



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.326 OF 2018**

**IN THE MATTER OF ARTICLES 2(1) & (2), 3(1),10,19,20,21,22,23,27(1) & (4),40(3),47,157(11),159,165(3)(d)(ii),6 & 7, 258,259 OF  
THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2(1) & (2), 3(1),10(2),19,20,21(1),27(1),(2) (4) &  
(5),40(3),47,157(11) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)  
PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER MILIMANI CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 1726 OF 2018**

**BETWEEN**

**GLOBAL AFRICA AUTO TYRES AND**

**ACCESSORIES LIMITED.....1<sup>ST</sup> PETITIONER**

**AHMED MOHAMED OSMAN.....2<sup>ND</sup> PETITIONER**

**-VERSUS-**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....3<sup>RD</sup> RESPONDENT**

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

**THE CHIEF MAGISTRATE'S COURT,**

**MILIMANI LAW COURTS.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioners through a petition dated 24<sup>th</sup> September 2018 brought pursuant to Articles 2(1), (2), 3(1), 10,19,20,21,22,23,27(1)(4),10,19,20,21,22,23,27(1)(4),40(3),47,157(1),159,165(3) (d) (iii),(6) & (7) ,258, 259 of the Constitution of Kenya 2010 seek the following orders:-

i) A declaration be and is hereby issued that investigations on the petitioner by the **DCI** and the **DPP's** institution of criminal proceedings against the Petitioners in criminal case number 1726 of 2018, *Republic v Ahmed Mohamed Osman and Global Africa Auto Tyres and Accessories Limited* violates the Petitioners constitutional rights, is an abuse of the process of the court and therefore unlawful, null and void *ab initio*.

ii) An order of certiorari be and is hereby issued to quash the entire charge sheet and proceedings against the Petitioner in criminal case number 1726 of 2018, *Republic v Ahmed Mohamed Osman and Global Africa Auto Tyres and Accessories Limited*.

iii) An order of prohibition be and is hereby issued prohibiting the Respondents from proceeding with the prosecution of criminal case number 1726 of 2018, *Republic v Ahmed Mohamed Osman and Global Africa Auto Tyres and Accessories Limited*.

iv) An order of prohibition be and is hereby issued against the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> from investigating, charging and recommending for prosecution or commencing any prosecution of the petitioners in respect of criminal case number 1726 of 2018, *Republic v Ahmed Mohamed Osman and Global Africa Auto Tyres and Accessories Limited*.

v) A declaration that the seizing, impoundment and detaining of the Petitioners' goods is unlawful, arbitrary, unreasonable, contrary to due process, good governance, rule of law and without regard to the Petitioners' right to fair administrative action and is in violation of the Constitution and the law.

vi) An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, its employees or representatives to forthwith release all detained goods of the Petitioners.

vii) An order of prohibition be and is hereby issued against the 1<sup>st</sup> Respondent from imposing, warehouse charges, penalties, duties and other related charges in respect of the goods detained in its warehouses.

viii) The costs of this Petition be provided for.

ix) An order of compensation to the petitions for loss of business income.

x) Any other or further relief that this Honourable Court considers appropriate and just to grant.

2. The petition is supported by petitioners affidavit in support of the petitioner dated 24<sup>th</sup> September 2018 and further affidavit sworn on 22<sup>nd</sup> November 2018.

3. The 1<sup>st</sup> Petitioner has been in the business of importing motor vehicle tyres from the People's Republic of China for the local market since April, 2018.

4. That sometime in June, 2018, 1<sup>st</sup> Petitioner imported a consignment of Motor Vehicle tyres from the People's Republic of China in container number **IX40FT EITU1512031**. The single container contained 2240 pieces of different categories and sizes of motor vehicle tyres (*See Annexure marked AMO-1, a copy of Import Declaration Forms at pages 17-19 of the Annexures in the Affidavit in Support of the Petition*).

5. On or about 11<sup>th</sup> June, 2018, the goods arrived at the Port of Mombasa. The goods were subsequently verified against the declaration of the Petitioners and on the 13<sup>th</sup> June, 2018 the goods were processed and cleared at the Inland Container Depot (**ICD**), Nairobi and upon Petitioners paying duties, taxes and other charges amounting to **Kshs. 1,901,887/=** in respect of the said consignment (*See Annexure marked AMO-2, a copy of Barclays Bank Payment Slip at page 20*).

