



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 204 OF 2019

IN THE MATTER OF: ARTICLES 1, 2, 10, 20, 22, 23, 27, 28, 29, 33, 47, 50, 99, 157, 238, 244 AND 249 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013

AND

IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003

AND

IN THE MATTER OF: THE PUBLIC FINANCE MANAGEMENT ACT, 2012

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT, 2015

AND

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

BETWEEN

DANIEL OGWOKA MANDUKU.....PETITIONER

VERSUS

1. THE DIRECTOR OF PUBLIC PROSECUTIONS

2. INSPECTOR GENERAL OF POLICE

3. DIRECTOR OF CRIMINAL INVESTIGATIONS.....RESPONDENTS

RULING

1. The Notice of Motion dated 28/11/2019 filed herein together with the petition of even date seeks, as a primary prayer, an order stopping the arrest and prosecution of the Petitioner herein pending the hearing and determination of the petition.

2. The Petitioner/Applicant is the Managing Director of the Kenya Ports Authority (KPA) appointed in accordance with the Kenya Ports Authority Act. The Petitioner's case is that he has been the target of unfair, un-procedural and grossly flawed investigations for alleged procurement related, and other offences by the 2nd and 3rd Respondents; and that the 3rd Respondent has recommended the Petitioner's prosecution by the 1st Respondent based on the impugned investigations. The Applicant alleges that the said investigations arose out of the Kenya Ports Authority's execution of executive and ministerial orders in regard to the revitalisation of the Kisumu Port; the construction of the Makongeni Goodshed; and the construction of concrete barriers for various ports in the country, under the supervision of the National Government. The Applicant states that the said works were executed and/or carried out by the Kenya Ports Authority in collaboration with a host of other public ministries, agencies, bodies and entities including the Ministry of National Treasury and Planning, the Ministry of Environment and Forestry and the Public Works Department, in obedience to exigent Executive and ministerial orders; and in accordance with applicable laws.

3. The Applicant avers that it is only the Kenya Ports Authority and a few of their staff members, including the Applicant, who have been singled out for investigations by the 2nd and 3rd Respondents, leaving out all the other government institutions involved in the procurement, planning and execution of the said works.

4. The Applicant avers that the 2nd and 3rd Respondents have usurped the authority and mandate of the Ethics and Anti-Corruption Commission as conferred on it by the Anti-Corruption and Economic Crimes Act, 2003, by purporting to investigate corruption related and economic crimes, and thereafter the 3rd Respondent unlawfully and unprocedurally recommending the Applicant's prosecution.

5. The Applicant's case is that the 1st, 2nd and 3rd Respondents in their actions and conduct towards the Applicant are in breach of the national values and principles of governance for failing to adhere to the rule of law, and to be accountable and transparent in their investigations and intended prosecution of the Applicant. It is alleged that the 2nd and 3rd Respondents have denied the Petitioner/Applicant the right to equal benefit and equal protection of the law, and are discriminatively, selectively and unfairly targeting the Applicant and a few other persons working for the Kenya Ports Authority for investigations and possible prosecution, for works carried out by a multi-ministerial and multi-agency government taskforce.

6. It is alleged that the 1st, 2nd and 3rd Respondents in their intended prosecution and investigations of the Applicant have subjected the Applicant to administrative action that is unfair, inefficient and unlawful, through non-disclosure of all relevant facts and denying the Petitioner the right to present his case.

7. It is further alleged that the 2nd and 3rd Respondents have mounted a scurrilous media campaign against the Applicant, publicizing the investigations against him and the recommendations to charge him thus denying him the right to be presumed innocent until the contrary is proved. The Applicant avers that the 2nd and 3rd Respondents have failed in their statutory and constitutional duty to carry out thorough and comprehensive investigations against the Applicant, and have presented half-baked information to the 1st Respondent as the basis of proposed criminal charges against the Applicant.

8. It is further alleged that the 1st Respondent has breached its Prosecutorial Policy and the Constitutional requirement of its independence through its acceptance of the 2nd and 3rd Respondents' incomplete investigations and its intention to arrest, charge and prosecute the Petitioner/Applicant based thereon. The Applicant states that in his petition he has set out his grievances against the 1st, 2nd and 3rd Respondents, which will be rendered nugatory if this Application is not allowed. The Applicant argues that he has a *prima facie* case with a high likelihood of success, and that unless this Court intervenes, the Petitioner will suffer irreparable harm, which cannot be compensated by way of damages, and that the balance of convenience tilts heavily in favour of preserving the rights and fundamental freedoms of the Petitioner which cannot be restored once infringed upon and/or contravened.

