



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 436 OF 2017

BETWEEN

REUBEN NJUGUNA GACHUKIA.....1ST PETITIONER

CHRISPINE OTIENO OYIRO.....2ND PETITIONER

AND

THE INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS...2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE GOVERNOR

OF THE COUNTY OF NAIROBI.....4TH RESPONDENT

THE COUNTY GOVERNMENT OF NAIROBI.....5TH RESPONDENT

JUDGMENT

The Parties

1. The petitioners herein describe themselves as male adults of sound minds and employees of the 5th respondent in the Finance Department as Accountant Grade 3 and the Assistant Chief Cashier respectively.
2. The 1st respondent is a constitutional office created under Article 245(1) of the Constitution whose functions and powers are defined in Section 10 of the National Police Service Act.
3. The 2nd respondent is an officer under the control of the 1st respondent created under the provisions of Section 29 of the National Police Service Act with duties specified under Section 24 of the said Act.
4. The 3rd respondent is a constitutional office created under Article 157 of the Constitution with functions and duties defined under Section 5 of the Office of the Director of Public Prosecutions Act.
5. The 4th respondent is the governor of the 5th respondent whose office is created under Article 180 of the Constitution while the 5th respondent is created under Article 176 of the Constitution with its functions and powers specified under sections 5 and 6 of the County Government Act.

The Petitioners' Case

6. A summary of the petitioners' case is that they were on 23rd August 2017 at about 9am at their work station at the 5th respondent's offices when all over a sudden, group of well-built men stormed into the cash office and began rummaging and ransacking through their desks. The petitioners later on came to learn that the men were the 4th respondent's hirelings/agents. In the course of searching the petitioners' desks and cabinets, the said men came across cash that belonged to the 5th respondent whereupon they began shouting and calling on the 4th respondent to come and see the money that had allegedly not been banked in the 5th respondent's account.

7. The petitioners state that they explained to the 4th respondent the reasons why the money collected by them the previous day was yet to be banked in the 5th respondent's account but that the 4th respondent did not buy their explanation and referred the matter for investigations by the 5th respondent's Chief Officer who found that no monies were lost or misappropriated.

8. It is the petitioner's case that despite their explanation and the findings of the 5th respondent's Chief Officer, they were on 29th August 2017 arrested and detained at Muthaiga Police Station on claims of abuse of office and later presented before the Chief Magistrates Court on trumped charges instigated by the 4th respondent thereby prompting them to file this petition in which they sought the following orders:

a) A declaration that the petitioner's rights as enshrined in the Constitution with respect to equality and privacy have been infringed by the acts and/or omissions of the respondents

b) A declaration that any punitive action taken by the 4th and 5th respondents against the petitioners employment would be ultra vires and should be declared null and void.

c) Conservatory orders prohibiting the 1st, 2nd and 3rd respondents from investigating and prosecuting the petitioners based on the events of 23rd August 2017 and the subsequent actions.

d) A declaration that the petitioner is deserving of damages to be assessed by this Honourable court.

e) Costs and interests.

9. The petitioners' case is that the actions of the henchmen of the 4th respondents were illegal and in complete violation of their rights under the Bill of Rights of the Constitution as, following the claims made against them by the 4th respondent, officers of the 2nd respondent began questioning them over their private properties and bank accounts in breach of Article 40(3) of the Constitution.

10. They contend that the fact that the 2nd respondent proceeded to act on the 4th respondent's complaint even after it had been established that there was no impropriety on their part indicates an improper motive on the part of the respondents.

11. The petitioners are apprehensive that unless the 4th and 5th respondents are restrained by this court, they could continue with the abuse of the petitioner's constitutional rights. They further contend that the charges preferred against them were based on a false complaint and should be declared unconstitutional for being discriminatory and against fair labour practices as envisaged under Articles 27 and 41(1) of the Constitution.

12. They claim that the 4th respondent is determined to remove them from office and replace them with more malleable persons under the guise of the trumped up charges. They further state that the 2nd and 3rd respondents intend to invade and violate their right to privacy by continuing to conduct investigations to support the charge of abuse of office against them which investigations will involve prying into their private lives and personal expenses contrary to the provisions of Article 31 of the Constitution.