6. On 14<sup>th</sup> June, 2018 the container containing the tyres were loaded onto truck registration number **KBY 939Y** and trailer registration **ZC6368** destined for the petitioners godown in Eastleigh area, Nairobi. However, on the same day being the 14<sup>th</sup> June, 2018 while the goods were being offloaded in the Petitioners' godown in Eastleigh, police officers from the **DCI**, Parklands Police Station arrived and without explanation stopped the offloading of the tyres from vehicle.

7. The Police officers subsequently ordered the employees of the petitioners to load the tyres in the godown which include tyres already offloaded from the container and other tyres which remained from a stock petitioners imported in May, 2018 and whose duties was paid by the petitioners onto the truck number **KBY 939Y** and Trailer Number **ZC6368** and upon loading the container to its capacity called Motor Vehicle Registration Number **KBZ 287X** where they loaded more tyres. In total, the police officers went with 2962 tyres.

8. The Police officers did not only seize and load the 2240 tyres which was the consignment in container number **IX40FT EITU1512031** but they in addition seized and loaded 722 tyres which remained from a consignment the Petitioners imported in the month of May, 2018. This explains why they had to use additional vehicle to carry the tyres. The goods were subsequently taken to **DCI** headquarters and the motor vehicles released (*See Annexure marked AMO-3 being copies of Police Inventory and Acknowledgement Note both dated 14<sup>th</sup> June, 2018 at pages 21-22*).

9. The 2<sup>nd</sup> petitioner thereafter recorded statement with the police detailing his grievances and protested against the conducts of the **DCI** officers who seized his goods unprocedurally.

10. That upon inquiry by the Petitioners from the offices of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, they were verbally informed that the said goods are under investigation to determine whether they are counterfeit goods.

11. On the 6<sup>th</sup> July 2018, the goods were deposited at the customs warehouse at the Jomo Kenyatta International Airport (**JKIA**) and are detained there to date. (See Annexure marked **AMO-4** being a copy of Notice of Goods Deposited in Customs Warehouse at page 23).

12. That vide letters dated 13<sup>th</sup> August, 2018 and 19<sup>th</sup> August, 2018, the petitioners wrote to the 1<sup>st</sup> Respondent explaining the circumstances under which the goods were seized by the police officers which letters were never responded to by the 1<sup>st</sup> Respondent. (See Annexure marked **AMO-5** being copies of the letters at pages 24-25).

13. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to take into consideration the relevant facts and a criminal case has since been instituted against the Petitioners, being Nairobi Chief Magistrate's Court Criminal Case No. 1726 of 2018, *Republic v Ahmed Mohamed Osman and Global Africa Auto Tyres and Accessories Limited* and by consent of the parties on the 26<sup>th</sup> September, 2018, the same was stayed pending hearing and determination of this petition. (See Annexure marked **AMO-7** being a copy of the Charge Sheet at page 28).

14. It is important to point out that during the period when the goods were seized was the period in the month of May and June, 2018, when the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were involved in the impoundment of contraband sugar, oil among other consumer goods around the country. Police officers from the office of the 2<sup>nd</sup> Respondent found a rare opportunity to harass, intimidate and oppress honest business people like the petitioners. While the initial purpose of the action of the 2<sup>nd</sup> Respondent in seizing the goods was to determine whether the goods were counterfeit, it metamorphosed into tax issues. (See Annexure marked **AMO-9** being copies of the news- papers reports at pages 34-40).

15. It is the Petitioners' case that they diligently and consistently paid duties, taxes and other applicable charges on imports and made the correct declarations on all imports at all times. (See Annexures marked **AMO-11** and **AMO-12** being copies of Imports Declaration Forms & Duties Payment Slips at pages 42-42)

16. The underlying premise of the Petition is that the officers from the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's office unfairly, illegally and unjustifiably detained these goods. The criminal proceedings as well as the seizing of the goods were carried out for extraneous purposes devoid of merit of criminal justice system.

#### The 1<sup>st</sup> Respondents Case

17. The 1<sup>st</sup> Respondent rely on affidavit of No. 231367 Chief Inspector Mohamed Jillo sworn on 9<sup>th</sup> October 2018 in which he has deponed on 19<sup>th</sup> June 2018 the 1<sup>st</sup> Respondent received intelligence from the 2<sup>nd</sup> Respondent that a counterclaim entry **No. EITU 1512031** loaded with tyres had been intercepted at Eastleigh Nairobi on suspicious of goods being contrabands.

