basis against him hence abuse of court process. To buttress this position, counsel referred to the case of **Jared Benson Kangwana vs A.G Nairobi High Court Misc. Application No. 446/1995 (UR)** and **AG vs AG Ex parte Kipngeno Arap Ngeny (supra)** which was cited with approval in the case of **George Joshua Okungu and Another vs Chief Magistrate's Anti Corruption Court at Nairobi and Another Petition No. 227/10 and 230 of 209 (2014) eKLR** in which the court held that:

**“The mutual consideration in the existence of discretion to prosecute is whether the evidence is sufficient to justify the institution or constitution of a process ... in my view a prosecution should be upheld or continued if there is admissible, substantial and reliable evidence that criminal offence known to law has been committed by the accused”.**

### **1<sup>st</sup> Respondents Submissions**

53. M/S Julius Muraya for the 1<sup>st</sup> respondent in his submissions identified the following issues for determination:-

- i. Whether the charges in ACC No. 7 of 2018 are defective?**
- ii. Whether failure to allow petitioner to raise the objection of defective charges before plea was in breach of his right to fair hearing?**
- iii. Whether the petitioner was selectively prosecuted on account of extraneous considerations?**
- iv. What orders should issue?**

54. On whether the charges in ACC 7 OF 2018 were defective, counsel stated that the counts complained of were properly framed and in accordance with the relevant sections governing framing of charges and plea taking inter alia sections 89-90, 134, 207 and 214 of the CPC.

55. Counsel submitted that the charge preferred under count 1 is created and defined in section 45(2)(b) of the Anti-Corruption and Economic Crimes Act, 2003 (hereafter ACECA) and the punishment is provided in section 48 of the same statute. That Section 45(2)(b) provides as follows:

**45 (2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person-**

**a) ...**

**b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or**

**c)...**

56. Thus it was counsel's submission that the statement of the offence clearly states the offence facing the petitioner as well as the punishment by including the penalty section being section 48 of the ACECA. Hence, the requirements of **Section 137 (a) (ii)**, of the CPC were complied with.

57. Counsel further submitted that the impugned charge had not framed two or more offences in the alternative in the same count and therefore not fatally defective. According to counsel, the offence is one that seeks to protect public revenue and submitted the following as ingredients of the offence:

**i. The accused must be an officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property.**

**ii. The officer or person must have failed to comply with any one or more laws, guidelines or procedures relating to procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures (which elements constitute the *actus reus*).**

**iii. The failure must be either wilful or careless (which elements constitute the *mens rea*)**

58. According to learned counsel, the particulars of the offence, as drawn, are sufficient granted that they clearly demonstrate that the accused was, at times material to the charge, a public officer namely, Permanent Secretary, Ministry of Roads and Public Works and one whose functions concerned management of public revenue and that he either wilfully failed to comply with a law, guideline or procedure which relates to any one of the specified activities namely procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditure. That in this case, he is accused of breaching the Chapter 5 of the Government Financial Regulations and the manner in which he did so is specified to with: “*ignoring the design of Kamukyuwa-Kaptama-Kapsokwony-Sirisia Road done by Engiconsult Consulting Engineers Ltd at the cost of 33, 303,600 and entering into a Memorandum of Understanding under which the Resident Engineer redesigned the same road.*” *Whether such conduct satisfies a breach of chapter 5 of the Government Financial Regulations is a matter of evidence which is within the remit of the trial court to assess and determine.*

59. Hence, it was counsel’s submission that there was no defect in the charges pleaded to by the petitioner as there was no specified offence and particulars which are specifically and unambiguously set out in the charge sheet.

60. On whether failure to allow an objection to defective charges before pleading is a breach of right to fair hearing, counsel submitted that in this case, the objection had been raised before closure of the prosecution’s case and no hearing had taken place. Hence, according to counsel, at this stage, even if the court was to find that there is any defect in the charges, the same is one which is amenable to amendment in terms of Section 214 of the CPC upon consideration of the evidence or explanations by the prosecution without causing any delay.