Petitioners' submissions

13. In the written and oral submissions presented by M/S Khaminwa & Khaminwa advocates for the petitioners, it was submitted that the 1st, 2nd and 3rd respondents failed to accord the petitioners equal treatment before the law and instead sought to arrest and charge them with the full knowledge that there was no sufficient evidence to support the charge of abuse of office hence the application to the trial court in CMC Miscellaneous Criminal Application No. 2736 of 2017 DCI Headquarters Reuben Njuguna Gachukia & 6 Others seeking court's leave to have all the respondents detained for a further 5 days to enable the 2nd respondent conclude investigations against the petitioners.

14. Counsel submitted that the public recording and airing, of the events of 23rd August 2017 also amounted to discrimination and that the respondents' actions were in breach of Articles 10, 25 and 29 of the Constitution. It was submitted that there was no reasonable cause for the search at the petitioners' offices and that the petitioners' legitimate expectation was that the investigations would be conducted in accordance with the Constitution.

15. Counsel submitted that the 4th respondent acted in an arbitrary manner as he did not have the right or locus standi to carry out investigations in which case, the investigations process was polluted right from the start and that only a court of law can bring sanity to the matter by upholding the Rule of Law and staying the entire criminal proceedings permanently or by issuing an order of prohibition. For this argument, counsel cited the case of **Osman vs Director of Public Prosecution[1999] ALL E.R.** wherein it was held that for a search to be valid, the police must;

a) Identify himself

b) State the grounds for search.

c) State the object of it; and

d) Inform the subject of their right to a record of search findings.

16. It was the petitioners' case that none of the above conditions were met during the raid in their offices and that what transpired during the raid was an abuse of process by the respondents. Counsel argued that the decision to charge the petitioners cannot be justified in the circumstances of the case as it flies in the face of Section 4 of the office of the Public Prosecutions Act and Article 157 of the Constitution. Counsel relied on several authorities on this point including the decision in the case of **Republic vs Director of Public Prosecutions & Another Ex parte Chamanlal Vrajilal Kamani & 2 Others [2015]eKLR** where the court stated that;

*“Criminal proceedings ought not to be instituted simply to appease the spirit of the public yearning for the blood of its perceived victims. This is a country governed by the Rule of law and any action must be rooted in the rule of law rather than on some perceived public policy or dogmas. The former has been branded an unruly horse, and when you get astride it, you never know where it will carry you. In paragraph 126, the court also relied on the case of **Republic vs Attorney General Ex parte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** where the court held, “as criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior 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.”*

The 1st, 2nd and 3rd Respondents' Response

17. The 1st- 3rd respondents opposed the petition through the replying affidavit of **Cpl. Moses Gituathi** who avers that he, on 23rd August 2017, received a letter of complaint from the 4th respondent who informed him that he had found cash and cheques amounting to KShs. 7 million from the 1st petitioner's office cabinet which information prompted the 2nd respondent to commence investigations with a view to establishing if any money had been lost by the 5th respondent or diverted to the petitioners' accounts. He also states that upon conducting investigations, discrepancies were discovered in the 5th respondent's collection of revenue and revenue records that raised suspicion and caused the police to file Miscellaneous Application No. 2780 of 2017 at Milimani Chief Magistrate's Court where they obtained orders to search the petitioners' bank accounts.

18. At the hearing of the petition, the 3rd respondent's counsel submitted that the prayers sought by the petitioners are unconstitutional as they seek to prevent the respondents from exercising their mandate as provided for by the law and further that the prayers would result in a greater injustice to the criminal justice system and public interest as they would insulate the petitioners against future liability in the matter notwithstanding discovery of new evidence.

19. Counsel submitted that the petition did not meet the threshold of proof as set in the case of **Anita Karimi Njeru vs Republic (1976-1980) KLR 1272** and further that Article 24(1) of the Constitution provides that a fundamental right or freedom shall not be limited except by law, in which case, enquiries into the petitioners' bank accounts was to establish if any monies had been diverted to the petitioners' accounts based on the complaint that had been lodged by the 5th respondent.

20. Counsel argued that the jurisdiction of the court to interfere with the exercise of the 3rd respondent's discretion in making prosecutorial decisions should be exercised sparingly and in the clearest of cases and where it is proved that it has been unfairly and improperly exercised. For this argument, counsel relied on the decision in the case of **Douglas Maina Mwangi vs Kenya Revenue Authority and Another HC Constitutional Petition No. 528 of 2013** wherein it was held that:

“When dealing with the decision as to whether or not to prosecute, the office of DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to the Constitution, in bad faith or amounts to an abuse of process....I do not find any reason or ground to intervene in that decision nor is it the obligation of the court to supervise the minutiae of investigation and prosecution.”