18. The consignment was seized when the Petitioners' agents were offloading the tyres in the godown. The tyres were reloaded back to the container and the truck hired by the 2<sup>nd</sup> Respondent and transported to the **DCI** headquarters at Kiambu Road pending verification.

19. The 1<sup>st</sup> Respondent dispatched a team who then conducted investigations and a 100% joint verification exercises on the quantity of the tyres in the container.

20. The investigations disclosed that the container No. **EITU1512031** was entered vide entry number **2018ICD25912** with the Consignee being Global Africa Auto Tyres and Accessories Ltd (the 1<sup>st</sup> Petitioner herein) and cleared by Blue Lime Limited (the 1<sup>st</sup> Petitioner's clearing agents). It was further disclosed that the 1<sup>st</sup> Petitioner had declared that they had imported **2240 tyres** under the entry number **2018ICD25912**.

21. On 19<sup>th</sup> June 2018 at the **DCI** Headquarters on Kiambu Road, a joint 100 % verification of the consignment was carried out. The verification findings disclosed that the actual quantity of the consignment was **3025** tyres. This implies that the 1<sup>st</sup> Petitioner imported but not declared the **785** tyres.

22. The said 785 out of a total 3025 tyres were packaged in such a way that several small tyres were fit into one big tyre thereby concealing the rightful number of tyres imported.

23. On 6<sup>th</sup> July 2018 the tyres were moved from the 2<sup>nd</sup> Respondent's Headquarters on Kiambu Road to JKIA Customs Warehouse and the 1<sup>st</sup> Respondent issued to the 1<sup>st</sup> Petitioner with F89 No. 204614 (This is a notice of goods deposited in customs warehouse). Petitioner's Annexure **AMO-4**

24. On 20<sup>th</sup> July 2018, the 1<sup>st</sup> Respondent summoned the 2<sup>nd</sup> Petitioner to its office at Corporate Business Centre, Nairobi Upper hill to answer to questions relating to the concealment of the imported goods. During the interrogation, the 2<sup>nd</sup> Respondent was asked to produce the particulars of stock which were available at the 1<sup>st</sup> Petitioner's godown and the number of goods which had been sold. This was not complied with.

25. It was then that the 1<sup>st</sup> Respondent reached a conclusion that the whole consignment of the tyres is deemed to have been imported vide entry number **2018ICD25912** for the computation of taxes.

26. This is also what informed the 1<sup>st</sup> Respondent to charge the Petitioners with the criminal offences in the **Milimani Chief Magistrate Court Criminal case No. 1726 of 2018**.

### **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Response**

27. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition dated 25<sup>th</sup> May 2019 with 6 grounds of opposition being as follows:-

- 1) Under Article 157(10) of the Constitution and Section 6 of the Office of The Director of Public Prosecution Act (2013) the 2<sup>nd</sup> Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.
- 2) Article 157(12) of the Constitution mandates parliament to enact legislation conferring powers of prosecution on authorities other than the 2<sup>nd</sup> Respondent. The Chamber Application discloses no cause of action as against the 2<sup>nd</sup> Respondent as the matter relates to the investigations and/or prosecutions by 1<sup>st</sup> Respondent.
- 3) Section 117 of the Income Tax Act provides that; notwithstanding anything contained in any written law an officer duly authorized in writing in that behalf the Commissioner may appear in any court on behalf of the Commission in proceeding to which the Commissioner is a party and subject to the directions of the Attorney General (read DPP) that officer may conduct a prosecution for an offence under this Act and for that purpose shall have all powers of a Public Prosecutor.
- 4) THAT the Application lacks clarity and precision in setting out the alleged directives in relation to the 3<sup>rd</sup> Respondent.
- 5) THAT the orders sought are therefore not tenable against the 3<sup>rd</sup> Respondent as the Applicant does not show how the 3<sup>rd</sup> Respondent has a duty in the matter raised.
- 6) The Application is without merit and should be dismissed.