9. It is upon these premises that the Applicant/Petitioner prays for the following orders:

1. This Application be certified as urgent and heard *ex parte* in the first instance.

2. Due to the urgency of the matter, service of this Application be dispensed.

3. An Interim and/or Conservatory Order be and is hereby issued allowing prayers 4, 5 and 6 hereof pending the hearing and determination of this Application *inter partes*.

4. An Interim and/or Conservatory Order be and is hereby issued restraining the 1st, 2nd and 3rd Respondents from arresting, arraigning in court, charging and/or prosecuting the Petitioner or otherwise instituting criminal proceedings against the Petitioner on the basis of the impugned investigations and recommendations of the 2nd and 3rd Respondents, until this Petition is heard and determined.

5. An Interim and/or Conservatory Order be and is hereby issued restraining the 1st, 2nd and 3rd Respondents from issuing any adverse, improper, inaccurate or unwarranted media statements against the Petitioner, until this Petition is heard and determined.

6. An order of stay be and is hereby granted of any criminal charges and/or proceedings instituted against the Petitioner before and/or during the pendency of this Application and the Petition; and until the Application and Petition herein are heard and determined.

7. Leave be and is hereby granted to amend the Petition and file a supplementary affidavit as may become necessary.

8. The costs of this application be provided for.

10. The application is supported by affidavit sworn by the Petitioner on 28/11/2019.

The Response

11. The application is opposed by all the Respondents through a Replying Affidavit sworn by No. 100804 PC (W) Nancy Daudi on 29/11/2019. The said deponent is an investigating officer in the Directorate of Criminal Investigation (DCI) and one of the investigators of the matters alleged in this petition and the application. The Respondents' case is that the application herein has not met the threshold for the grant of conservatory orders sought therein, and that the Petitioner has not placed before this Court any material facts demonstrating a *prima facie* case with a probability of success to warrant the grant of the interim/conservatory orders sought herein. The Respondents aver that the instant application as framed, and the conservatory orders sought therein are intended, to usurp the constitutional and statutory powers of the Respondents. The Respondents aver that there is nothing before this court demonstrating that the 2nd and 3rd Respondents are in breach of the National Values and Principles of Governance in the conduct of the said investigations. Further the Respondents aver that the Petitioner has failed to demonstrate that in the conduct of the said investigations, the 2nd and 3rd Respondents have denied the Petitioner right to be heard, or the right to equal protection of the law. In addition, the Respondents state that the Applicant has willfully and selectively failed to disclose to this Court that he recorded a statement on the 5th, 26th, 27th of September, 2019 and on the 27th day of November 2019 wherein his version of events was recorded. **(Attached marked as ND1 are copies of the Petitioner's statements)**. In the course of investigations, the 2nd and 3rd Respondents aver that they have conducted interviews from various personnel and employees of various Government Agencies and private entities.

12. With reference to allegations that the Respondents were releasing to the media adverse information, the Respondents aver that they are not media institutions nor are they agents of the media and that they have no control over the media and cannot therefore be faulted over media reports, and that in any event the courts cannot be impaired or swayed by media reports.

13. The Respondents state that the 1st Respondent in the exercise of his mandate under Article 157 of the Constitution and the Office of the Director of Public Prosecutions Act, has the right to make the decision to charge based on evidence contained in the file, and can also direct further investigations upon review of a file, or even order closure of investigations where there is not enough evidence. The 2nd and 3rd Respondents aver that they are Constitutional bodies created under the National Police Service Act and under Article 245 of the Constitution. Their lawful mandate is to conduct investigations in any particular offences including offences relating to procurement and corruption.

14. The Respondents' case is that the instant Application is a misuse of the judicial process and judicial time as there are no ripe or real issues to be determined, and that the Conservatory Orders sought in the instant Application and in the Petition violate the provisions of the Constitution as they seek to unlawfully curtail the Constitutional and Statutory Powers of the Respondents. The orders, if granted shall gravely and irreparably prejudice the Respondents and deny them the right to exercise their lawful constitutional and statutory mandate.