21. Counsel submitted that under Article 157 of the Constitution, the 3rd respondent is an independent office mandated to institute and undertake criminal proceedings against any person before any court of law in respect to any offence alleged to have been committed. Counsel cited the decision in the case of **Republic vs DPP Ex parte Victory Welding Works and Another HC Misc. No 249 of 2012** where the court held that the office of the Director of Public Prosecutions is an independent constitutional office that is only subject to the control of the court based on the principles of illegality, rationality and procedural impropriety. Counsel argued that the trial court was better placed to look into the sufficiency and veracity of the evidence presented to it by the prosecution.

22. On the prayer for an order of prohibition, counsel submitted that the same is discretionary and only tenable where a public body or official acted in excess of their powers. Counsel relied on the decision in the case of **Republic vs The Chief Magistrate, Milimani and 2 Others Ex. P Tusker Mattresses Ltd and 3 Others HC Misc. Civil Application No. 179 of 2012** where it was held 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.”

4th & 5th Respondents' Response

23. The 4th and 5th respondents opposed the petition through the replying affidavit of **PAUL WACHIRA** a Senior Superintendent of police

attached to the Directorate of Criminal Investigations who avers that on or about 23rd August, 2017, he received information sufficient to raise a reasonable suspicion, to the effect that the petitioners had not remitted money collected as revenue on behalf of the 5th Respondent to the 5th Respondent's bankers for banking in accordance with Public Finance Management (County Governments) Regulations, 2015 which he claims, superseded "Procedure for Invoicing, Receipting and Banking Council's Collection in Cash Office" that had been relied upon by the petitioners to justify their failure to promptly deposit the cash in the 5th respondent's account.

24. He states that he immediately commenced investigations into the said allegations after which he established that revenue collected on 22nd September 2017 amounting to **KShs. 5,471,124** in cash was still being held at the cash office and that it was not immediately clear why the cash had not been banked whereas cheques collected on the same day amounting to **KShs. 2,332,752** had already been banked thereby prompting him to interview the Petitioners who could not explain why they had not banked the cash as required yet the bank was/is only 10M away and that the Bank Manager confirmed to him that whereas the bank's representatives had been given cheques the said representatives had not been given any cash..

25. He further states that he also noted that the Cash Reconciliation Sheet for 23rd September 2017 had not been reconciled by the Petitioners against the cash handed over to the 1st petitioner and that he immediately informed the 4th Respondent about the failure by the Petitioners to comply with Public Finance Management Act and the Regulations thereunder.

26. He also states that he conducted the said investigation in line with the normal investigative process and that they did not have any sinister motive in the entire exercise as the 5th Respondent is empowered under the relevant employment statutes, Fair Administration Actions Act and or Public Finance Management Act and Regulations thereunder to investigate conducts constituting gross misconduct and to taking any action authorized by the said statutes.

27. He contends that the Petitioners have not demonstrated how the 4th and 5th Respondents have violated and or threatened to violate their Constitutional rights and the allegations therein are merely hypothetical as they seek to stop the exercise of lawful actions by the 4th and 5th Respondents herein and further that if the Petitioners feel that their rights are violated by being charged with crimes they did not commit and or are falsely charged, then the proper forum in which to raise that is the Trial Court and not through a petition in a Constitutional Court.

28. It was the 4th and 5th respondents' case that the Conservatory Orders prohibiting investigations and prosecution of the Petitioners would only be allowable if the Petitioners demonstrate that the Respondents' conduct thus far has been unlawful, unreasonable, is contrary to public interest, the administration of justice or has abused the legal process.

29. At the hearing of the petition, counsel for the 4th and 5th respondents highlighted the cardinal issues for determination to be whether the court can issue conservatory Orders staying any sanction by the 4th and 5th Respondents against the employment of the Petitioners and orders restraining the 1st and 2nd Respondents from conducting further investigation into the private affairs of the Applicants/Petitioners.

30. On jurisdiction, counsel submitted that that the Honourable court lacks jurisdiction to grant prayers bordering on the petitioners' employment relationship with the 5th Respondent as by dint of the provisions of Article 165 (2)(b) and Section 12 of the Employment and Labour Relations Court (ELRC) Act, the only court empowered to do so is the ELRC. For this argument, counsel relied on the Supreme Court decision in **Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR**, where the court pronounced itself on jurisdiction as follows-

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation..." (Emphasis provided).

