REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NUMBER 6 OF 2018

IN THE MATTER OF ARTICLES 19,20,22,21,23,24 AND 25 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONTRAVENTION OF ARTICLE 31, 35,40,50,57,73 AND 157 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF UNLAWFUL AND ILLEGAL SEIZURE AND DETENTION OF PRIVATE PROPERTY AND CONTRAVENTION OF THE OWNERS FUNDAMENTAL RIGHTS.

AND

IN THE MATTER OF PROCEEDINGS IN THE CHIEF MAGISTRATES COURT AT KITUI CRIMINAL CASE NUMBER 1392 OF 2017

AND

IN THE MATTER OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004

BETWEEN

AGNES NGENESI KINYUA aka AGNES KINYWA...PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.......................................1ST RESPONDENT

RAHAMAD MUKHISA WASILWA...2ND RESPONDENT

JUDGEMENT

1. These proceedings, according to the petitioners, relate to the illegal and/or unlawful seizure and detention of the petitioner's vehicle registration number **UAP 188T** by the 2nd Respondent and the charging of the petitioner by the 1st Respondent in an attempt to cover up the illegal and unlawful violation of the petitioner's rights to her property.

2. It was the petitioner's case that motor vehicle registration number **UAP 188T,** is owned by **Francis Sebagenzi Munyambabanzi** a Ugandan Citizen who purchased the same from its registered owner **Top Finance Co. Ltd** of P.O Box **33913** Kampala. The said vehicle is registered in the partner state of Uganda and therefore its use within Kenya is subject to the provisions of **the *East African Community Customs Management Act 2004***.

3. The petitioners averred that the owner hired out the vehicle to the petitioner for her use for a period of 12 months effective from June 2017 to May 2018 at a consideration of **Kshs. 1,500,000.00** at the rate of **Kshs. 125,000.00** per month. In consideration of the agreement, and upon being paid the agreed amount, the said **Francis Sebagenzi Munyambabazi** deputized his agent **Eric Kiio** to convey the vehicle from Uganda to Kenya and deliver it to the petitioner, which the said agent did, and the petitioner became the owner of the vehicle within the meaning of the provisions of the ***East Africa Customs Management Act, 2004***. According to the petitioner, she has been in compliance with

the provisions of the law and there has been no outstanding duty payable to the Kenya Revenue Authority in respect of the said vehicle.

4. However, on 20th December, 2017 at about 8.00pm, while the petitioner was driving the said motor vehicle Registration number UAP 188T, Toyota Land Cruiser, within Kitui town, the 2nd Respondent arrested the said vehicle and commandeered it to Kitui Police Station where he ordered it parked at and took the ignition Key thereof saying that the vehicle was now under his custody. It was averred that the 2nd Respondent did not book the Seizure and subsequent detention of it in the Occurrence Book and when the petitioner demanded that it be so booked and an extract thereof given to her, she was served with Requisition to compel attendance under section 52(1) of the ***National Police Service Act*** requiring the petitioner to attend before the 2nd Respondent on 21st December, 2017. The petitioner also discovered that the 2nd Respondent was making inquiry in to alleged offence of possession of uncustomed Goods.

5. On the said day at 11.00am the petitioner did appear before the 2nd Respondent and her attendance was extended by the 2nd Respondent to 22nd December, 2017. According to the petitioner, on her way, she passed through the report office of the Kitui Police station to check whether the seizure and detention of her vehicle had been booked and the officer at the report desk informed her that there was no report booked concerning the seizure and detention of the said motor vehicle.

6. It was pleaded that on 22nd December, 2017 at about 9.15am, while the petitioner was preparing to attend the 2nd Respondent in his office at 11.00am per his directions, the petitioner received a call from a lady friend who works with County Government of Kitui whose vehicle had also been seized, who informed her that she was at the office of the 2nd respondent and had been informed that seen 3 files involving foreign registered vehicles, one of which was the petitioner's, were being taken by the 2nd Respondent to Court. The said lady also informed the petitioner that she overheard the 2nd Respondent say that he would make the petitioner learn a lesson of her lifetime.

7. The petitioner then instructed her advocate to rush to court and verify the information which was confirmed to be true as the petitioner had been charged vide Criminal Case Number 1392 of 2017.

8. It was pleaded that the petitioner's advocate subsequently attended court on 22nd December, 2017, and raised the issue that the case was instituted in contravention of the law as it was filed before any meaningful investigations had been carried. Accordingly, the court deferred the plea to 9th January, 2018 and directed summons to be issued and served upon me by the 2nd Respondent. However, the 2nd Respondent did not serve the petitioner with summons and on 9th January, 2018 the plea was deferred to 18th January, 2018.