### **The 4<sup>th</sup> and 5<sup>th</sup> Respondents Response**

28. The 4<sup>th</sup> and 5<sup>th</sup> Respondents filed grounds of opposition dated 19<sup>th</sup> May 2019 comprising of 8 grounds being as follows:-

- 1) That the petitioners have filed this petition to frustrate and evade the investigations, and any probable prosecution against them. They ought to face their accusers, prove their innocence or otherwise and submit to the consequences of the law should they be found culpable.
- 2) That the petition as drawn and filed offends and curtails the provisions of Article 157 of the Constitution of Kenya 2010, the authority and exercise of Article 245 (4) (a) and 259 (3) (a) of the Constitution, both read with section 34 and 35 of the National Police Service Act.
- 3) That the matters complained of by the petitioners are prematurely before the Court as they form the basis of the defences of the petitioners and ought to be canvassed before the trial magistrate and not the Constitutional Court hence it cannot be said that the decision to charge the petitioners is an abuse of the powers vested on the respondents or that the same is irrational or actuated by ulterior motive or malice as alleged.
- 4) That the petitioners are merely apprehensive having failed to provide a concrete demonstration that the trial magistrate is or will be biased, not accord them a fair hearing, or has acted contrary to the constitution, the criminal procedure code or any other written law or has acted contrary to judicial code of conduct therefore not able to dispense justice accordingly.
- 5) That the present application and petition grossly offends section 6 of the **Judicature Act Cap 8 Laws of Kenya** which provides:-  
  
**"No Judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of this judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or other the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a Judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it."**
- 6) That no evidence has been adduced before this court to show that prejudice has been occasioned which has resulted to violation of rights and freedoms under the constitution thus rendering the continued prosecution of the petitioners an outright abuse of the court process.
- 7) That grant of reliefs sought will threaten the petitioners' right under Article 50, in particular, the right to have the trial begin and conclude without unreasonable delay.

8) That both the application and petition presented before this Honourable Court are frivolous, without merit, devoid of legal reason, an abuse of the court process and ought to be dismissed forthwith.

### **Analysis and Determination**

29. I have very carefully considered the petitioners petition, affidavit in support dated 24<sup>th</sup> September 2018 and further affidavit dated 22/11/2018; the 1<sup>st</sup> Respondent's Replying affidavit dated 9<sup>th</sup> October 2018; grounds of opposition by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as well as grounds of opposition by the 4<sup>th</sup> and 5<sup>th</sup> Respondents and counsel rival oral submissions and from the aforesaid the issues for consideration can be reduced to the following:-

**a) Whether the 1<sup>st</sup> Respondent adduced hearsay evidence?**

**b) Whether the seizure and detention of the petitioners' good was unlawful, unreasonable, unfair, blatant abuse of power, is a violation of petitioners' right and thus unconstitutional?**

**c) Whether the criminal proceedings in criminal case No. 1726 of 2018 is malicious and an abuse of the legal process?**

**A) Whether the 1<sup>st</sup> Respondent adduced hearsay evidence?**

30. The 1<sup>st</sup> Respondent filed a Replying affidavit dated 9<sup>th</sup> October 2018 sworn by No. 231326 Chief Inspector Mohamed Jillo, in response to the petitioners' petition, who was the investigating officer and seconded to the 1<sup>st</sup> Respondent at the time of the incident. From the contents of his affidavit it is clear, that the deponent herein was not one of the officers sent to the scene to investigate a container **No. EITU 151203** loaded with tyres at Eastleigh on suspicion of the goods being contrabands. He was similarly not present when the goods were collected from the godown of the petitioners by the police officers. Under paragraph 9 of his Replying affidavit he has deponed:-

**"THAT on 19<sup>th</sup> June 2018, 2<sup>nd</sup> Respondent informed the 1<sup>st</sup> Respondent that they had intercepted a container No.EITU1512031 loaded with tyres at Eastleigh on suspicion of the goods being contrabands."**

The 1<sup>st</sup> Respondent from its own affidavit became aware of the incident for the first time on 19<sup>th</sup> June 2018, five (5) days after goods had been imposed by the officers of the 2<sup>nd</sup> Respondent.

31. In his affidavit, Mohamed Jillo, reiterates what he was informed and states what was purportedly done by others. He did not state what role he personally undertook as regards the interception of the goods or the inspection. I have considered his affidavit sworn on 9<sup>th</sup> October 2018 and the entire averments made by him amount to hearsay and have in my view no probative value for the reason, that he had no capacity to depone to matters of facts and events that occurred in his absence or to that which he had not witnessed. I find the same cannot be relied upon.