31. On the claim that the petitioners' constitutional rights under Articles 10, 27, 31(c) and 41(1) of the Constitution had been violated, counsel submitted that petitioners had flatly failed to prove, with the requisite degree of precision, the specific rights which have been violated, the manner in which they have been violated and the persons against whom such a complaint of violation has been made. For this argument, counsel cited the case of **Mumo Matemu v Trusted Society of Human Rights Alliance Civil Appeal 290 of 2012 (2013 eKLR)** and **Anarita Karimi Njeru -vs- Attorney General, (1979) KLR 154**.

32. Counsel added that is trite law that the court will not interfere with other State organs unless it can be shown that they violate the constitution. He cited the Court of Appeal decision in **Commissioner Of Police & The Director Of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR** where it was held as follows-

"...we now turn to the crux of this appeal – whether or not the court can prohibit the police from conducting investigation into an alleged crime. From the provisions of the Constitution, and the National Police Service Act, as a key agency of the criminal justice administration, the police are responsible for performing multi-faceted functions such as the prevention of crime, maintenance of law and order, and conduct of investigation of crimes.

For the purpose of this appeal, we shall focus on the role of police in the investigation of crime and the extent, if at all, to which the court can interfere with this function bearing in mind that police efforts to investigate crime and collect evidence represent the very foundation of the criminal justice system. Article 157 (4) and (11) of the Constitution underscores this point. It provides that:-

"4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to

investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

.....

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.” (Our emphasis supplied).

Article 245 (4) (a) of the Constitution on the other hand provides that:-

“245(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to-

The investigation of any particular offence or offences.” (Emphasis).

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, **it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law.** That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. **The courts must wait for the investigations to be complete and the suspect charged.**

By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. **The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution.** See *Githunguri V. Republic* [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) **must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification.** The court has inherent power to interfere with such investigation or prosecution process.”

33. It was submitted that the decision to investigate the Petitioners in the instant matter was sound in law and made without any bias or bad faith and cannot be said to have been made to achieve ulterior motives or as a tool to settle scores as it was made with the solitary intention of inquiring into the alleged conduct of the Petitioners and in public interest. Counsel asserted that it had been demonstrated that the Petitioners were found with money belonging to the 5th Respondent in contravention of the Public Finance Management Act (hereafter **PFMA**) which at Section 162 (2) obligates every County Public Officer to comply with the provisions of the Act as far as possible while Regulation 81 of the Public Finance Management (County Governments) Regulations, 2015 obligates receivers of County Revenue to promptly deposit it into the County exchequer account.

34. Counsel maintained that allowing the prayers sought in the petition will be akin to inviting the court to assume the role and place of the Trial Court and evaluate the defence and prosecution case in advance and or usurp the powers of the 3rd Respondent to investigate and or prosecute enshrined under Article 157 of the Constitution of Kenya. Counsel cited the decision in **Republic v Director of Public Prosecutions & 2 others Ex-Parte Stephen Mwangi Macharia [2014] eKLR**, where the court pronounced itself as follows:-

“...the mere fact there is no sufficient evidence to sustain a conviction is no ground for halting or terminating a criminal case. The trial Court is usually in a better position to scrutinise the evidence presented before it in determining whether such evidence prove the accused’s guilty beyond reasonable doubt. To paraphrase the decision in *Meixner & Another vs. Attorney General* (supra) to set out on that voyage would have the effect of embarking upon an examination and appraisal of the evidence to be adduced before the trial Court with a view to showing the applicants’ innocence yet that is hardly the function of the judicial review court.”

Analysis and determination

35. I have carefully considered the pleadings filed herein, the parties’ submissions and the authorities that they cited. The main issue for determination is whether the petitioners have made out a case so as to warrant the granting of the orders sought in the petition. In a nutshell, the petitioners sought orders for declaration of violation of rights to equality and privacy, declaration that any punitive action taken against their employment would be ultra vires, orders prohibiting the 1st, 2nd and 3rd respondents from investigating or prosecuting them based on the events of 23rd August 2017, damages and costs of the suit.