9. According to the petitioner, the intentions of the 2nd Respondent in preferring charges against her were to ensure that a warrant of arrest would be issued against her in order that he would arrest her at 11.00am on 20th December, 2017 when she attended him in his office. The fact that in the charge sheet the 2nd Respondent indicated that the petitioner was out on free bond when he knew very well she was not was, according to the petitioner, a testimony to this fact. Her belief was further bolstered by the fact that instead of serving her with summons to attend Kitui Law court, on 18th January, 2018 as ordered by the court, the 2nd Respondent took out summons to appear in court on 9th January, 2018 to answer charges of not appearing in court on 22nd December, 2017. It was the petitioner's belief that the 2nd Respondent had intended all along to abuse the court process to have her arrested and put in cells knowing that 22nd December, 2017 was a Friday and the next court session would be Wednesday 27th December, 2017.

10. The petitioner deposed that on 20th December, 2017 at about 9.00pm, she received a call from a man who introduced himself to her as Bosnia through safaricom line number 0722 630 992 and informed her that he was at Kitui police station and had a friend of his whose foreign registered vehicle had also been seized by the 2nd Respondent. The said Bosnia informed the petitioner that he was negotiating for the release of his friend's vehicle and if the petitioner wanted hers to be released to her, the 2nd Respondent was demanding Kshs. 50,000.00. However, the petitioner told the caller that she does not pay bribes and in any case she did not see any logic in paying for the release of her own vehicle. The petitioner therefore believed that it is for this reason that the 2nd Respondent decided to teach her a lesson that she would never forget as her friend had informed her on 22nd December, 2017.

11. The petitioner disclosed that despite her inquiries from the Respondent as to the circumstances that rendered her vehicle unaccustomed good, the Respondents have not given her any answer. On 15th January, 2018, the petitioner went to the office of the commissioner of customs to enquire on any duty that may be outstanding on her vehicle and the officer who was deputized to deal with her case checked their records and confirmed to her that there was no duty payable from their records. Upon being shown a copy of the charge sheet, he confirmed that they had no complaint against the petitioner and further informed he they had not directed or sought the assistance of the 2nd Respondent concerning the petitioner's vehicle and further that the directorate of Criminal investigations does not have mandate or authority to deal with cases arising from the revenue collection by the Commissioner of Customs. The petitioner insisted that her vehicle is duly authorized to be in Kenya and she has always ensured that it is compliant.

12. Accordingly, to the petitioner, no investigations carried out and no statement taken from the petitioner, and as at 6th February, 2018, more than 2 months after the case was presented in court, there were no statements in the then opened police file. The petitioner lamented that despite notices given to the 1ST Respondent by the Petitioner's Advocates, the 1st Respondent has failed to act on the serious issues raised and has never given any reasons for his failure to do so.

13. It was the petitioner's case that said the vehicle has been in the custody of the 2nd Respondent since December 2017, thereby violating the petitioner's right to user as a result of which the petitioner suffered loss and damages of Kshs. 625,000.00. The Petitioner averred that there was no duty payable and/or owing in respect of the motor vehicle as at 20th December, 2017, and no duty has ever owed. Accordingly, and the charges preferred against her were ill intended and actuated by express malice on the part of the 2nd Respondent. Further, the seizure and subsequent detention of her vehicle by the 2nd Respondent was unlawful and illegal as at the time of the seizure and during all the time he has detained it, the 2nd Respondent had, and continues to lack authority and/or power to do so and is personally liable to the petitioner as

his acts are not sanctioned by the law and therefore amounts to abuse of office and impunity.

14. According to the petitioner, the charges against her were preferred in blatant abuse of the law, procedure and usage regarding investigations and that the 1st Respondent has failed to take control and exercise his constitutional mandate, but instead he has subjected himself to the whims, wishes and control of the 2nd Respondent. It was therefore averred that the Respondents' actions as set out above are patently unlawful and a violation of the Constitution for the reasons that the Seizure and detention of the petitioner's vehicle by the 2nd Respondent effective is a violation of articles 20(1) and 20(2) Article 31(1) and Article 40(a) and 40(3) of the Constitution and therefore null and void. Further, the charging of the petitioner on 22nd December, 2017 even before investigations were conducted and concluded was a violation of Article 25(c) and Article 50(2) (c) of the Constitution, and therefore the charges against the petitioner are unlawful, null and void. In addition, the continued detention of the petitioner's vehicle is a violation of Article 40(3) of the Constitution and that the maintenance of the charges in the lower court by the 1st Respondent is a violation of Article 21(1) and Article 157(11) of the Constitution and therefore the charges are null and void. It was contended that the charging of the petitioner by the 1st Respondent at the instigation of the 2nd respondent is a violation of Article 157 (10) of the Constitution and therefore the proceedings before the subordinate court are null and void and that the 1st Respondent in instituting proceedings against the petitioner even when no investigations had been carried out violated Article 73(1) (a) and therefore the charge against the petitioner is null and void. It was contended that the decision by the 1st Respondent to maintain the charge against the petitioner even when there was admission that there were no witness statements as late as 20th March, 2018 is a violation of Article 73(2)(b) of the Constitution, and is null and void as that decision is not based on the guiding principles of leadership and integrity.