15. The Respondents further aver that the public interest in this matter outweighs the interests of the Applicant and as such the balance of convenience tilts in the favour of the Respondents, and so the orders sought herein should not be granted. In any event, the Respondents aver that the 1st Respondent is yet to make a decision and as such the conservatory orders sought herein will amount to interference with the mandate of the 1st Respondent.

The Hearing and Submissions

16. The application was heard through oral submission of counsel on 02/12/19. Learned Counsel **Mr. James Orengo SC** led the Petitioner's legal team which included **Mr. Nelson Havi** and **Ms. Julie Soweto**, learned Counsel. The Respondents legal team was led by **Mr. Alexander Muteti**, and included **Mr. Fedha**, **Mr. Owiti** and **Mr. Wachira Nguyo**, learned Counsel.

17. Mr. Orengo SC submitted that the application before the court details instances of violations of Applicant's individual rights, and that the prayers the Applicant is seeking are limited to restraining the arrest and prosecution of the Petitioner. The Petitioner has no problem with the ongoing investigations. Counsel submitted that the subject matter of the petition revolves around the Kisumu Port and the storage facility which is in Makongeni Nairobi. Counsel submitted that the 2nd and 3rd Respondents have proposed charges against the Petitioner which the DPP is waiting to effect. The charges relate to conspiracy under the Penal Code and under Public Procurement and Disposal Act, and Anti-Corruption and Economic Crimes Act. Counsel submitted that the proposed charges are in violation of the constitution and statutes.

18. Mr. Orengo submitted that the ODPP Act requires the Inspector General to make appropriate disclosure of all material facts gathered during the investigations to assist the prosecution and the defence in furtherance of Section 26 of the ODPP Act.

19. Mr. Orengo submitted that the proposed charges and the intended prosecution are being taken in disregard to Section 26 aforesaid. Counsel referred the court to page 18 of the Petitioner's Bundle, where there is a report by the 3rd Respondent that there are pending reports from Public Procurement and Regulatory Authority and other relevant agencies. These reports have not been made available to the DPP. Counsel submitted that apart from these inchoate processes, there are other issues for example on budgeting for procurement, which have not been disclosed. Mr. Orengo submitted that a prosecution cannot be based on information which has not been disclosed to the suspect.

20. Mr. Orengo further submitted that the statements recorded by the Petitioner were made in general terms without being confronted with specific charges, hence violating Article 47 of the Constitution and the Fair Administrative Action Act under which provisions of the law the Petitioner has a right to be given reasons for proposed charges.

21. Mr. Orengo further submitted that there is a proposal to charge the Petitioner under the Anti-Corruption and Economic Crimes Act. That

Act spells (Section 35) how the investigations under that Act are to be carried out. Counsel referred the court to the **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019]** and submitted that the DCI cannot purport to undertake investigations under Anti-Corruption and Economic Crimes Act, and if the DCI is doing that then he should be stopped and the investigations handed over to relevant agencies.

22. Mr. Orengo also submitted that there is a question of inflammatory media coverage. The force of this media coverage is from the Respondents. In the court of public opinion the Petitioner has been tried and found guilty making it even very difficult for this court to reach a contrary finding. Counsel referred court to the case of **Irvin v Dowd, Warden 1960 US**, a USA case which emphasizes the role of pre-trial media coverage and especially before the trial. The case castigated the media for inflammatory statements. For these reasons, the Petitioner urged the court to stop the Respondents from giving to media adverse statements on the Petitioner.

23. It was submitted for the Applicant that the threshold for a conservatory order to be made under Article 23(1) depends upon the demonstration that there is more than a threat to the Petitioner. Counsel submitted that the media has for months carried inflammatory statements on the Petitioner, and that if these orders are not granted (orders Nos. 4 and 5) the petition will have been rendered nugatory.

24. Mr. Muteti opposed the application, submitting that the same is misconceived and is premature. Counsel submitted that the court is being asked to usurp the powers of the DPP under Article 157(10). According to Counsel the DCI did his bit by carrying out the investigations and forwarding the file to the DPP as required by law.

25. Mr. Muteti submitted that under Articles 244 and 245(4) of the constitution the National Police Service has a duty to prevent corruption. And in the performance of its duties and mandate, the National Police Service shall not be under the authority of anybody. Counsel submitted that to issue an order preventing arrest and arraignment in court, the Court must be satisfied that if indeed an arrest were to occur, there is probable cause. And if there is a probable cause, then the court should not interfere. Mr. Muteti submitted that the recorded statements of the Petitioner disclose a probable cause. But even then the recommendations which the DCI may make to the DPP do not bind the DPP. So the proposed charges remain mere proposals. The DPP will exercise his discretion at his time. In this particular instance, counsel submitted that the DPP has not exercised his discretion. Counsel submitted that the application merely seeks to render the function of the DPP impossible so that it cannot decide and render a decision on the matter.