36. In respect to the prayer that any punitive measures taken against the petitioners’ employment be declared null and void, the respondents argued that this court, by dint of the provisions of Article 165(5), lacks the jurisdiction to entertain such a prayer. **Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350** defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise **Words and Phrases Legally Defined Vol. 3, at page 113** reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

37. The respondents argued that under Article 162(2) as read with section 12 of the Employment and Labour Relations Court Act the prayer does not fall within the ambit of the jurisdiction of this court.

Section 12 of the Employment and Labour Relations Act on the other hand provides for the jurisdiction of the ELRC in the following terms:

“(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers’ organization and a trade union organization;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers’ organization and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer’s organization or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.”

38. **Article 162(2)** on the other hand empowers Parliament to “establish Courts with the status of the High Court to hear and determine disputes relating to

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

Clause (3) thereof authorizes Parliament to “determine the jurisdiction and functions of the Courts contemplated in clause (2)”.

Article 165(5) stipulates that the High Court shall not have jurisdiction in respect to matters-

a) Reserved for the exclusive jurisdiction of the supreme court under this Constitution; or

b) Falling within the jurisdiction of the courts contemplated in Article 162(2).

39. Besides the above provisions of the Constitution, it is also trite law that jurisdiction is derived from the Constitution and statute and that without jurisdiction, a court cannot make one more step and must down its tools. (See **Owners of Motor Vessel “Lilian”S” vs Caltex Oil (Kenya) Ltd** [1989] eKLR).

40. Whenever the issue of jurisdiction is raised, the court is enjoined to wholly reflect upon it while bearing in mind the relevant constitutional and statutory provisions. In this regard and taking into account the above cited provisions and authorities, I find that the prayer that (b) of the petition touches on the employer/employee relationship between the petitioners and the 4th and 5th respondents which is an area that this court cannot venture into as it falls within the purview of the ELRC. In any event, the respondents’ claim that the petitioners had already instituted a similar claim before the ELRC was not disputed by the petitioners. My above finding that this court does not have the jurisdiction to entertain the claim regarding the petitioners’ employment does not however preclude this court from considering the other claims on violation of constitutional rights which was, in any event, the dominant issue for determination in this petition.

Right to equal treatment

41. Turning to the issue of whether or not petitioners' rights to equality and privacy under Articles 27, and 31(c) of the Constitution were violated, the petitioners' case was that by conducting arbitrary searches in their offices and thereafter initiating criminal proceedings against them, the respondents violated their constitutional rights. Article 27 of the Constitution embodies the principle of equality and non-discrimination thus:

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law...

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

42. Needless to say, equality includes the full and equal enjoyment of all rights and fundamental freedom. The import of Article 27 is that human rights and fundamental freedom are guaranteed to all persons by virtue of being human and must be enjoyed without limitation. That is to say that the rights and fundamental freedoms that are guaranteed by the Constitutions must be enjoyed by all human beings in equal measure and to the fullest extent.

43. The constitution prohibits all forms of discrimination and grounds of discrimination are not exhaustive. The petitioners claimed that they were not accorded equal treatment before the law as charges had been preferred against them together with 5 other suspects. With all due respect to the petitioners' argument, my humble view is that there was no proof that the action taken against the petitioners herein was discriminatory as they did not show that they were subjected to different treatment from other suspects on any of the grounds stated in Article 27(1) of the Constitution. In the case of ***John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR***, the Court stated referring to Article 27 of the Constitution;

“[i]t must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the constitution.”

44. In the instant case, I reiterate that the petitioners' claim that they were not accorded equal treatment before the law was not proved as it was not shown that there were other employees of the 5th respondent whose offices were raided under similar circumstances and were not given the same treatment as the petitioners in as far as the institution of the criminal charges is concerned.

Right to Privacy

45. On the right to privacy under Article 31 of the Constitution, the petitioners claimed that by arbitrarily raiding their offices and subsequently seeking court orders to probe into their private bank accounts and personal expenses, the respondents infringed their right to privacy.

The right to privacy is provided for under **Article 31** of the **Constitution** in the following manner;

Every person has the right to privacy, which includes the right not to have –

- a. Their person, house or property searched;***
- b. Their possessions seized;***
- c. Information relating to their family or private affairs unnecessarily required or revealed; or***
- d. The privacy of their communications infringed.***

46. From the facts of the case and the evidence on record, it is not in doubt that that the petitioner's right to privacy was violated. I am satisfied that the petitioners have demonstrated, on the balance of probabilities, that their offices were arbitrarily raided and searched by persons who were not law enforcement officers and who had no locus standi to undertake such a raid. The respondents did not tender any explanation for their actions save for the claim that they had information that the petitioners were holding cash in their offices which claim, I have already found, did not mount to the commission of a criminal offence as such cash can only be held by the petitioners in their offices in their capacity as the 5th respondent's cashier and accountant respectively.