15. In the petitioners' view, the issues that fall for determination in this petition are:

(a) Whether the 2nd Respondent had the legal authority and/or power to impound or seize the petitioner's vehicle and detain whether in doing so, he violated, and has been in violation of the petitioner's rights protected by Article 40(1) and Article 40(3) of the Constitution.

(b) Whether the charge preferred against the petitioner in the Chief Magistrate's Court at Kitui vide Criminal case number 1392 of 2017 is null and void for violating the petitioner's right to a fair trial which is a right protected by article 25(c) of the Constitution.

(c) Whether the 1st Respondent has violated Article 157 of the Constitution by preparing a charge against the petitioner even when no meaningful investigations had been carried out, and therefore the charges are null and void.

(d) Whether the act seizing and detaining the petitioner's vehicle by the 2nd Respondent was devoid of legal authority and statutory power and therefore it infringed on the petitioner's right to her property in violation of Article 40(1) and 40(3) of the Constitution thereby rendering the seizure and detention of the vehicle null and void.

(e) Whether by failing to disclose to the petitioner the amount of duty non-payment whereof made the 2nd Respondent seize and detain her vehicle violated the petitioner's right to information guaranteed by Article 35 therefore rendering the charge null and void.

(f) Whether in failing to disclose in the charge sheet the particular fact that renders the motor vehicle to be uncustomed good, the 1st respondent violated the petitioner's right to a fair trial and right to be informed of the charge, with sufficient detail to answer it which violates Article 50(1) (b) of the Constitution of Kenya and the charge is therefore null and void.

(g) Whether the 1st Respondent in maintaining the charge against the petitioner he has breached public trust in him and therefore violated Article 73(1) and Article 73(2) (b) of the Constitution and therefore has rendered his decision null and void.

(h) Whether the petitioner's right to enjoy her property having been violated by the 2nd Respondent, the High Court can award damages to her.

16. The petitioner therefore believed that her trial will be a sham and violation of her rights as there is no evidence for the prosecution to present to the court and that the criminal case was presented to court to cover the 2nd Respondent's wrongful acts. To her, the 1st Respondent has abdicated his constitutional duty and left the 2nd Respondent to dictate to him as is evidenced by the record of the proceedings already taken in the subordinate court.

17. The petitioner therefore prayed for the following orders:

(a) A declaration that the charging of the petitioner in Criminal Case number 1392 of 2017 without any meaningful investigations were carried out amounted to charging her without evidence and therefore constitutes a violation of Article 25 of the Constitution and is therefore null and void.

(b) A declaration that failure to disclose in the charge sheet the facts that rendered the motor vehicle registration UAP 188T an uncustomed good is a violation of Article 50(1) (b) of the Constitution which renders the charge null and void.

(c) A Declaration that the decision by the 1st Respondent to maintain the charge against the petitioner is a violation of the requirement that the 1st Respondent should be objective in his decisions and to ensure that his decisions are not influenced by any improper motives, and therefore the 1st Respondent has violated Article 73(2)(b) of the Constitution of Kenya,2010 which renders his decision null and void.

(d) A declaration that the 2nd Respondent had no lawful authority to seize and detain the petitioner's motor vehicle UAP 188T and therefore the seizure and detention of the vehicle by the 2nd Respondent violates Article 40(1) and 40 (3) of the Constitution which renders the seizure and detention null and void.

(e) A declaration that charge against the petitioner violates the provisions of Article 25 and article 50(b) of the Constitution and therefore the said charge is reviewed and quashed.

(f) A mandatory injunction directing the 2nd Respondent to release the motor vehicle registration number UAP 18T to the petitioner.

(g) An order that the 2nd Respondent do compensate the petitioner for all losses and damages arising from the seizure.

(h) Costs of the petition.

18. It was submitted on behalf of the petitioner that since the Respondents have not filed any document opposing the petition, the petition is not opposed by the Respondents and as such the same should be deemed to have proceeded ex parte under the provisions of rule 16 of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013***.

19. According to the petitioner, the first Respondent is established by article 157(1) of the Constitution and his powers may be exercised by him or by subordinate officers acting in accordance with general or special instructions. However, in the exercise of the powers of the Director in the counties, there are established offices of the Director of Public Prosecutions and there is such an office with Public prosecutors in Kitui County who exercises the powers and who institutes and undertakes criminal proceedings against persons at courts in Kitui county, per the provisions of article 157(6)(a) of the Constitution. Such officers are bound to exercise the powers in accordance with the Constitution, and must always have regard, *inter alia*, to the need to prevent and avoid abuse of the legal process as is required of them by article 157(11) of the Constitution.

20. It was submitted that while exercising such power, the Director or those acting as such per the provisions of article 157(9) must always be alive to the rights of an accused person under article 50(2)(b) of the Constitution being that the accused person should be informed of the charge with sufficient detail to answer it. The director is at all times required to observe the provisions of article 73(1) (a) (1) that the authority assigned to him is a public trust and that his exercise of the authority vested in him by article 157(6) is exercised in consistence with the purposes and objects of the Constitution. Any deviation from the provision of article 73(1) (a)(1) would amount to a breach and violation of the article.