61. Learned counsel opined that section 324 of the CPC reserves the accused’s right to raise objection throughout the trial by providing as follows:

**“324. (1) The accused person may, at any time before sentence, whether on his plea of guilty or otherwise, move in arrest of judgment on the ground that the information does not, after any amendment which the court has made and had power to make, state an offence which the court has power to try.**

**(2) The court may either hear and determine the matter during the same sitting, or adjourn the hearing thereof to a future time to be fixed for that purpose.**

**(3) If the court decides in favour of the accused, he shall be discharged from that information.**

62. On whether by failing to include Members of the Ministerial Tender Committee, the Petitioner has been selectively prosecuted in breach of his freedom from discrimination, counsel submitted that the petitioner has not been selectively prosecuted on account of the act and that other persons initially left out of the charges in error have now been charged in court hence, this argument is no longer available to the Petitioner.

63. Lastly, on what orders should issue, counsel submitted that no evidence has been placed before this court to demonstrate that the petitioner is being harassed or denied his rights by the court or any exceptional circumstances to warrant a stay of the proceedings hence, it is not in the public interest to stay or quash the charges levelled against the Petitioner and the case should be allowed to proceed to its logical conclusion.

## **2<sup>nd</sup> Respondent’s Submission**

64. Reiterating on their replying affidavit to petition and written submissions filed on 22<sup>nd</sup> August 2018, Mr. Muteti Alexander appearing for the 2<sup>nd</sup> respondent adopted almost the same approach just as the 1<sup>st</sup> respondent’s submissions. The 2<sup>nd</sup> respondent submitted on five broad issues inter alia; whether the matters raised in the petition are resjudicata; whether the doctrine of Autrefois Aquit applies; whether the review decision to prosecute by 2<sup>nd</sup> respondent (DPP) is unjust; whether the petition is unduly delayed; and whether there is any breach of the petitioner’s right to equal protection.

65. Regarding the doctrine of resjudicata, it was submitted that the petitioner’s case under ACC No. 11/15 was not determined on merit as the petitioner was discharged and his Revision application seeking to be acquitted was dismissed by the High Court and the subsequent appeal in Cr. Appeal No. 7/18 is still pending before the Court of Appeal. Counsel referred the court to **petition No. 59/2015 Okiya Omutata Communication Authority of Kenya and 14 others** where the court held that, “it amounts to an abuse of the court process to raise subsequent proceedings in matters which would not and therefore should have been litigated in earlier proceedings”.

66. Touching on the doctrine of Autrefois acquit, counsel submitted that the petitioner has not been tried and acquitted of the same offence hence the subject of a pending appeal before Court of Appeal where a prayer for stay was rejected. That a person can only plead Autrefois

acquit upon proof that he has been tried and acquitted of the same charge before a competent court. Learned counsel referred the court to the case of **Nicholas Kipsigei Ngetich and six others vs R (2016) e KLR**.

67. Concerning review of prosecution decision, counsel relied on the powers of the DPP anchored under Article 157 (6) (a) and (c) which provides for the DPP's powers in undertaking criminal proceedings and discontinuation of the same. He submitted that the decision to review prosecution of a matter he had earlier on recommended for prosecution was not unconstitutional. The court was referred to the case of **Francis Anyango Juma vs DPP and Another Petition No. 160/12** where the court held that the DPP's office is an independent office and the court cannot direct or interfere with exercise of his powers and direct him on what to do or conduct his constitutional mandate unless there is clear evidence of violation of a party's right. Further reference was made to the cases of **R vs DPP and three others exparte Bedan Mwangi Nduati and Another (2015) eKLR** and **R vs Simon Okoth (2017) eKLR**.

68. Concerning illegality, irrationality and procedural impropriety, counsel submitted that there was no proof that by charging the petitioner afresh an illegality was committed. To bolster their case, counsel referred to the case of **R vs Permanent Secretary Ministry of Housing and Another (2014) eKLR** where the court cited with approval **council of Civil Unions vs Minister for Civil Service (1985) AC 2** where the court stated that:

**“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”.**

69. As to whether the process to proceed to prosecute the petitioner was fair and reasonable, counsel submitted that petitioner had not established to the required degree breach of any of those touching on the right to equal treatment and protection. It was submitted that the petitioner has not been discriminated against as the other members of the tender committee have been charged in ACC No. 44/18.