26. As to allegation that the DCI is encroaching on the mandate of the Anti-corruption and Economic Crimes Act, Counsel disagreed, and submitted that EACC may investigate corruption, but the DCI retains the residual powers to carry out all criminal investigations in Kenya. Counsel submitted that under Section 26 of the ODPP Act the disclosure referred to is to the DPP. So it is only the DPP that can complain. Even then Counsel submitted that the material alleged to have not been disclosed is not identified by the Applicant.

27. Mr. Muteti denied allegation that the Petitioner is threatened. Counsel submitted that the DCI has called the entire board of Kenya Ports Authority to record a statement, and that the substantive orders sought in this petition will still be available even after the DPP makes a decision. Counsel submitted that if this application is granted, it will open a Pandora's Box where every suspect being investigated would be running to the court to seek refuge, a position which will be retrogressive for this country. Counsel submitted that it is not in public interest that the DPP be stopped from making decision on a prosecution file. Mr. Muteti submitted that this application has no leg to stand on. The DPP and DCI are acting very reasonably, and this court should not interfere with their constitutional duties.

28. Mr. Muteti dismissed the decision in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda (supra)** as bad law, stating that the court cannot purport to decide for the DCI which offences to investigate. To stop intended prosecution is a very serious issue and there must be sufficient reasons for that. Counsel urged the court to dismiss the application.

29. Mr. Owiti distinguished the authorities by the Petitioner, stating that in all those cases, there was already a decision to prosecute, or there was already an ongoing prosecution. In this case the Petitioner has not availed any information in this court to enable this court know whether or not to grant the orders – see. **Judicial Service Commission v Speaker of the National Assembly & 8 others [2014] eKLR**. See also **Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR**. In these cases, there was already a prosecution ongoing, unlike in the matter before this Court. Counsel submitted that the current petition is premature, since the DPP may make a decision one way or the other, and that Articles 23 and 24 must be read together because Article 23 rights can be limited in Article 24.

30. Mr. Nguyo supported the submissions and case of the Respondents in this matter.

31. In response, Mr. Havi submitted that at this stage of the hearing the court is not obligated to determine with finality the grounds on which the petition is based. All that the Petitioner is under duty to do is to demonstrate an urgent case of denial, violation or a threat under the Bill of Rights. Counsel submitted that the Respondents have not indicated how the three main grounds of the petition are frivolous. In response to the submission that the court should not usurp powers of the DPP under Article 157, Mr. Havi argued that the Court has the final say in any matter on the interpretation of the law. Counsel submitted that Article 23(3) (c) gives Court power to issue a conservatory order. That power is not conditional or pegged upon milestone in prosecution or investigation. The court can intervene at whatever stage. The Petitioner is a state officer. If he is charged without cause the Petitioner will be suspended and will not continue holding the said office. A conservatory order should be issued to protect the rights of the Petitioner. If conservatory orders are not granted, then the Petition will be rendered useless.

Issues for Determination

32. From the submissions and pleadings, it seems to me that the following are the issues to be determined by this court.

(i) What are the constitutional and statutory basis for criminal investigations and prosecution?

- (ii) *What information ought to be shared under Section 26 of the ODPP Act?*
- (iii) *Whether the DCI can investigate Anti-corruption cases.*
- (iv) *Whether due process was followed by the respondents in conduct of the investigations.*
- (v) *What is the mandate of the D.P.P under Article 157(11) of the Constitution?*
- (vi) *Whether the 2nd and 3rd Respondent powers can be interfered with?*
- (vii) *What rights of the Petitioner were interfered, if any?*

Constitutional and Statutory basis for criminal prosecutions

33. The Director of Public Prosecutions derives his powers from Article 157 of the constitution.

Article 157(4),(6),(10) &(11) of the Constitution provides as follows:

“157 (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

(5)...

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(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.”

34. Section 6 of the Office of the Director of Public Prosecutions Act states as follows:

“6. Pursuant to Article 157(10) of the Constitution, the Director shall—

(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law.”