47. In this case, it was not disputed that the investigations that led to the subsequent arrest and institution of criminal charges against the petitioners were initiated by the 4th respondent who employed 'goons' to raid the petitioners' private offices on an alleged mission to find out if the petitioners were having any cash therein that belonged to the 5th respondent. The claim that the raid was conducted by goons was not disputed by the 4th respondent and was confirmed by the 1st- 3rd respondents deponent **Cpl. Moses Gituathi** who averred that he, on 23rd August 2017, received a letter of complaint from the 4th respondent who informed him that he had found cash and cheques amounting to Kshs. 7 million in the 1st petitioner's office cabinet which information prompted the 2nd respondent to commence investigations with a view to establishing if any money had been lost by the 5th respondent or diverted to the petitioners' accounts. My take is that the 4th respondent does not have powers to investigate or 'find cash' as he claimed to have done and I find that the investigations into the alleged loss of cash by the 4th respondent, was irreparably botched from the onset and that the 4th respondent could not purport to belatedly sanitize an illegal search by inviting the 1st, 2nd and 3rd respondents to carry out the said investigations.

48. From the facts of the case and the evidence on record, it is not in doubt that that the petitioners' right to privacy was violated. The petitioners have demonstrated on the balance of probabilities that their offices were arbitrarily raided and money seized therefrom. The 4th respondent did not tender any explanation for his actions save for the claim that he had information that the petitioners were holding cash in their offices which then begs the question as to where the 5th respondent's cashiers could have kept the cash, at least before it is banked, if not in their offices. My take is that the manner in which the search was carried out by the 4th respondent and his hirelings does not meet the validity test that was stated in the case of **Osman vs Director of Public prosecutions** (supra) as the search was conducted by persons who were not only not police officers but they also did not identify themselves to the petitioners before the search, or state their grounds/ objects of the search and neither did they inform the petitioners of their right to a record of the search findings.

49. My further finding is that the manner in which the investigations and the subsequent arraignment of the petitioners before were conducted has all the hallmarks of malice and abuse of process. I say so because if indeed the 4th respondent had information regarding any misuse of funds or abuse of office, then nothing would have been easier for him to do than to invite law enforcement authorities to carry out the audit or investigation instead of taking the law into his own hands by employing the services of goons. My humble view is that the actions of the 4th respondent and his henchmen cannot be tolerated in a democratic society that is governed by the rule of law as it is not open for any public servant, however high ranking, to usurp the powers of the law enforcement agencies and purport to carry out investigations and searches into other people's private offices. My finding is bolstered by the provisions of Section 118 of the Criminal Procedure Code which stipulates that:-

Where it is proved on oath to a Court or a Magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the Court or a Magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a Court having jurisdiction to be dealt with according to law.”(Emphasis added)

50. In the instant case the respondents did not establish that they had search warrants to search the petitioners' offices and I am therefore satisfied that was conducted in total disregard to the petitioner's right and freedom from arbitrary search.

Conservatory orders

51. The petitioners also sought conservatory to prohibit the 1st, 2nd and 3rd respondents from investigating or prosecuting them based on the events of 23rd August 2017. Article 157 of the Constitution establishes the office of the Director of Public Prosecutions and grants him powers to initiate, sustain or discontinue prosecutions without direction or control from any person or authority, Article 157(11) requires the 3rd respondent, in exercising the prosecutorial powers to *have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.*

52. In the instant case, as I have already found in this judgment, the impugned investigation into the alleged indiscretions by the petitioners was tainted by malice and abuse of process right from its inception. Under the above circumstances I find that the prosecution that was initiated as a result of such investigation cannot be said to be free from suspicion of malice and ulterior motive. I also note that no sooner had the petitioners taken plea before the trial court than the prosecution sought for more time to carry out further investigations which turn of events before the trial court lends credence to the petitioners' claim that their prosecution was actuated by malice as it is apparent that the petitioners were arraigned in court without any cogent evidence, a scenario that can be likened to the proverbial cart that was put before the horse. This court is of the view that nothing would have been easier than for the 3rd respondent to finalise investigations before preferring the charges, if any, against the petitioners as one has to wonder what the fate of the petitioners would be if, after the conclusion of such investigations, it turns out that there was no sufficient evidence to sustain the charges in the first place.