70. Mr. Muteti submitted that before a court could grant leave for an order for judicial review, the court should consider whether the orders if granted would delay the process and secondly, whether there is alternative remedy or vexatious conduct of the applicant.

71. Lastly, on the defective charge, Mr. Muteti submitted that there is nothing ambiguous or unconstitutional and if there was, the same could be resolved before the trial court and then review before the high court. He urged the court to find that the charges as drawn are in compliance with relevant provisions of the CPC i.e. Sections 137, 89 – 90, 2017 and 382. Mr. Muteti finally stated that the issue of defective charge can be amended at any stage.

### **3<sup>rd</sup> and 4<sup>th</sup> Respondents Submissions**

72. The 3<sup>rd</sup> and 4<sup>th</sup> respondents filed their submissions on 14<sup>th</sup> November 2018 challenging the petition. Mr. Moimbo appearing for the 3<sup>rd</sup> and 4<sup>th</sup> respondents opined that there was no proof of any violation of the petitioner's rights and that the petition is intended at frustrating legitimate public expectation hence an abuse of the court process. Counsel opined that the petitioner has filed a multiplicity of suits thus delaying this case.

73. Mr. Moimbo basically submitted that the matter at hand ought to have been presided before the lower court and thereafter revision or appeal under Sections 362, 364, 354 and 382 of the CPC as an alternative remedy which does not raise any constitutional issue. Learned counsel relied on the decision in the case of **Speaker of National Assembly vs James Karume Civil Application NAI 92/1992** where the court stated that wherever:

**“there is a clear procedure for redress of a particular grievance prescribed by the constitution or an act of parliament, the procedure should strictly be followed”.**

74. Mr. Moimbo termed the petition as vexatious and frivolous hence should be struck out in limine. To support this position, he referred the court to the case of **Benjoh Amalgamated and Another vs Kenya Commercial Bank Limited (2007) eKLR**. Mr. Moimbo further referred the court to the case of **Alphonse Mwangemi Munga and 10 others vs African Safari Club (2008) eKLR** where the court held that parties should make use of normal procedures under the various laws to pursue their redress as an alternative remedy instead of all of them moving to the constitutional court.

75. In their rejoinder, Mrs. Soweto asserted that once an illegality has been committed, a constitutional breach is or violation is apparent and the issue of amendment does not arise. Counsel referred the court to the case of **Stanley Munga Githunguri vs Republic Nairobi High court criminal appeal No. 271 of 1985 – 1986**.

### **Analysis and Determination**

76. I have carefully examined the petition herein, grounds in support, verifying affidavit, further affidavits, replying affidavits by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and grounds of opposition by the 3<sup>rd</sup> and 4<sup>th</sup> respondents plus written and oral submissions by counsel. Issues that crystallize for determination are:

- (a) Whether the High Court has jurisdiction to entertain the petition herein.**
- (b) Whether the criminal trial amounts to resjudicata**
- (c) Whether the doctrine of Autrefois Acquit is applicable.**

**(d) Whether the trial court violated Constitutional rights of the petitioner in refusing to entertain the preliminary objection before plea taking.**

**(e) Whether the petitioner was discriminated against.**

**(f) Whether the DPP's action in directing the EACC to review the petitioners file and forward it to him for necessary action amounted to interference with the independence of the EACC.**

**(g) Whether the charges as drafted are defective.**

**(h) What appropriate orders to grant.**

**Whether the High Court has jurisdiction to entertain the petition.**

77. According to the petitioner, the petition before court raises substantial constitutional issues touching on the right to a fair trial and more particularly breach of Articles 50 (2) (b) and Article 27 of the Constitution in which he alleges discrimination by being charged alone yet some tender committee members whom he was charged with previously in Cr. case 11/15 were left out. To the petitioner, these are serious constitutional violations calling for invocation of Article 22 (1) and 23 (1) to which the trial court has no jurisdiction.

