



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION & ECONOMICS CRIME DIVISION**

**CONSTITUTIONAL PETITION NO. 32 OF 2017 as consolidated with PETITIONS NO. 25 OF 2017 AND 27 OF 2017**

**IN THE MATTER OF:** ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 41, 48, 50, 79, 157, 159, 162, 165, 258 AND 259 OF THE CONSTITUTION OF THE SOVEREIGN REPUBLIC OF KENYA, 2010

**AND**

**IN THE MATTER OF:** ARTICLE 159 OF THE CONSTITUTION OF KENYA, 2010

**AND**

**IN THE MATTER OF:** THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

**AND**

**IN THE MATTER OF:** THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

**AND**

**IN THE MATTER OF:** THE ANTI-COUNTERFEIT ACT NO. 13 OF 2008

**AND**

**IN THE MATTER OF:** THE ANTI-COUNTERFEIT REGULATIONS, 2010

**AND**

**IN THE MATTER OF:** ANTI-COUNTERFEIT AGENCY POLICY ON ALTERNATIVE DISPUTE RESOLUTION

**AND**

**IN THE MATTER OF:** THE DECISION OF THE DIRECTOR OF PUBLIC PROSECUTION MADE ON 26<sup>TH</sup> SEPTEMBER, 2017

**AND**

**IN THE MATTER OF:** ANTI-CORRUPTION CRIMINAL CASE NO. 1 OF 2017 BEFORE THE CHIEF MAGISTRATE COURT, KERICHO

**AND**

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

**BETWEEN**

**MARTIN LUTHER BWANGA.....1<sup>ST</sup> PETITIONER**

**EFFIE MONICAH OLUOCH.....2<sup>ND</sup> PETITIONER**

**ROBERT KIPTANUI CHIRCHIR.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE ANTI-COUNTERFEIT AGENCY.....3<sup>RD</sup> RESPONDENT**

**THE CHIEF MAGISTRATE COURT, KERICHO.....4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. Three constitutional petitions were filed separately by **Effie Monicah Aluoch, Robert Kiptanui Chirchir** and **Martin Luther Bwangah Ongaya** (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners respectively) against the Director of Public Prosecutions, Ethics and Anti-Corruption Commission, Anti-Counterfeit Agency, Chief Magistrate's Court Kericho and the Attorney General (the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents respectively). The petitions relate to the petitioners arrest and subsequent prosecution for corruption related criminal offences of bribery at the Chief Magistrate's Court in Kericho in Criminal Case No. 1 of 2017. The offences were said to have been committed on 6<sup>th</sup> April 2017 in Kericho County. The petitioners are challenging the criminal proceedings against them as being unlawful and unconstitutional. The petitions were therefore consolidated since they involved the same issue.

2. The petitions seek the orders and declarations in the following terms;

**1<sup>ST</sup> PETITIONER'S PETITION:-**

(i) A declaration that the decision of the 1<sup>st</sup> respondent, on the recommendation of the 2<sup>nd</sup> respondent to charge the petitioner in Criminal Case No. 1 of 2017 before the Chief Magistrate's Court, Kericho is unconstitutional and therefore null void.

(ii) A declaration that the consequential decision of the 3<sup>rd</sup> respondent, on the recommendation of the 2<sup>nd</sup> respondent, dated 5<sup>th</sup> October 2017 to suspend the petitioner's duties on the basis of the proceedings in Anti-Corruption Criminal Case No. 1 of 2017 before the Chief Magistrate's Court, Kericho is unconstitutional and therefore null and void.

(iii) A judicial review order of certiorari to bring before this court for the purposes of being quashed both the decisions of the 1<sup>st</sup> respondent made on 22<sup>nd</sup> September 2017 to charge the petitioner in Criminal Case No. 1 of 2017 before the Chief Magistrate's Court, Kericho and the consequential decision of the 3<sup>rd</sup> respondent made on 5<sup>th</sup> October 2017 to suspend the petitioner from his duties on the basis of the said charges.

(iv) A judicial review order of permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from charging the petitioner with any criminal offences in relation to the decisions made on 6<sup>th</sup> July 2017 and which are subject of the proceedings in Anti-Corruption Criminal Case No. 1 of 2017 before the Chief Magistrate, Kericho.

(v) Costs of the petition.

**2<sup>ND</sup> PETITIONER'S PETITION:-**

(i) A declaration that the decision of the 1<sup>st</sup> respondent, on the recommendation of the 2<sup>nd</sup> respondent to charge the petitioner in Criminal Case No. 1 of 2017 before the Chief Magistrate's Court, Kericho is unconstitutional and void.

(ii) A permanent injunction restraining the 3<sup>rd</sup> respondent from dismissing or suspending the petitioner in relation to proceedings in the Anti-Corruption Criminal Case No. 1 of 2017.

(iii) Costs of the petition.