32. The admissibility of averments by Mohamed Jillo, must be weighed against the provisions of section 33 of the **Evidence Act (Cap 80) Laws of Kenya**, which deals with statement by persons who cannot be called as witness, and which lays out the kind of statements that constitute exceptions to the hearsay rule by providing as follows:-

**"Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases..."**

33. **Under section 33 of the Evidence Act**, the exceptions to the hearsay rule include statement relating to the cause of death; made in the course of business against the interests of the maker; an opinion as to public right or custom; relating to existence of relationship and relating to family affairs. I therefore find that the question whether the said Mohamed Jillo could properly adduce evidence in his affidavit regarding circumstances under which the goods were intercepted is critical and of great importance in these proceedings. In his affidavit nothing has been established or put forward before this court demonstrating that the police officers from **DCIO Parklands**, who are alleged to have intercepted the goods were not able to swear to the events and the circumstances leading to the interception of the goods. There is no averment that they are deceased, or that they could not be found to make the averments of the facts, that Mohamed Jillo, purports to make. No attempt has been made to justify Mohamed Jillo, proceeding to make this affidavit. This court is left to guess what was the reason of the **DCIO** police officer not proceeding to make affidavit instead. The only inference this court can draw from the conduct of the **DCIO** police officers; failure to make an affidavit is that they were not willing to swear affidavit as the same would be adverse to the 1<sup>st</sup> Respondents case.

34. In the case of **Dominic Mutua Maweu vs. Occidental Insurance Company Ltd (2015) eKLR**, the court observed at paragraph 17 that:-

**"Hearsay in its non- legal sense means gossip or rumour. It conveys the idea that what is being reported is somehow second hand, adulterated, at a remove from the original. This sense underlies the inadmissibility of hearsay in the law of evidence, which demands the originality of testimony, so that its reliability can be properly tested."**

35. The same position was held in **Salim Awadh Salim & 10 Others v. Commissioner of Police & 3 Others (Nairobi High Court Petition No. 822 of 2008)** where the court held that the 1<sup>st</sup> Petitioner did not have the capacity to depone to matters of fact and events that occurred.

36. **Black's Law Dictionary Tenth Edition at page 838** defines "hearsay" as follows:-

**"Traditionally, testimony that is given by a witness who relates not what he or she know personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness."**

37. From the foregoing, it is not in dispute Mohamed Jillo, was not at the scene of the incident nor did he intercept the container **No. EITU 1512031** loaded with tyres at Eastleigh on suspicion of the goods being contrabands. The contents of his affidavit relates not to what the deponent herein knows personally, but what others have said and the contents of his affidavit is therefore dependent on the credibility of someone else other than himself. Such testimony is hearsay and inadmissible. I therefore find and hold the evidence adduced by the 1<sup>st</sup> Respondent in his Replying affidavit dated 9<sup>th</sup> October 2018 is inadmissible in law. Accordingly this court cannot rely on such evidence.

**B) Whether the seizure and detention of the petitioners' good was unlawful, unreasonable, unfair, blatant abuse of power, is a violation of petitioners' right and thus unconstitutional?**

38. In the instant petition there is no dispute that the petitioners' goods were verified by the 1<sup>st</sup> Respondent and cleared on 13<sup>th</sup> June 2018 at the Inland Container Depot (**ICD**) Nairobi upon the petitioners paying duties, taxes and other charges amounting to Kshs.1,901,887/- in respect of the said consignment. The underlying premise of this dispute is whether the petitioners goods having been verified by the 1<sup>st</sup> Respondent against the declaration made by the petitioners and the petitioners having subsequently paid the duties, taxes and other charges to the tune of Kshs.1, 901,887 to the 1<sup>st</sup> Respondent can reasonably and justifiably place reliance on erroneous information provided by the 2<sup>nd</sup> Respondent to seize and detain the goods.

39. In the instant petition the Respondents Nos. 2, 3, 4 and 5 filed only grounds of opposition. The 1<sup>st</sup> Respondent who verified the petitioners goods against the petitioners declaration and had due duties, taxes and other charges paid, had carried out its core duties of assessing and receiving revenue from tax payer herein, however it seeks to rely on information provided by the 2<sup>nd</sup> Respondent, which is contrary to what the 1<sup>st</sup> Respondent had verified. The seizing of the goods was done on 14<sup>th</sup> June 2018 at Nairobi while the goods were being offloaded in petitioner's godown in Eastleigh, by police officers from **DCIO**, Parklands police station. It is contended the police loaded the tyres in the godown which included tyres already offloaded from the container and other tyres which remained from a stock petitioners imported in May 2018 and whose duties had been paid by petitioners and loaded into a truck number **KBY 939Y** and Trailer Number ZC 6368 and upon loading the container to its capacity called motor vehicle Registration Number **KBZ 287X** where they loaded more tyres, in total, the police officers went away with 2962 tyres.