35. On the other hand, Article 244 of the Constitution provides for the objects and functions of the National Police Service *inter-alia* as follows:

“(a) strive for the highest standards of professionalism and discipline among its members;

(b) prevent corruption and promote and practice transparency and accountability;

...

36. And Article 245(4), (a) of the Constitution provides that:

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

- (a) the investigation of any particular offence or offences;
- (b) the enforcement of the law against any particular person or persons;
- (c) ...

37. To give effect to the constitutional mandate of investigation of crimes under the aforesaid Articles, the National Police Service Act under Section 24 provides for the functions of the Police to include investigation of crimes and apprehension of offenders as follows: -

24. Functions of the Kenya Police Service

The functions of the Kenya Police Service shall be the—

- (a) ...
- (e) investigation of crimes;

38. The Directorate of Criminal Investigations, which is headed by the DCI, is established under Section 28 of the National Police Service Act, 2011, and is placed under the direction, command and control of the Inspector General of the National Police Service. The functions of the Directorate, as provided for under section 35 of the National Police Service Act, include:

- (a) *collect and provide criminal intelligence;*
- (b) *undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;*
- (c) maintain law and order
- (d) detect and prevent crime;

39. Further, Section 52 (1) of the National Police Service Act grants a police officer power to summon any person believed to have information which may assist in investigation to appear before the police in police station. The said Section reads as follows:

“(1) A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.”

40. Further, Section 26(2) of the Office of the Director of Public Prosecution Act provides as follows:

- (2) The Inspector-General or any other investigative agency shall—
- (a) conduct thorough investigations;
- (b) compile all evidence; and
- ...

Statutory provisions giving the EACC powers to investigate

41. Section 11 (1) (d) & 3 of the Ethics and Anti-Corruption Commission Act provides as follows:

- (1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—
- (a) in relation to State officers— (i) develop and promote standards and best practices in integrity and anti-corruption; (ii) develop a code of ethics;
- (b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anticorruption;
- (c) receive complaints on the breach of the code of ethics by public officers;

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution;

...

(3) The Commission may cooperate and collaborate with other State organs and agencies and any foreign government or international or regional organization in the prevention and investigation for corruption.

42. Section 13 (2) (c) of the Ethics and Anti-Corruption Commission Act provides for the Powers of the Commission which include:

(2) Without prejudice to the generality of subsection (1), the Commission shall have the power to—

(a) ...

(c) conduct investigations on its own initiative or on a complaint made by any person;

43. On investigations, Section 23 of the Anti-Corruption and Economic Crimes Act provide as follows:

(1) The Secretary or a person authorized by the Secretary may conduct an investigation on behalf of the Commission.

(2) Except as otherwise provided by this Part, the powers conferred on the Commission by this Part may be exercised, for the purposes of an investigation, by the Secretary or an investigator.

44. Further, Section 35 of ACECA provides as follows:

(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.

45. The foregoing expositions show also clearly that it is the mandate of the Ethics and Anti-Corruption commission to carry our investigations on corruption allegations. The question to answer now is whether or not the investigation of corruption allegations is the sole domain of the Ethics and Anti-Corruption Commission. This question has been answered in the foregoing paragraphs. Corruption is a special kind of crime and that is the reason why a whole commission was created to fight it, and a special Act of Parliament enacted to enable that purpose. However, it is the finding of this Court, and I hold as much that the investigations of corruption offences is not limited to the Ethics and Anti-Corruption Commission. The National Police Service and the DCI, have as much mandate to investigate corruption related crimes and to hand over their findings to the DPP to exercise its mandate under the law and the constitution. The Petition and the current Application are primarily premised on the allegation that the 2nd and 3rd Respondents have no mandate to investigate corruption crimes, and that that kind of investigation is the sole domain of the Ethic and Anti-Corruption Commission. This allegation has been denied by all the Respondents who aver that the DCI has the mandate to investigate all crimes in Kenya without any limitation. This issue was also a subject of **Philomena Mbete Mwilu v Director of Public Prosecutions (supra)** where it was held as follows:

“Article 244 (b) of the Constitution mandates the National Police Service to “prevent corruption and promote and practice transparency and accountability”. The Directorate of Criminal Investigations, which is headed by the DCI, is established under section 28 of the National Police Service Act, 2011, and is placed under the direction, command and control of the Inspector General of the National Police Service. The functions of the Directorate, as provided for under section 35 of the National Police Service Act, include: -