**3<sup>RD</sup> PETITIONER'S PETITION:-**

(i) A declaration that the decision of the 1<sup>st</sup> respondent, on the recommendation of the 2<sup>nd</sup> respondent to charge the petitioner in Criminal Case No. 1 of 2017 before the Chief Magistrate's Court, Kericho is unconstitutional and therefore null void.

(ii) A judicial review order of certiorari to bring before this court for the purposes of being quashed both the decisions of the 1<sup>st</sup> respondent made on 22<sup>nd</sup> September 2017 to charge the petitioner in Criminal Case No. 1 of 2017 before the Chief Magistrate's Court, Kericho.

(iii) A judicial review order of permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from charging the petitioner with any criminal offences in relation to the decision made on 6<sup>th</sup> July 2017 and which is subject of the proceedings in Anti-Corruption Criminal Case No. 1 of 2017 before the Chief Magistrate, Kericho.

(iv) Costs of the petition.

3. The brief facts from which the consolidated petitions arise are as follows; the petitioners are employees of the 3<sup>rd</sup> respondent based at its regional office in Kisumu. At the material time, the 1<sup>st</sup> petitioner was designated as an Anti-Counterfeit Inspector, the 2<sup>nd</sup> petitioner, a Senior Anti Counterfeit Inspector and the 3<sup>rd</sup> petitioner, a Chief Anti Counterfeit Inspector. The 3<sup>rd</sup> petitioner also doubled up as the regional manager. Kericho County fell under his jurisdiction. On the day of the incident, the petitioners launched a crackdown on counterfeit goods in Litein Town, within Kericho County. They identified several businesses namely Deltaline Electronicals, Litein Electronics and Sky Max Electricals which they suspected of dealing with counterfeit goods. They obtained reinforcement from police officers at Litein Police Station to raid the businesses.

4. The petitioners state that they proceeded to the said businesses and found the owners at the premises. They introduced themselves to them before they conducted a search at the premises. During the search they recovered assorted counterfeit electronic goods from each business which were seized and impounded by the police. The businessmen were arrested and taken to Litein Police Station.

5. They informed the businessmen that the dispute could be settled through an Alternative Dispute Resolution (ADR) option available without trial entailing forfeiture of the impounded counterfeit goods and payment of the retail price of the items. They claim that the businessmen opted to settle the dispute through the ADR process and therefore made a formal application which was approved by the 3<sup>rd</sup> respondent.

6. Thereafter they assessed and determined the retail value of the items recovered which amount was paid by the respective businessmen and an official receipt of the 3<sup>rd</sup> respondent issued before they were released from custody. The impounded items were subsequently loaded in the 3<sup>rd</sup> respondent's vehicle to be transported back to the regional office in Kisumu with the petitioners aboard the vehicle.

7. The petitioners allege that on their way to Kisumu they saw that it was going to rain and they therefore stopped their vehicle on the side of the road to arrange the items recovered. They claim that it was at that point that they realized that the 2<sup>nd</sup> respondents officers had also been aboard the vehicle. The said officers asked them to step aside and they conducted a body search on them.

8. Recovered from them was the money paid by the business owners, Kshs.6,000 from the 1<sup>st</sup> petitioner said to be office petty cash, Kshs.27,000 from the 2<sup>nd</sup> petitioner, Kshs.48,000 from the 3<sup>rd</sup> petitioner, an inventory of the recovered items, loose leaf note books and several other assorted documents from the vehicle. The officers then took them back to Kericho Police Station. They were later arraigned at Kericho Chief Magistrate's Court charged with the now facing them. Following their arraignment in court the 3<sup>rd</sup> respondent suspended them from duty.

#### **THE PETITIONERS' CASE**

9. The three petitions were argued together. They are brought under Articles 2(1), 3 (1), 10, 19, 20, 22, 23, 27, 28, 41, 47, 48, 50, 159, 227 and 258 of the Constitution. The petitioners aver that their rights to equal protection of the law under Article 27 of the Constitution have been violated. They contend that a mechanism for ADR process is provided for under the Anti -Counterfeit Act, its Policy on ADR and Article 159 of the Constitution. Further that the businessmen made a formal application to pursue the ADR process put in place under Section 34 of the Policy on ADR and the same was approved.

10. They argue that their actions were done in good faith and within their job description. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners state that they were mandated to apply the provisions of the Policy on ADR. On her part, the 2<sup>nd</sup> petitioner claims that she acted under the instructions of the 1<sup>st</sup> and 3<sup>rd</sup> petitioners who were her seniors. According to the petitioners, the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to prefer and sanction their prosecution and their subsequent suspension from duty infringes on their rights to fair labour practices under Article 41.

11. The petitioners further claim that the charges preferred against them are unsustainable in law. They contend that the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to prosecute them is an unlawful, unreasonable and unfair administrative action contrary to the principles set out under Article 47. The petitioners also claim that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' reliance on the documents executed by themselves in the process of the said ADR infringes on their constitutional right against self-incrimination protected under Article 50 (2) (k) and (n).