21. According to the petitioner, one of the purpose and/or objective of the Constitution is to ensure that a person's right to privacy which includes the right not to have his possessions seized, per article 31(b) of the Constitution. It was submitted that the Director has this onerous responsibility to ensure that in exercising his power under article 157(6) of the Constitution, no unjustified seizure of person's property is made. While exercising his powers, the director has the obligation, under article 50(1) (c) to inform an accused person of the charge with sufficient detail to answer it and where an accused person requires particular or specific information that concerns the charge against him, such information must be given as a right under the provisions of article 35(1) (a)& (b) of the Constitution. More so when the information sought goes to the furtherance of the purpose and objective of article 50(1)(c) by affording the accused person adequate time and facilities to prepare defence. It is a right specifically provided for under article 50(1) (1) of the Constitution. The director must provide to the accused person information in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

22. It was contended that that the provisions of article 157(1) (which establishes the office of Director of Public Prosecutions) and article 157(6) (which states the purpose of establishing the office that is to exercise powers of prosecution), the Director does not carry out investigations and that the only role the Director may play in investigations is to direct the inspector General of the National police Service to investigate any information or allegation of criminal conduct per article 157(4) of the Constitution. The role of the Inspector General of police, inter alia is to carry out investigations and that reference to the inspector –General of police includes the Inspector General of police or any subordinate officers in the police service. Due process must always be followed in carrying out investigations. All the state organs involved in criminal proceedings including investigators, prosecutors and trial court are required to observe and/or protect the rights of the suspect or accused person, as provided by articles 19 and 20 of the Constitution, under article 19(3).

23. In this case it was submitted that the 1st Respondent contravened the provisions of the Constitution as stated hereinabove. According to the petitioner, though the 2nd Respondent had summoned the petitioner to appear before him, instead of carrying out investigations as intimated in his requisition, the 2nd Respondent proceeded and filed the charge sheet in court on 22nd December, 2017 even without having summoned or bonded the Petitioner to appear in court. The offence that the petitioner was charged with is being in possession of uncustomed goods contrary to Section 200(d)(1) of the ***East Africa Community Customs Management Act***. Based on section 2 of the Act it was submitted that the dutiable value of the goods, must be disclosed in the charge sheet in all instances of a charge under this Section. And if the charge relates to category (i) of the description of the uncustomed goods (i.e duty payable not paid or paid in full), the amount of the unpaid duty must be given in the charge sheet as the offence constitutes non-payment of the duty.

24. It was therefore submitted that the particulars of the offence the petitioner was charged with do not give these disclosures and that the only mention made is of the identity of the goods being vehicle registration number UAP 188T.What made the possession of the motor vehicle to be uncustomed goods was not disclosed in the charge sheet and that being in possession per se does not amount to an offence, but the fact of the goods being uncustomed. Accordingly, the charge as made in the charge sheet does not disclose any offence.

25. It was therefore submitted that it was unlawful for the Respondents to charge the petitioner with a technical charge without any investigations having been carried out. Indeed, the only action that the 2nd Respondent took in relation to the case was to seize the petitioner 's vehicle, issue a requisition to compel attendance, extend the requisition then prepare and present a charge against the petitioner without having heard her and without notice to her. Apart from the requisition, the petitioner was not issued with any other documents. Yet, in the

charge sheet, the 2nd Respondent gave false information that the petitioner was out on free bond. Instead of making an application for summons, he indicated that an application for warrant of arrest was to be made. All this while he knew that the petitioner would be in his office at 11.00 am. It was therefore submitted that the Respondents are motivated in this matter by malice or ill-will which is contrary to the law.

26. It was contended that on **6th February, 2018** the 1st Respondent duly informed the court that even as at that time, there were no statements in the police file yet it is expected that before forming an opinion to prefer charges, investigations ought to have been carried out and concluded, then the file be placed before the director for review of the evidence presented to him for him to form an opinion whether to charge the person or not after reviewing the evidence. In the case of the petitioner, the 1st Respondent clearly concurred that there were no investigations carried out so there was no evidence for him to review and therefore he had no basis to charge the petitioner. And instead of discharging his duty to protect the violation of the petitioner's rights by withdrawing the charges, he has maintained them in contravention of the articles of the Constitution.

27. In support of her submissions the petitioner relied on **H.C.C.P No. 436 of 2014 - Ronald Lepose Musengi vs. Director of public prosecutions & 3 Others** and **H.CC.P No. 29 of 2012 - Joseph K. Nderitu & 23 Others vs. Hon. Attorney General & 2 Others.**

28. In opposing the petition, the 1st Respondent filed an affidavit which was sworn by **Mogoi Lilian**, a Prosecution Counsel in the Office of the Director of Public Prosecutions, Machakos.

29. According to the deponent, under Article 157(6)(a) of the Constitution 1st Respondent has powers to institute and undertake criminal proceedings against any person before any Court in respect of any offence alleged to have been committed. Further, Article 157(10), stipulates that the 1st Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of its powers or functions, the 1st Respondent shall not be under the direction or control of any person or authority.