(a) ...;

(b) undertake Investigations on serious crimes including homicide, narcotics crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crimes, and cybercrime, among others,

296. A plain reading of the Constitution suggests that the DCI and the EACC have coordinate mandates to investigate economic crimes. It may be concluded, therefore, that investigations carried out by the DCI and recommendations made to the DPP cannot be faulted on account of not having been conducted by the EACC. With regard to economic crimes, the DPP can act on the outcome of investigations whether they are carried out by the DCI or the EACC. In Michael Sistu Mwaura Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others (supra), the court held that the DPP is at liberty to rely on any source of information in order to institute criminal proceedings, whether the information emanates from the EACC or not, as long as the source is not unlawful.”

46. A review of the constitutional and statutory provisions herein show without any doubt that the police have the mandate for performing multi-faceted functions as provided under Articles 244 and 245 of the Constitution, Section 24(e) and 35(b) & (d) such as the prevention of crime, corruption, maintenance of law and order, and conduct of investigation of economic crimes. Therefore, investigations carried out by the DCI and recommendations made to the DPP cannot be faulted on account of not having been conducted by the EACC as the investigations by the DCI are procedural and lawful.

47. Under Article 157(11) the D.P.P is mandate to:

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

48. 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;”

49. Relating the above Article to this matter, this Court finds and holds that because the matter before the Court is, at this stage, merely speculative, the DPP has not preferred any charges against the Applicant, and it is difficult to say whether or not the DPP will infringe Article 157(11). This is a matter where we must wait and see.

Whether the 2nd & 3rd Respondents powers to investigate can be interfered with?

50. While in this matter the Petitioner/Applicant does not object to investigations being carried out, the Petitioner objects to possible prosecution arising from the said investigations. The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.

51. Odunga J. in **Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR**, said with regard to the power of the police to investigate:

“42. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and 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.”

In **Pauline Adhiambo Raget v. DPP & 5 Ors.**, (2016) eKLR, a case where breach of right to equality was alleged to have been violated by investigations of an offence, Onguto J. held, and I agree, that-

“I have also been unable to see how in investigating an alleged criminal conduct or activity there could be discrimination or a practice of inequality before the law. The respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the interested party in this case. In so doing, it is a legal mandate they would be undertaking.”

52. Regarding prosecution Odunga J in **Agnes Ngenesi Kinyua aka Agnes Kinywa vs. Director of Public Prosecution (supra)** held as follows:

“ it must be emphasized 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.”

53. In the matter at hand, there is yet no prosecution, and the copies of alleged proposed charge sheets remain just that – alleged proposed charge sheets. The Court is not in a position to weigh the weight of would be evidence and what probative evidential value to place thereon.

54. It is the finding of this court that there has not been any violation of the Petitioner’s rights under Article 27 and 47 of the Constitution

because the 2nd and 3rd Respondents invited the Petitioner herein to record statements on 5th, 26th, 27th of September, 2019 and on the 27th day of November 2019 giving the Petitioner an opportunity to give his version on the allegations against him. Further, in the course of investigations, the 2nd and 3rd Respondents have conducted interviews from various personnel and employees of various Government agencies and private entities. At least at this stage, that is a *prima facie* evidence that the Respondents have so far carried out their investigations in a fair manner or process.

Whether a conservatory order ought to be granted

55. Mr. Orengo cited the case of **Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015]** in support for the Conservatory Orders, stating that the Applicant at this stage is merely required to demonstrate that he has a *prima facie* case with a likelihood of success, and that unless the court grants Conservatory Orders, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. On his part, Mr. Muteti submitted that the DCI had called the entire board of Kenya Ports Authority to record a statement, and that the DPP is yet to decide whether or not to prosecute the Applicant, with the result that this application at this stage is merely speculative and that in any event the substantive orders sought in this petition will still be available even after the DPP makes a decision.

56. The foregoing paragraphs of this Ruling reveal that the Petitioner has failed to demonstrate any specific right or fundamental freedom that was or was likely to be affected by the Respondents' actions. The Petitioner also failed to bring himself within the aid of Article 47 of the Constitution to demonstrate a *prima facie* case at this stage.

57. This Court finds and holds that the Application before the Court is merely apprehensive of what the DPP is likely to do. That being so this Court finds and holds that the said Application is speculative and the prayers sought therein cannot be granted at this stage except that this Court has a duty to comment on two orders sought herein being the allegation of adverse media reports and the prayers for bail pending arrest.