78. It is trite that for somebody to seek redress from the High Court on a matter which involves a reference to the Constitution, the same should set out with reasonable precision the provision said to be infringed and the manner in which they are alleged to be infringed. **(See Anarita Karimi Njeru vs R (No.1) (1976 – 80) KRL).**

79. Article 22 (1) of the Constitution provides that every person has a right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been violated, denied or infringed or threatened. Article 23(1) further confers High Court with jurisdiction exercisable in accordance with Article 165 to hear and determine applications for redress of a denial, violation, infringement of or threat to, a right or fundamental freedom in the bill of rights. Article 165 3(a) bestows unlimited jurisdiction to the High Court in Criminal. and Civil suits.

80. Based on the above provisions, it is my holding that this court has jurisdiction to determine the issues in controversy. That does not mean that the lower court could not address the issue of furnishing the petitioner sufficient detail to answer to the charge. Save for the issue of discrimination under Article 27 of the Constitution and the DPP's alleged interference with EACC's mandate, the rest of the prayers would adequately be addressed before the lower court. Nevertheless, this court is properly seized of the matter and therefore duty bound to make a determination..

**Whether the current trial before the lower court amounts to resjudicata and therefore the doctrine of Autrefois Acquit applies**

81. According to the petitioner, the current criminal charges are spent in view of the Court of Appeal's decision in Cr. Appeal No. 102/16 in which proceedings relating to Cr. Case No. 11/15 was declared as tainted with illegalities and therefore unconstitutional.

82. The respondents vehemently opposed that approach arguing that, the Court of Appeal decision referred to did not prohibit the 2<sup>nd</sup> respondent from charging the petitioner afresh and that a discharge under Section 87(1) of CPC in Cr. Case No. 11/15 was not a bar to subsequent prosecution. I have perused the court record in Cr. Case no 11/15 where the petitioner was discharged. He subsequently filed Revision application No. 1/18 before the High Court seeking to be acquitted but the same was dismissed. His move to the court of appeal in Cr. Appeal No. 7/18 was thwarted as well as no stay orders were granted and the application was dismissed. The main appeal is however pending determination.

83. From the chain of events, one cannot plead resjudicata nor Autrefois Acquit under Article 50(2) (0) and Section 207 (5) (a) of the CPC where no trial has been conducted to conclusion and the case determined before a competent court on merit. The doctrine of Autrefois Acquit presupposes that, the petitioner must have been tried and acquitted hence cannot be tried for the same offence as that will amount to double jeopardy. This is a matter now pending before Supreme Court for determination. The doctrine of Autrefois acquit and resjudicata is not relevant **(See Nicholas Kipsigei Ngetich and 6 others vs R (2016) eKLR)** where the court addressed itself on the doctrine of Autrefois Acquit as follows:

**“it is obvious that this principle is infringed if the accused is on trial again for the offence of which he has been acquitted”.**

84. In the instant case, the petitioner is relying on the court of appeal decision in Cr Appeal No. 102/16 in which the original charges in Cr. C. No. 11/15 were quashed but left it open for the prosecution to take any other necessary steps they deemed fit. I need not belabour on the issue whether the petitioner ought to have been discharged or not as that is for the Court of Appeal to decide and not the magistrate's court. For me to address the same issue already determined by a court of concurrent jurisdiction will amount to presiding over an appeal on my colleague's decision. What is material to the trial court is that the petitioner has never been acquitted of these same charges before court at least as per the High Court determination. I do agree with the Hon. Magistrate that he had no business upholding the prayer on Autrefois Acquit. This ground is therefore misconceived and the petitioner should have appealed against the decision. Accordingly that ground is not available.

**Whether the trial court violated the petitioner's right of hearing by refusing to entertain the preliminary objection challenging the defective charge before taking plea**

85. When the petitioner was summoned to appear on 30<sup>th</sup> May 2018 to answer to the charges, he raised a preliminary objection based on the doctrine of Autrefois acquit which was dismissed on 6<sup>th</sup> July 2018 on grounds that he had not been tried and therefore acquitted. Immediately the ruling was delivered, the petitioner raised a preliminary objection challenging the legality and constitutionality of the charges as framed alleging that they were in violation of Article 50 (2) (b) hence could not be call to answer to non existent charges.