30. It was averred that by virtue of the Requisition to compel attendance issued by the office of the DCI Kitui, the Petitioner was to appear in the said office on the 22nd December, 2017 when the matter was taken to Court for plea and from the Court record that the Petitioner was present in Court on the said 22nd December, 2017 and also present was her Advocate and after the charge and substance of the charge had been read to the Petitioner, her advocate informed the Court that the Petitioner was not aware of the charges being preferred against her despite the fact that the intended charge had been indicated on the requisition to compel attendance and that the said requisition to compel attendance required her to report at the station hence requested that the plea be deferred to another day under Section 90 of the ***Criminal Procedure Code***.

31. The deponent confirmed that the Application to defer the plea was allowed and the same deferred to 9th January, 2018 and summons issued for the Petitioner to attend Court. However, on the 9th January, 2018, the Petitioner failed to attend Court but her advocate was present and he indicated to Court that the Petitioner had not been served with the Summons to attend Court and prayed that the plea be deferred again despite the fact that the plea date had been given in Court in his presence and him being a representative of the Petitioner and being an officer of the Court and having been present in Court when orders to summon the Petitioner were issued, he had mandate to uphold the Court order and avail the petitioner in Court irrespective of whether summons were effected or not. However, the plea was again deferred to 18th January, 2018 with directions to **Cpl Mogire** to summon the Petitioner to attend Court for plea.

32. It was conceded that it is not clear what transpired of the 18th January, 2018 but when the matter was before Court on the 6th February, 2018, the Petitioner was again absent but the advocate was present and the advocate raised several issues one of them being that the case had been filed in Court before investigations were complete and then proceeded to make an application for the plea to be deferred for the issues raised to be resolved. Although the said application was opposed by the prosecution the Court allowed the Application and deferred the plea to 6th March, 2018. On the said date, counsel for the Petitioner made an Application before the trial Court for the matter to be dismissed which Application was opposed and the Court made a Ruling rightfully directing the Petitioner's counsel to engage the office of the DCI and 1st Respondent to resolve the issues raised and in the event that no agreement is reached, the Petitioner to appear in Court on 20th March, 2018 for plea with further directions to the counsel to avail the Petitioner in Court on the said date.

33. When the matter came up before Court on the 20th March, 2018, the Petitioner was absent contrary to the Court order of 6th March, 2018 but her counsel was present and the counsel informed the court that there was an indication that the matter was to be withdrawn however the prosecution in formed the Court there was a note form **CIP Wasilwa** that the matter was to proceed to its logical conclusion. According to the deponent, on the said 6th March, 2018, the Petitioner's attendance had not been dispensed with irrespective of whether the state was to withdraw the matter or not, thus the Petitioner was still in contempt of Court. After the prosecution informed the Court that they intended to proceed with the matter to its logical conclusion, the Court issued and order for the defence counsel to avail the Petitioner in Court for plea on 12th April, 2018 and the summons for the Petitioner were to be served upon the defence counsel. However, **b**efore the Petitioner could attend Court on the said 12th April, 2018 for plea, the Petitioner through her advocate filed this Petition with an intention to have the decision by the 1st Respondent to charge the Petitioner rendered null and void. Consequently, to date, the Petitioner has not taken plea despite several Court orders being issued to her to attend Court to take plea so first and foremost, the Petitioner is in defiance of the trial Court's order to attend Court to take plea and such conduct should not be taken lightly.

34. It was the 1st Respondent's case that the intended charge against the Petitioner is one recognized by the laws thus nothing bars the police officers from investigation the Petitioner and the 1st Respondent from prosecuting her. According to the deponent, criminal procedure dictates that once plea has been taken, the accused person is supplied with witness statements and the exhibits the prosecution intend to rely on during prosecution but in the instant case, plea has not been taken, the Petitioner has not been supplied with the witness statements and exhibits hence the Petitioner is not in a position to make a determination on whether the evidence the prosecution has is sufficient or not and otherwise, it is the duty of the Court to determine whether or not the evidence is sufficient during Ruling or Judgment.

35. It was contended that it is clear from the annexures by the Petitioner that the she is not the rightful owner of the vehicle and no evidence has been advanced in support of her averment that the vehicle had been hired to her by the said agent one **Erick Kiio**. Contrary to the Petitioner's averments in paragraph 6 and 7 of the Petition, there is no proof to the effect that the registered owner of the motor vehicle Registration No. UAP 188T one **Francis Sebagenzi Munyambabanzi** hired the said vehicle to the Petitioner. Similarly, **there** is not proof that the rightful owner of the said vehicle deputized one **Erick Kiio** to convey the vehicle from Uganda to Kenya to deliver to the Petitioner; actually, the Petitioner's annexure ANK-2(a) as marked clearly indicate that the said **Erick Kiio** was declaring the importation as the owner and for himself and not as an agent and this raises questions as to the rightful owner of the said vehicle.