40. It is petitioners contention the police officers did not only seize and load 2240 tyres which were the consignment in container number **1X40FT EITU 151 2031** but in addition seized and loaded 722 tyres which had remained from a consignment the petitioners had imported in May 2018 urging that then explains why they had to use additional vehicle to carry the tyres. The petitioners were subsequently verbally informed the goods were under-declared and duties of additional 725 tyres alleged not to have been paid. The petitioners contend duties payable in all their goods were paid and the allegation that goods were under-declared is false, malicious and that it is the officers of the 2<sup>nd</sup> Respondent who conducted themselves unprofessionally, maliciously in loading the additional tyres from the godown despite the petitioners pleading with them not to do so. The petitioners further contend the criminal proceedings as well as seizing of the goods were carried out for extraneous purposes devoid of merit of criminal justice system.

41. The Respondents have not filed any affidavit challenging the petitioners averments; but has only filed grounds of opposition to the petition.

42. **Article 2(1) of the Constitution of Kenya 2010** provides that the constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government. Article 2(2) of the Constitution of Kenya 2010 provides that no person may claim or exercise state authority except as authorised under the constitution. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents violated these two provisions in the manner they acted and in exercising their state authority and powers in an oppressive and unreasonable manner in seizing and detaining the goods as well as invoking of criminal justice system for extraneous purpose unconnected with the pursuant of criminal justice. The Respondents seized the petitioners goods which had been brought to their storage in the month of May 2018 and which had no connection with goods for which taxes had been paid for and released on 13<sup>th</sup> June 2018. In view of the uncontroverted affidavit evidence by petitioners relating to the goods subject of these proceedings, I am satisfied the charges herein are unfounded and unenforceable and an abuse of the criminal justice system by 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

43. Article 3 of the constitution obligates every person to respect, uphold and defend this constitution. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents do not deny the petitioners goods were verified, taxes paid and released but later the same goods including other goods of the petitioners in petitioners store at Eastleigh were subsequently all seized and detained without considering the petitioners prayers that the two consignments were different. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in doing so have failed to respect, uphold and defend the constitution to the extent they failed to observe procedural fairness, acted irrationally, unreasonably in making administrative decisions and particularly seizing and impounding the goods in clear contravention of the constitution and the law.

44. Article 10 of the constitution provides that all state organs, state officers, public officers and all persons are required to apply national values and principles of governance which include *inter alia*; the rule of law, equity, social justice, equality, human rights, non-discretion, integrity, transparency and accountability. In this petition it is of great interest to note the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents carried out investigation regarding the matter and todate, a period over 1 year from the date of seizure of petitioners goods, the petitioners are yet to receive any written communication or the reason of seizure of their goods. No reason has been given for failure to give petitioners written reason for seizure of the goods. The 3<sup>rd</sup> Respondent has failed to uphold the rule of law in discharging of his duty and prevent abuse of the legal process by preferring charges against the petitioners and failing to consider the circumstances under which the goods were seized by the 2<sup>nd</sup> Respondent and the fact that all applicable taxes, duties and other charges were assessed by the 1<sup>st</sup> Respondent and were duly paid by the petitioner. I find the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in discharge of their functions, are in contravention of Article 21(1) of the Constitution by

failing in their duty, to observe, respect, protect, promote and fulfil the rights and fundamental freedom in the Bill of Rights. Under Article 27(1) of the constitution every person is equal before the law and has the right to equal protection and benefit of the law. The petitioners herein having paid the applicable duties, taxes, and other charges in all the imported goods; I find they were treated differently by 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by being treated harshly, punitively and in a discriminatory manner. The interception, seizure and detention of petitioners' goods without lawful cause constitutes a violation of petitioners' right to property as guaranteed under Article 40 of the Constitution of Kenya 2010.

**45. Article 47 (1) of the Constitution** provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47(2) of the Constitution of Kenya 2010 further provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, have no doubt, have grossly violated petitioners rights as provided for under Article 47 of the constitution by seizing and detaining the petitioners' goods and by failing to give the petitioners reasons in writing of detention of the goods and subsequent commencement of the criminal proceedings. I find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in contravention of section 4 of the Fair Administration Action Act, which Act gives effect to Article 47 of the Constitution of Kenya 2010. The section provides that:-

**“4(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**

**2) Every person has the right to be given written reasons for any administrative action that is taken against him.**

**3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) Prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) An opportunity to be heard and to make representations in that regard;**