86. After listening to the objection raised and prosecution's sentiments urging that all objections be raised during pre trial conference, the Hon. Magistrate upheld prosecution's submission and directed that all preliminary objections be withheld until pre -trial conference. This was allegedly in line with Gazetted case management guidelines issued sometime 2015. After pre trial conference, the court directed all preliminary objections be filed within 7 days. The petitioner opted to file the current petition on 17<sup>th</sup> August 2018 but withdrew a similar application dated 22<sup>nd</sup> August 2018 before the lower court on 4<sup>th</sup> September 2018.

87. Learned senior counsel Mr. Orengo submitted extensively on this issue stating that the right to a fair trial was violated. That the right to fair trial cannot be limited under Article 25 of the Constitution. He submitted that the trial court robbed the petitioner an opportunity to raise the objection at the earliest opportunity pursuant to Section 382 of the CPC. To support this position counsel made reference to **Kajiado High Court Cr. Revision No. 11/2017 (2017)** where the court stated that:

**“The procedure which deprives an accused person the opportunity right to know with sufficient detail of the charge (sic) and adequate time, facilities to prepare his/her defence is clearly a violation of the Constitution”.**

88. To the respondents, there was no prejudice suffered by the petitioner in postponing time for raising preliminary objections until after pre trial conference proceedings. What is critical in this case is, what does the word earliest opportunity possible mean under Section 382 of the CPC.

89. It is not denied that a preliminary objection was raised challenging the legality of the defective charges. It is also clear from the record that the court did decline to entertain the preliminary objection raised by the petitioner before plea taking till pre trial conference was held. The rationale behind raising objections at the earliest opportunity is to save the court and parties time and unnecessary costs in litigation on a matter that would be disposed of at the initial stages of a trial. Legally, the petitioner should have been given an opportunity to canvass his preliminary objection and same determined before proceeding further. To that extent, I am in agreement with Mr. Orengo that it was prudent to determine the preliminary objection first.

90. However, the law allows preliminary objections to be raised at any time before judgment is delivered. Delayed preliminary objections can only be justified if discovery of the evidence or issues leading to the preliminary objections were not within the knowledge of the objector at the beginning of the trial. Nevertheless, the court was acting in good faith pursuant to legal guidelines on case management. He did not act with any malice or ulterior motive. In any event, raising a preliminary objection during pre trial conference which was almost immediately after taking plea and before hearing could commence is not prejudicial. It is not fatal and actually it was within the prescribed time constituting “earliest opportunity possible”. Earliest opportunity possible is not mandatorily confined to raising preliminary objections before taking plea. For the above reasons stated that ground cannot justify a basis to declare the trial a nullity or unconstitutional. In any event, under Section 214 of CPC, a trial court has powers to direct amendment of a defective charge sheet at any stage of the trial. Equally, any proceedings challenging that ruling should have been brought by way of revision or appeal.

#### **Whether the Petitioner was discriminated against**

91. The petitioner raised the issue of discrimination under Article 27 of the Constitution claiming that some of his co-accused persons in Cr. Case No. 11/15 had been spared subsequent prosecution. However, the 2<sup>nd</sup> respondent submitted that those people have since been charged under Cr. Case NO. 44/18. I have personally perused the lower court file and confirmed that indeed they have been charged and the case is due for consolidation with petitioner's file. I need not be labour on that issue as the same is now moot.

#### **Whether the DPP interfered with EACC's mandate by demanding submission of the petitioner's file for review and further action**

92. It is the petitioner's argument that on 6<sup>th</sup> October 2017, the 2<sup>nd</sup> respondent issued instructions and directions to the 1<sup>st</sup> respondent to complete the review and reconsideration of inquiry files and to submit the same within 21 days with fresh statutory notices. Mr. Orengo submitted that the instructions given amounted to a violation of Article 249 of the Constitution as the commission is not supposed to receive directions from any quarters. That unlike the Inspector General of police to whom the DPP can issue directions under Article 157 (1) and Section 5 (1) k of the ODPPA he cannot direct the commission.

93. The 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on Article 157 (1) of the Constitution and Section 35 of ACECA to justify the DPP's Act. Like all other commissions, Article 249 provides that EACC is an independent institution which is bound to exercise its mandate without any influence or direction from any authority. The matter at hand was investigated long time ago and recommendation to charge made to the DPP by the EACC. Subsequently, the petitioner was charged. However the decision of the Court of Appeal quashing the charges led to the petitioner's discharge.