36. It was therefore contended that in view of the foregoing and the evidence available, there is an indication that the 1st Respondent will amend the charge sheet to include more offences once the Petitioner takes plea. In the deponent's view, what the Petitioner ought to do, is to subject herself to the criminal procedure and allow the Court to make a finding as to her innocence or guilty in relation to the charge instead on filing this Petition which aim at nothing other than to defeat justice. According to her, the petitioner through this Petition and her advocate's letters to the 1st Respondent seems to want to control or direct the 1st Respondent in its powers to make a decision on whether or not to charge and its powers to prosecute or terminate prosecution which powers have been invested to the 1st Respondent by the prosecution and which powers cannot be interfered with by any individual or institution.

37. The 1st Respondent was of the view that it is in the Petitioner's interest that her matter commences which will give her an opportunity to present her case and even make an Application before the trial Court for the release of the motor vehicle pending the hearing and determination of the matter so as to make use of the vehicle in view of the fact that the said vehicle cannot be released by virtue of it being prosecutions exhibit until and when the plea is taken. It was deposed that it is clear that the Petitioner is trying by all means and ways to avoid criminal trial which can be perceived from her conduct which indicates that she has something she is trying to hide and is afraid that if she undergoes the full trial, the same might be exposed. To the said Respondent, equity dictates that he who seeks its protection, must have clean hands but in the instant case, the Petitioner's hands are tainted, she is in contempt of the Court order requiring her to attend Court to take plea hence cannot seek the protection of this Court against facing the criminal trial. It was contended that if the averment by the 2nd Respondent that the Petitioner is being represented by her husband are true, then the counsel might want to look at the facts based on the law or have another advocate to represent the Petitioner so as to avoid emotional involvement and to have the matter determined on merit.

38. It was averred that by virtue of Article 157(10), this Court does not have the power to direct the 1st Respondent on how to conduct its duties hence in the instant case, this Honourable Court cannot be asked to stop the prosecution of the Petitioner.

39. It was therefore the petitioner's case that the Application before this Court lacks merit, it is premature and its sole purpose is to defeat and/or delay the wheels of justice with an intention to frustrate prosecution of the Petitioner hoping that the prosecution will be compelled by the numerous Applications to drop the charges.

40. It was averred that we have competent and just Courts that can hear both the prosecution's case and the Petitioners case in trial and make a just finding depending on the evidence which finding this Court cannot make at this stage in view of the fact that it does not have the prosecution's evidence hence no chance to examine the same to make a determination on whether or not the Petitioner is being prosecuted wrongly. Accordingly, this Petition is frivolous, vexatious and an abuse of the Court process as the same is meant to prevent the commencement of criminal proceedings against the Petitioner whereas criminal cases are determined on merit. In view of the foregoing, the 1st Respondent prayed that this Application be dismissed with cost and a warning to the Petitioner against disobeying Court Orders.

Determinations

41. I have considered the petition, the affidavits in support thereof, the affidavit in opposition to the petition and the submissions filed as well as the authorities relied upon in support thereof.

42. It is bears repeating that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. In a petition such as this the court ought not to transform itself into the trial court. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court.

43. The general rule in these kinds of proceedings is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. Therefore, mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not, on its own and without more, a ground for halting such proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who contends that he has a good defence in the criminal trial ought to be advised to raise the same in his defence before the criminal trial instead of invoking this Court's jurisdiction with a view to having this Court determine such an issue as long as the criminal process is being conducted *bona fides* and in a fair and lawful manner. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

44. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

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

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

45. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

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

46. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta...The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer..."

47. The Court proceeded:

"In the instant case it is...alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...[W]here the prosecution is an abuse of the process of court...there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances...where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed."

48. The Court was however of the view that:

"It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts.

The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

49. The duty and mandate of the police was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

"The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

50. It is therefore clear that whereas the discretion given to the Respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. However, it must be emphasised that a constitutional petition challenging prosecution does not deal with the merits of the case but only with the process. The Court in such proceedings is mainly concerned with the question of fairness to the petitioner in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

51. That this Court can in cases where the threshold is met interfere with a criminal process must now be clear from a strict reading of section 4 of the ***Office of the Director of Public Prosecutions Act***, which provides the factors which the Director of Public Prosecution is required to take into account in making a decision whether or not to embark on a prosecution. The said provision provides that:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) The need to discharge the functions of the Office on behalf of the people of Kenya;

(f) The need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

52. It follows that the discretion and powers given to the DPP under Article 157 of the Constitution cannot be said to be unfettered. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the Constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the Constitution; (iii) Whether the prosecution is against public policy."

53. Similarly, in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**, it was held:

> **"Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the Constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters..."**

54. Therefore, this Court is perfectly entitled in appropriate cases to interfere with the decision of the DPP to commence and proceed with prosecution. Such cases include where the criminal prosecution is being instituted to achieve collateral purposes such as where the officers investigating or prosecuting the matter use the prosecution to extract some personal benefits from the petitioner.