**(c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**(d) A statement of reasons pursuant to section 6;**

**(e) Notice of the right to legal representation, where applicable;**

**(f) Notice of the right to cross-examine or where applicable; or**

**(g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.”**

**C) Whether the criminal proceedings in criminal case No. 1726 of 2018 is malicious and an abuse of the legal process?**

**46.** The Respondents in their grounds of opposition rely on the provisions of Article 157, 245(4)(a) and 259(3) (a) of the Constitution of Kenya 2010, section 8 of the Judicature Act, (Cap 8) of the Laws of Kenya, 34 and 35 of the Police Service Act. The petitioners submit the 4<sup>th</sup> and 5<sup>th</sup> Respondents grounds of opposition is borne out of lack of appreciation on the nature of the grievances and actual imports of the petitioner's petition; whereas the petitioners do not dispute the 3<sup>rd</sup> Respondent has been bestowed with state powers of prosecution under Article 157 of the constitution, the exercise of prosecutorial powers are however subject to provisions of Article 2(1) 3(1) and 157 (11) of the Constitution of Kenya 2010. **Article 157(11)** of the constitution provides:-

**“(11) 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.”**

**47.** In **Justus Mwenda Kathenge v. Director of Public Prosecutions & 2 Others**, [2014] eKLR , the Court held that the High Court can interfere with the exercise of the prosecutorial powers of the DPP where such exercise of prosecutorial power offends 157 (11) of the Constitution.

**48.** In exercising its prosecutorial power, the DPP is required under **Article 157(11)** of the Constitution of Kenya to have regard to the administration of justice and the need to prevent and avoid abuse of legal process. Where the 3<sup>rd</sup> Respondent exercises his prosecutorial powers in a manner other than provided in the Constitution, any person including the Petitioners, whose rights are violated in this instance can move this honourable court for appropriate remedy and this court can stop the DPP and all other Respondents on their tracks.

**49.** It is contended in this petition by the petitioners that the provisions of Articles 245(4)(a) and 259(3)(a) of the constitution and Section 34 and 35 of the Police Service Act cited by the 3<sup>rd</sup> and 5<sup>th</sup> Respondents are inapplicable in this case and that the 5<sup>th</sup> Respondent is the Chief Magistrate's Court, Milimani law Courts, a constitutional office established under **Article 169(1)(a)** of the Constitution read together with **Section 5** of the Magistrate's court Act No. 26 of 2015. Therefore, the 5<sup>th</sup> Respondent is not the judicial officer presiding over the Criminal Case Number 1726 of 2018 but rather constitutional office and thus **Section 6** of the Judicature Act is inapplicable.

**50.** There is nowhere in the petitioners' pleadings where it is urged the judicial officer presiding the Criminal Case Number 1726 of 2018 as

being biased as against the petitioners and thus the same must fail.

51. It is contended by the petitioners that the 5<sup>th</sup> Respondent is enjoined in this petition for the reason that the petition is partly seeking orders from the High Court staying and quashing the criminal proceedings in exercise of its unique supervisory jurisdiction over the 5<sup>th</sup> Respondent under **Article 165(6) and (7) of the Constitution.**

52. The officers of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents upon acting on investigation preferred criminal Case Number 1726 of 2018 against the petitioners herein. The petitioners were charged with offence of concealing imported goods contrary to section 202(c) of East African Community Customs Management Act 2004.

53. The petition as drawn and filed in my view is not challenging the independence of the office of the 3<sup>rd</sup> Respondent under Article 157 and Article 157(10) of the constitution, in particular nor is it intended to interfere with the independence of such office as provided by Article 157 of the constitution but seeks to point out, that the exercise of prosecutorial powers are subject to other provisions of the constitution which has to be observed. The petitioners position is as I understand the counsel submissions, is that provisions of Article 157 (11) of the constitution should be upheld as the 3<sup>rd</sup> Respondent exercises his function.

**Article 157(11) of the constitution** provides as follows:-

**"(11) 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."**

54. The 3<sup>rd</sup> Respondent is therefore obligated in exercising powers conferred by Article 157 of the constitution to have regard to public interest, the interest of administration of justice and need to avoid abuse of legal powers. There is need to act fairly and lawfully in exercising the power conferred upon the **DPP**. There should be no abuse of the power or acting illegally.