94. The DPP in compliance with the decision of the court of appeal decision that prosecution was at liberty to take any other action permissible in law or the Constitution, made a follow up on the status of the files affected by that decision. The letter addressed to the commission in my view does not amount to a violation of any constitutional provision. The action taken was inevitable in the circumstances being an administrative action as well as a procedural aspect. It was not directing the commission to investigate so and so. Investigations were long gone.

95. The DPP's communication was a routine process of communication. This applies even in situations where the DPP receives a file and directs the EACC to cover certain aspects in evidence before resubmitting it for further action. That is not the same as giving directions. It is

trite that courts have no platform through which they can direct or dictate the DPP on what to do unless his actions or omissions manifestly violates a party's constitutional rights(see **R vs DPP and three others Exparte Bedan Mwangi Nduati and another(2015) eKLR**. I do not find any merit in that ground hence the same is dismissed.

### **Whether the charges are defective**

96. This is the elephant in the room. Accused was charged on 30<sup>th</sup> May 2018 with two counts as stated elsewhere in this judgment. The issue arose from the manner in which the charge was framed without disclosing the specific government financial regulations and procedures that were violated. Secondly, that the two charges amounts to duplicity.

97. For clarity purposes, particulars of the offence in respect to count one read in part **“on the 15<sup>th</sup> day of March 2008 in Nairobi area within Nairobi County being the Permanent Secretary Ministry of Roads and being a person whose functions concerned the management of public revenue wilfully failed to comply with Chapter 5 of the Government Financial regulations and procedures .....**”.

98. The most contentious aspect in the particulars is lack of specificity as to the regulations that the petitioner acted in breach so as to enable him prepare for the defence. That as it stands, the charges are ambiguous and lacks clarity hence offending Article 50 (2) (b) of the constitution. Article 50 (2) (b) provides:

**“Every accused person has the right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer”.**

99. The question that begs for answers is, which regulation out of the several regulations under Chapter 5 of the Financial Regulations is applicable. Section 134 of the CPC sets guidelines on what a proper charge entails as follows:

**“Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.**

Section 137 further provides on what a charge sheet should contain key among them the provision of the law against which the charge is preferred and the action or act that was or done or not done leading to the preferment of the charges. Section 214 of the CPC further enjoins the trial court to direct amendment on its own motion in case of a defective charge sheet.

100. It is the petitioner's case that the prosecution herein was commenced without proper factual foundation hence a nullity (**See R vs AG Exparte Kipngeno Arap Ngenyi (Supra)**). Under Section 89(5) of the CPC, a trial court can reject a defective charge sheet and discharge an accused person. However, that is not a bar to subsequent arrest and prosecution. According to Mr. Orengo the Hon. Magistrate should have rejected the plea and discharged the petitioner.

101. In their response to the issue of a defective charge, the 2<sup>nd</sup> respondent maintained that the charge as drawn was proper with all the ingredients properly spelt out. Mr. Muteti however submitted that failure to include the specific regulation is not fatal as the charge can be amended. There is no doubt that, in criminal proceedings, an accused person is constitutionally entitled to know in detail the charge he is facing, the act or omission complained of and the specific provisions of the law violated, adequate time and facilities to prepare a watertight defence.

102. As correctly stated by my brother J. Mativo in the case of **Rvs Director of Public Prosecutions and 4 others Exparte Applicant Charles Mwiti Mugambi Nairobi High Court Misc. Civil Case no156/2017(2018)Eklr**, a wrong decision to charge or not to charge a person tend to undermine the confidence of the community in the criminal justice system. Thus, a wrong charge will as well erode the integrity of an entire criminal trial in a case bound to collapse at its conclusion hence a waste of public resources, judicial time and unnecessary inconvenience to an accused person in terms of time and expense.

103. In this case, at count one, the petitioner is alleged to have acted contrary to Chapter 5 of the Government Financial regulations and procedures. This Chapter has several regulations. The petitioner cannot sufficiently and in detail understand the specific regulation he offended. He is as of right supposed to know what he did not comply with under the said regulations.