58. On the issue of media reporting this Court has taken judicial notice that the Petitioner has been the subject of adverse media reports both print and audio-visual. The cumulative effect of such report is to paint the Petitioner in a bad light. While media report is not likely to influence the Court, the Petitioner is likely to be judged adversely in the Court of public opinion with the result that should he be found innocent by the Court the said public is likely to be highly disappointed, and this scenario is not good for administration of justice. This Court has the duty to protect the Petitioner from such adverse media coverage so as to ensure that should the Petitioner finally be charged with the alleged offences the Petitioner shall receive a fair hearing.

59. The other issue I wish to comment on is the Petitioner's application for bond/bail pending the hearing of the petition. On 02/12/2019 when the application was heard *inter partes* this court granted the Applicant a free bond, should the Applicant be arrested during the pendency of the said Ruling. I was able to take notice that this fact of free bond became the main pre-occupation of the media, especially that of the Nation Media Group in its television commentaries. This court appreciates the duty of the media to inform the public of critical public issues. However, when that information is couched in a way to create confusion intentionally, that is not justice. The media has the duty to inform the public about the place of bond/bail in our constitutional democracy, and more so the purpose for which a bond may be granted. If we appreciate the purpose for a bond or bail, then it becomes easy to understand the terms upon which such bond or bail may be granted.

60. Every accused person has the right to be presumed innocent. See (Article 50(2) of the constitution). This is the primary rationale for the requirement of the constitution that an arrested person has the right to be released on bail or bond. The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. Accused persons should not be subjected to the same rules and regulations as convicts. In this respect, the International Covenant on Civil and Political Rights (ICCPR) provides that "*accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.*"

61. Again, every accused person has the right to liberty. As a general rule, therefore, every accused person should not be detained, but should be released subject to his/her guarantee to appear for trial. Pretrial detention should therefore be a measure of last resort, and the criminal justice institutions should make every reasonable effort to avoid pretrial detention.

62. Bail and bond provide guarantees that accused persons will attend trial. They are securities that aim to procure the release of an accused person from legal custody together with an undertaking that he or she will appear for trial. This then means that accused persons have a right to reasonable bail and bond terms, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial. Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.

63. The purpose of bond/bail is therefore meant to treat suspected offenders with some measure of dignity. This dignity should be accorded to every citizen or suspect. The Petitioner herein prays for a bond or bail pending arrest, should that happen. Arrest in Kenya has become a public spectre, and I should think the prospect of being arrested is the most devastating emotional issue for the would be suspected criminals, more so if they hold high office. In Kenya today, the public waits with baited breath whenever a senior public servant is rumoured to be required for arrest. In a primitive society that would be the day when villagers met at a public square to witness public execution of public offenders. It, however, needs not be so. Every Kenyan should be arrested with dignity, and be given a reasonable chance to apply for bail either before or immediately upon arrest. While in this matter I have found out that the threats of arrest against the Petitioner are speculative, the Petitioner can still be arrested if the DPP decides to do that. As at now, the Petitioner has not been arrested. He is not an accused

person. He is still discharging the duties of his high office. He is not a suspect, and there are no charges preferred against him. The Petitioner nonetheless fears that his arrest is imminent. In that regard, this court is persuaded that the Petitioner has established a case for temporary conservative orders of bond pending arrest, should that happen. And for the worth of the Petitioner's fears, I am persuaded to release him on bond or bail pending arrest.

64. In the upshot, I make orders as under:

(a) The Respondents are hereby prohibited from releasing to the media any further adverse information regarding the alleged investigations against the Petitioner.

(b) The Petitioner is granted a conservative cash bail of Kshs. 500,000/= pending arrest, should that happen during the pendency of the petition herein. This cash bail shall automatically terminate and cease upon the first appearance in criminal trial court, if that happens, and the trial court will then set fresh bond terms, if any, in accordance with the nature of the charges.

(c) The Petitioner is hereby granted the leave to amend the petition.

(d) Save as provided in these orders the application before the Court dated 28/11/2019 is dismissed with costs in the Petitioner.

Dated, Signed and Delivered at Mombasa this 17th day of

December, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Muteti for 1st and 3rd Respondents

Mr. Nguyo for 2nd Respondent

Mr. Orengo, Mr. Havi and Ms. Soweto for Petitioner

Mr. Kaunda Court Assistant