55. In **Justus Mwenda Kathenge v Director of Public Prosecutions & 2 Others**, [2014] eKLR , the Court stated as follows as to when the exercise of the **DPP's** powers may be deemed to be unlawful:

**"[8] It is now trite law that Courts cannot interfere with the exercise of the above mandate [exercise of prosecutorial powers] 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."**

56. In the instant petition, the petitioners have averred the period during which their goods were seized was in the month of June 2018 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, during which period the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were involved in the impoundment of contraband sugar, oil among other consumer goods around the country. Police officers from the office of the 2<sup>nd</sup> Respondent, it is urged found a rare opportunity to harass, intimidate and oppress honest business people like petitioners. The initial purpose of the action of the 2<sup>nd</sup> Respondent in seizing the goods was to determine whether the goods were contraband, it later metamorphosed in tax issues. It is therefore petitioners contention that their prosecution is not genuine but an abuse of the legal process.

57. In **Mohammed Gulam Husseign Fazal Karmali & Another versus Chief Magistrate's Court & Another** [2006] eKLR the learned judge held that;

**" (14) 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."**

58. The court further observed 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."**

59. I have very carefully considered the pleadings in this matter and affidavits in support and find that the proceedings pending in Magistrate court lack factual foundation and basis, and as such is suspect for ulterior motive or improper purpose. It is trite that before institution of criminal proceedings, there ought to be existence of material evidence on which the prosecution can surely base the charge on. It must not be any material but one which have reasonable and probable cause with high chances of success, short of that, the prosecution is malicious and an abuse of the court process. In such circumstances it is always in the interest of substantive justice to halt such prosecution to prevent an abuse of the legal process. The court should not allow a try and error system of prosecution.

60. Upon further reconsideration of Article 157 of the constitution of Kenya 2010 on the powers of the Director of Public Prosecution, I am

of the view, that it was not intended to make Director of Public Prosecution a conveyor belt for each and every investigations and findings placed before him. The office is duly bound to interrogate and investigate the evidence presented to it and ensure it complies and meets the constitutional threshold before acting on the same. The circumstances of each case must be considered on its own merit. In this case I find that the prosecution failed to consider the circumstances under which the alleged offence was allegedly committed, leading to invoking the criminal justice system, unreasonably, irrationally and for extraneous purposes unconnected with the pursuant of criminal justice.

**61.** Having considered the petitioners petition, I find that the seizure and detention of the petitioners goods as well as the criminal proceedings before the trial court violates the rights of the petitioners and I find this court can intervene through the powers conferred to this court under **Articles 165(3) (d) (ii), 165(6) and (7) of the constitution** so as to stop the abuse of the legal process. To that extent I proceed to make the following orders:-

**i) A declaration be and is HEREBY issued that investigations on the petitioners by the DCI and the DPP's institution of criminal proceedings against the Petitioners in criminal case number 1726 of 2018, *Republic v Ahmed Mohamed Osman and Global Africa Auto Tyres and Accessories Limited* violates the Petitioners constitutional rights, is an abuse of the process of the court and therefore unlawful, null and void *ab initio*;**

**ii) An order of certiorari be and is hereby issued to quash the entire charge sheet and proceedings against the Petitioners in criminal case number 1726 of 2018, *Republic v Ahmed Mohamed Osman and Global Africa Auto Tyres and Accessories Limited*;**

**iii) An order of prohibition be and is hereby issued prohibiting the Respondents from proceeding with the prosecution of criminal case number 1726 of 2018, *Republic v Ahmed Mohamed Osman and Global Africa Auto Tyres and Accessories Limited*;**

**iv) An order of prohibition be and is hereby issued against the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> from investigating, charging and recommending for prosecution or commencing any prosecution of the petitioners in respect of criminal case number 1726 of 2018, *Republic v Ahmed Mohamed Osman and Global Africa Auto Tyres and Accessories Limited*;**

**v) A declaration be and HEREBY issued that the seizing, impoundment and detaining of the Petitioners' goods is unlawful, arbitrary, unreasonable, contrary to due process, good governance, rule of law and without regard to the Petitioners' right to fair administrative action and is in violation of the Constitution and the law;**

**vi) An order be and is HEREBY issued compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, its employees or representatives to forthwith release all detained goods of the Petitioners;**

**vii) An order of prohibition be and is hereby issued against the 1<sup>st</sup> Respondent from imposing, warehouse charges, penalties, duties and other related charges in respect of the goods detained in its warehouses;**

**viii) Costs of this Petition to the petitioners;**

**ix) Petitioners are awarded Kshs.500, 000 as compensation for loss of business income.**

Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of July, 2019.

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J .A. MAKAU

JUDGE