55. In this case, the petiti0ner's case is that on the 2nd Respondent is using the criminal case to teach the petitioner a lesson for refusing to give in to his demands for a bribe. These damning allegations have not been challenged by the 2nd Respondent. It is in fact averred that there is no investigation that has been undertaken at all in the matter and that those who ought to have been the complainants in the matter are not aware of and have not lodged any complaint against the petitioner. Again these allegations have not been controverted at all by the Respondents. This Court therefore held in **Republic vs. Director Of Public Prosecution & Another Ex Parte Chamanlal Vrajlal Kamani & 2 Others [2015] eKLR** in which the Court expressed itself as hereunder:

> **"In my view, criminal proceedings ought not to be instituted simply to appease the spirits 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. See Richardson vs. Mellish (1824) 2 Bing 229."**

56. As was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

> **"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".**

57. In the said case, the Court went on:

> **"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so."**

58. That crimes must be punished and proved criminal must be dealt with expeditiously and decisively is not an option. A judicial system that is so porous that permits criminal to go scot-free is not worthy of its name. However, the process of arriving at the decision whether a person has committed a crime must in the words of Article 47 of the Constitution be expeditious, efficient, lawful, reasonable and procedurally fair. Anything less than that will not do. In **Justus Mwenda Kathenge vs. Director of Public Prosecutions & 2 Others[2014] eKLR**, it was held at para 8 that:

> **"It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11);**
>
> ***(i) he has acted without due regard to public interest,***
>
> ***(ii) he has acted against the interests of the administration of justice,***
>
> ***(iii) he has not taken account of the need to prevent and avoid abuse of Court process.***
>
> **These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of**

the 1st Respondent. I say so taking into account the following decisions where the issue has been addressed;

Githunguri vs. Republic [1986]KLR 1 -

In this case, where a prosecution was commenced long after the alleged offence had been committed and where the Attorney-General *(at the time having powers similar to those of the DPP)* had assured the Applicant that he would not be prosecuted, the Court stated *inter-alia* that;

"A prosecution is not to be made good by what it turns up. It is good or bad when it starts"

Gulam & Anor vs Chief Magistrate's Court & Anor [2006] eKLR where the learned judge held that;

> ***"Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any Prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other improper purpose such as undue harassment of a party or abuse of the process of court."***

Further, 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 institution of criminal proceedings, there must be in existence material evidence on which the Prosecution can say with certainty that they have a probable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."***

The learned Judge proceeded to state that;

> ***"Prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest."***

He then concluded thus;

> ***"The rationale for prohibiting such proceedings is that for a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the Court (of its inherent power to prevent abuse of its process). On the score of cost alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup."***

(iii) Peter D'Costa vs AG & Anor, Petition No.83/2010 (U.R.)

where the Court stated thus;

"The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioners' fundamental rights as the petitioner will not receive a fair trial. It is the duty of court to stop such abuse of the justice system."

Michael Monari & Anor vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011 where Warsame, J. *(as he then was)* stated as follows;

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

The reasoning in all the above cases would lead to only one conclusion; whereas the DPP has the ultimate discretion in determining which complaint should lead to a criminal prosecution, where that power is seen to have been manifestly abused, the High Court can intervene by powers conferred by Articles 165(3)(d)(ii) of the Constitution and stop that abuse, including where the Court system is being used to settle scores and to put an accused person to great expense in a case which is clearly not otherwise prosecutable."

59. In this case, a serious allegation was made that the 2nd Respondent intended to arrest the petitioner on a Friday with the intention of keeping the petitioner in custody over the weekend. As already stated hereinabove, the discretion and powers given to the DPP under Article 157 of the Constitution cannot be said to be unfettered. According to **Prof Sir William Wade in his Book *Administrative Law*:**

"The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"

60. In **George Joshua Okungu and Another vs. Chief Magistrate Court Anti Corruption Court at Nairobi and Another (2014) eKLR** the Court held that:

"where the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the...constitutional rights, the Court will not hesitate in putting a halt to such proceedings…It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. In so doing, it must be emphasised that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld…Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would, in our view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by in *Koinange vs. Attorney General and Others* (supra):

'Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy.'"

61. In **R vs. Attorney General ex p Kipngeno Arap Ngeny** which was cited with approval and referred to extensively in the ***George Okungu Case***, it was held that:

"a prosecution that is contrary to public policy (or interest) will not be allowed...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

62. This position resonates with Article 157(11) which provides that:

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.

63. It is therefore imperative that the DPP must consider the three interests identified in the said article - the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. To arrest anyone with a view to ensure that the person does not get access to constitutional redress with respect to the right to access bail, amounts to abusing the legal process. In my view it is neither in the public interest nor in the interest of administration of justice to resort to unconstitutional methods under the guise of fighting crime. Yes, crime must be fought and must be fought with the vigour it deserves and Kenyans expect nothing less. However, the fight must be strictly within the rule of law.