104. In the case of **BWD v R (2017) eKLR** at Page 28 to 30 the court of appeal held that:

**“there we must ask ourselves when it is appropriate to find that a charge sheet is fatally defective. Our case law has given crucial pointers. Two cases are pertinent: the case of Yosefa v. Uganda [1969] E.A. 236 – a decision of the Court of Appeal – and Sigilani v. Republic [2004] 2 KLR 480 – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence”.**

**Sigilani v. Republic [2004] 2 KLR** held:

**“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.”**

105. In the instant case, it is clear that the accused can only speculate the specific regulation he acted in breach of. It is not his duty to call for proper particulars from prosecution nor is he obligated to answer to defective charges. As it stands now, the charge sheet in respect of Count 1 is ambiguous, lacks specificity and cannot be allowed to continue in its current form as it offends Article 50 (2) (b) of the Constitution.

106. What remedy is available. The respondents argued that the matter should have been handled before the trial court and thereafter on revision or appeal if not satisfied. Whereas I do agree with the respondents that the case has its in built mechanisms and remedies as provided under Section 89 – 90 and 214 of the CPC and thereafter revision or appeal, this court cannot shy away from making a determination now that it is seized of jurisdiction of the matter. In as much as I do agree also with the holding in **Alphonse Mwangemi Munga & 10 Others vs African Safari Club (2008) eKLR** that parties should make use of other remedies available to pursue redress, I cannot run away from making a finding.

107. Ideally, the petitioner should have exhausted the trial court's proceedings first before clogging the High Court with constitutional references which would otherwise be fast dealt with before the trial courts as per the relevant and applicable statutes in this case the CPC. **(See Speaker of the National Assembly vs James Karume (Supra) and Benjoh Amalgamated and Another vs Kenya Commercial Bank(supra).**

108. Having held that the petitioner's rights as envisaged under Article 50 (2) (b) have been violated and having found that violation amounts to an illegality, the same is subject to certiorari orders thereby quashing that particular charge (Count 1).

109. Regarding duplicity of the charges, this is an issue to be adequately handled before the trial court and not a constitutional matter. As concerns lack of prima facie case and sufficient evidence, that is a matter that will be dealt with sufficiently by admission and interrogation of evidence and thereafter determination by the trial court. The petitioner shall have an opportunity to ventilate his case at that stage. A constitutional court shall not be used as a short cut to circumvent due process and therefore frustrate proceedings before the trial court even commences the hearing.

110. In the case of **R vs Commissioner of Police and Another Exparte Michael Monari and Another (2012) eKLR and William Ruto and Another vs AG HCCC No. 1192 of 2004** it was held that, analysis of evidence should be done before the trial court and not the constitutional court. Before the case is heard and determined, this court would have no basis to declare the proceedings as vexatious and an abuse of the court process. For those reasons, an order of prohibition cannot issue as prayed.

111. Having considered the reliefs sought and the findings made in this case, the appropriate relief that render itself for issuance is prayer 7 to the extent that, the charge sheet dated 23<sup>rd</sup> May 2018 in criminal case No. 7/18 in respect of count one only, be removed to the high court and the same be and is hereby quashed. However, prosecution shall be at liberty to submit a properly framed charge sheet specifying the correct provision of the law or regulations relating to the affected count. For avoidance of doubt, account two is not affected by this declaration. The upshot of it all is that save for the orders herein made, the rest of the prayers are hereby dismissed.

112. Accordingly, the petition dated 16<sup>th</sup> August 2018 partly succeeds and partly fails with orders as follows:

**(a) That an order of certiorari do and is hereby issued calling for the charge sheet dated 23<sup>rd</sup> May 2018 in respect of ACC No. 7/18 pending before the Chief Magistrate's Court and the same be and is hereby quashed only in respect of Count 1.**

**(b) That prosecution shall be at liberty to institute properly framed charge sheet in accordance with the relevant and applicable law.**

**(c) That the trial court shall cause the prosecution to amend the charge sheet to conform with the orders of this court.**

**(d) This being a constitutional issue touching on a matter of public interest each party shall bear own costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF APRIL, 2019.**

**J.N. ONYIEGO**

**JUDGE**