53. This court takes judicial notice of the fact that courts have in the recent past been swarmed with numerous cases where the prosecution present high profile suspects in court prematurely before concluding investigations only for such cases to collapse for lack of evidence thereby creating the impression that courts are either ineffective in their work or are colluding with suspects to defeat justice. In the circumstances of the present case, it is clear that the prosecution was instituted without reasonable or probable cause and this court cannot therefore countenance the continuation of such prosecution. The grounds upon which prosecution may be prohibited were considered in the case of **Director of Public Prosecutions V Martin Maina & 4 Others** [2017] eKLR, wherein the Court cited, with approval, the decision by the Supreme Court of India in **State Of Maharashtra & Others V Arun Gulab Gawali & Others**, Criminal Appeal No. 590 of 2007. The grounds are as follows:

“(i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(ii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(iii) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(iv) Where the allegations constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fails to prove the charge.”

The court went further to state that:-

“The power of quashing criminal proceedings has to be exercised very sparingly with circumspection and that too in the rarest of rare cases.”

54. Having regard to the above cited authorities over the power of the court to quash/prohibit the institution of criminal proceedings I come to the conclusion that this case meets the criteria set for halting prosecutions. I am guided by the position taken in the case of **Regina vs Ittoshat [1970] CRNS 385** wherein it was held that:-

“this court not only has a right but a duty to protect citizens against harsh and unfair treatment. The duty of this court is not only to see that the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner.”

55. Similarly in the case of **Joram Mwenda Guantai V The Chief Magistrate [2007] 2 E.A. 170**, the court held:

“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 process of the court and is oppressive and vexatious, the judge has the power to intervene and the High Court has an inherent power and duty to serve fair treatment for all persons who are brought before the court or to a subordinate court to prevent an abuse of the process of the court.”

Damages

56. The petitioners sought damages for the violation of constitutional rights. Article 23 (3) of the Constitution empowers this court to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. What amounts to "appropriate relief" was discussed by the South African Constitutional Court in **Minister of Health & Others vs. Treatment Action Campaign & Others(2002) 5 LRC 216** at page 249 as follows:-

“...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal.”

57. The principles applicable to award of damages for constitutional violations under the Constitution were exhaustively discussed by the Privy Council in the famous case of **Siewchand Ramanooop vs. The AG of T&T**, PC Appeal No 13 of 2004 wherein it was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.

All these elements have a place in this additional award. “Redress” in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions “punitive damages” or “exemplary damages” are better avoided as descriptions of this type of additional award.”

58. In **Peters v. Marksman & Another** [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in **Fuller v A-G of Jamaica (Civil Appeal 91/1995**, unreported), where the Court held that:

“It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable...Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.”

59. The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is “just and appropriate” in **Doucet-Boudreau v. Nova Scotia (Minister of Education)**, 2003 SCC 62 to include, a remedy that will :

(1) meaningfully vindicate the rights and freedoms of the claimants;

(2) employ means that are legitimate within the framework of our constitutional democracy;

(3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and

4) be fair to the party against whom the order is made.

60. Having regard to the above judicial experience and philosophy, it is clear that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court but that such discretion is limited by what is "appropriate and just" according to the facts and circumstances of a particular case in view of the fact that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringement.

61. Taking a cue from the dictum in the above cited cases and having regard to the fact that the prosecution of the petitioners had barely commenced before the trial court, I find that the justice of this case does not favour the granting of an award of damages for the breach of constitutional rights and that a declaration of violation of rights would be the appropriate remedy in the circumstances of this case.

62. Consequently, I come to the conclusion that the instant petition succeeds, albeit in part, and I allow it in the following terms:-

a) A declaration is hereby issued that the petitioners' rights as enshrined in the Constitution with respect to the right to privacy have been infringed by the acts and/or omissions of the respondents.

b) Conservatory orders are hereby issued prohibiting the 1st, 2nd and 3rd respondents from investigating and prosecuting the petitioners based on the events of 23rd August 2017.

c) Each party shall bear its/his own costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 12th day of April 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr Adan for the petitioners

Court Assistant - Fred