64. In other words, the police and the prosecutors must not exercise their powers with a view to extracting revenge or maliciously. To effect an arrest of a citizen after hours on a Friday in order to avoid arraigning him in court till after he has spent a number of days in custody without any justification for doing so, in my respectful view, amounts to abuse of power. The practice that is ominously gaining ground in this country otherwise infamously known as *"kamata kamata Friday arrests"* whereby suspects are deliberately arrested on Fridays and kept in police custody over the weekend must not be permitted to take root. To do so, in my respectful view, amount to chipping away at the democratic gains achieved in this country since the promulgation of the Constitution of Kenya, 2010. It would in effect take the country back to the dark days when suspects faced frivolous capital charges aimed at unlawfully incarcerating them with a view to achieving extraneous

objectives, thereby unjustifiably denying them of their liberty. The attempt to claw back at non-existent powers ought to be restricted at all costs by the courts which are the temples of justice in this country. As was held in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 ([2008] 2 KLR (EP) 565:**

> **"The High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system…In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend…In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."**

65. Hand in hand with this is the practice of arraigning suspects in court and applying for their incarceration for 14 days. In my view, it is only in exceptional circumstances where there is evidence preferably by way of sworn affidavit, that the liberty of a suspect ought to be denied on the ground that investigations are ongoing. Courts ought not to be used by investigating agencies as holding grounds for suspects while they are conducting investigations. Ordinarily suspects ought only to be brought to court after investigations are finalised in which event the only issues that can fall for determination are the conditions for release of the suspects.

66. The petitioner contends that she was never afforced an opportunity to give her version before she was hauled to court. In my view, in exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

> **"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".**

67. Therefore, the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. The mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, adopting an equivocal approach to investigations by deliberately denying a suspect an opportunity to put forward his version before a person is arraigned in court surely amounts to maladministration of justice. Similarly, where exculpatory evidence is presented to the police in the course of investigation and for some reasons known to them they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power.

68. It was contended by the petitioner that the particulars of the offence the petitioner was charged with do not give any disclosures and that the only mention made is of the identity of the goods being vehicle registration number UAP 188T. In other words, the charge as made out in the charge sheet does not disclose any offence. This Court appreciates that a distinction must be made between a situation where what is alleged is insufficiency of evidence as opposed to where the evidence to be adduced does not disclose an offence. In the former, the right forum to deal with the matter is the trial Court. In the latter, it would amount to an abuse of the criminal process to subject the applicant to such a process. Criminal process ought to be invoked only where the prosecutor has a conviction that he has a prosecutable case. Whereas he does not have to have a full proof case, he ought to have in his possession such evidence which if believable might reasonably lead to a conviction. He does not have to have evidence which disclose a prima facie case under section 210 of the ***Criminal Procedure Code*** since a decision as to whether a *prima facie* case is disclosed is a jurisdiction reserved for the trial Court. He however must have evidence which satisfy him that his is a case which ought to be presented before a trial Court. He must therefore consider both incriminating and exculpatory evidence in arriving at a discretion to charge the accused. Unless this standard is met, the Court may well be entitled to interfere with the discretion of the prosecutor since that discretion, as stated hereinabove, is not absolute.

69. As was appreciated in **R vs. Attorney General exp Kipngeno ArapNgeny High Court Civil Application No. 406 of 2001**:

> **"Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A**

prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

70. In this case I have however looked at the charge sheet exhibited and I cannot say that it discloses no known offence.

71. However, in this case neither the complainant, assuming he exists, nor the investigator has sworn any affidavit showing the basis upon which the charges against the petitioner were preferred. It is trite that based on **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra):

> **"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".**

72. It follows that the burden is on the prosecutor to show by way of admissible evidence that he is in possession of material that disclose the existence of a prosecutable case since as was held in **Stanley Munga Githunguri vs. R [1986] eKLR** at page 18 and 19 by a three bench High Court constituted of Ag. Chief **Justice Madan** and **Justices Aganyanya** and **Gicheru**:

> **"A prosecution is not to be made good by what it turns up. It is good or bad when it starts."**

73. The prosecution of the petitioner cannot be permitted to proceed in the hope that something positive might come out of it. The prosecution must show upfront that it has a prosecutable case based on the investigations conducted upon a complainant lodged with those who are empowered to do so unless it is shown that the matter was in the public domain and result from investigations unearthed material upon which the prosecution reasonably believed that it could successfully mount a prosecution.

74. In this case there is no such material. Accordingly, I find merit in this petition. However, there is no material placed before me on the basis of which I can award damages or compensation.

Order

75. In the result I issue the following orders:

> **1) A declaration that the charging of the petitioner in Criminal Case number 1392 of 2017 contravened the Constitution and is therefore null and void. Accordingly, those proceedings are hereby quashed and the Respondents prohibited from continuing therewith.**
>
> **2) A declaration that the 2nd Respondent had no lawful authority to seize and detain the petitioner's motor vehicle UAP 188T.**
>
> **3) A mandatory injunction directing the 2nd Respondent to release the motor vehicle registration number UAP 18T to the petitioner.**
>
> **4) Costs of the petition are awarded to the petitioner.**

76. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 28th day of May, 2019

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musyoki for the Petitioner

CA Geoffrey