12. Mr. Kenyatta represented the petitioners during the hearing. He submitted that pursuant to Articles 165 (3) (b) (ii), 165 (6) and the High Court (Organization and Administration) Act No. 27 of 2015, this court has jurisdiction to hear and determine the petitions. To further buttress his submissions, counsel relied on the cases of *Republic –vs- Attorney General Ex parte Kipngeno arap Ngeny, High Court Civil Application No. 406 of 2001*, *Republic –vs- Minister for Home Affairs and Others Ex Parte Sitamze, Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323* and *George Joshua Okungu & Another –vs- The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another [2014] eKLR*.

13. Counsel submitted that the respondents' arguments to the effect that the petitioners having been charged at the trial court should allow the

trial to proceed since the allegations of breach of the Constitution are mere speculations are against the express provisions of the Constitution. He relied on the case of **Bernard Murage –vs- Fineserve Africa Limited & 3 Others [2015] eKLR**.

14. In addressing the question of the infringement of the petitioners' rights under the constitution, Mr. Kenyatta submitted that none of the respondents disputed that the petitioners acted pursuant to the 3<sup>rd</sup> respondent's policy on ADR. He submitted that Clause 2.1-2.5 of the policy provides that the said policy is grounded on the provisions of the Constitution, Criminal Procedure Code, Common Law and the Arbitration Act. He submitted that the said policy was brought to the attention of the 3<sup>rd</sup> petitioner by the 3<sup>rd</sup> respondent's deputy director, Enforcement and Legal Services vide a letter dated 9<sup>th</sup> July 2016 with instructions to strictly implement it to the letter.

15. He also submitted that the 3<sup>rd</sup> petitioner properly applied the policy and there was therefore no basis to charge the petitioners at the Kericho Chief Magistrate's Court. He submitted that the petitioners acted in good faith and they had a legitimate expectation that their actions would not be criminalized. He argued that the decision to prosecute the petitioners is based on a selective reading and interpretation of the EACC Act, Anti-Counterfeit Act and the Constitution.

16. Mr. Kenyatta contended that the 3<sup>rd</sup> respondent's suspension of the petitioners and the accompanying uncertainty and anxiety amounts to subjecting the petitioners to unreasonable working conditions. He contended further that under Article 50 of the Constitution, the petitioners have a right not to give incriminating evidence. They also have a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya.

### **THE 1<sup>ST</sup> RESPONDENT'S CASE**

17. The 1<sup>st</sup> respondent did not file a replying affidavit but instead filed grounds of opposition dated 1<sup>st</sup> February, 2018. The 1<sup>st</sup> respondent argues that the decision to prefer the charges against the petitioners was made in accordance with Article 157 (6) of the Constitution pursuant to a report of the 2<sup>nd</sup> respondent under Section 35 of the Anti-Corruption and Economic Crimes Act (ACECA). The 1<sup>st</sup> respondent contends that Article 252 of the Constitution confers upon the 2<sup>nd</sup> respondent powers to conduct investigations which this court cannot interfere with unless conducted in breach of the law or the Constitution.

18. They argue that the petitioners have not demonstrated any such breach. According to the 1<sup>st</sup> respondent, the petitions raise questions touching on the sufficiency of evidence to support the charges preferred against them which should be left to the trial court to determine. The 1<sup>st</sup> respondent maintains that the petitioners' suspension is lawful in accordance with Section 62 of the ACECA.

19. **Mr. Ashimosi**, appeared on behalf of the 1<sup>st</sup> respondent. It was submitted that the decision to prosecute the petitioners was made independently premised on the evidence obtained and the underlying public interest in prosecution of anti- corruption offences. It was argued that the petitioners had failed to demonstrate that the 1<sup>st</sup> respondent had in any way abrogated any provision of the law, Constitution and rule of natural justice. Counsel relied on the case of **Kenya Commercial Bank Limited & 2 Others –vs- Commissioner of Police & Another, Nairobi Petition No. 218 of 2012 [2013] eKLR** to urge that the court should not usurp the DPP's Constitutional mandate under Article 157 of the Constitution.

20. He also drew the court's attention to the case of **George Okungu & Another –vs- Chief Magistrate Court Anti-Corruption Court at Nairobi & Another [2014] eKLR** to submit that the fact the ongoing proceedings are in all likelihood bound to fail is not a ground to halt the criminal process. He reiterated that the petitioners' suspension was lawful.

21. To sum up his submissions, Counsel for the 1<sup>st</sup> respondent submitted that the petitioners having failed to prove any breach of the Constitution or written law are not entitled to the orders sought.

### **2<sup>ND</sup> RESPONDENT'S CASE**

22. The 2<sup>nd</sup> respondent's case is contained in the replying affidavit of **Caleb Okoth** sworn on 18<sup>th</sup> January, 2018. Its case is that it is mandated under the Constitution, Anti-Corruption and Economic Crimes Act (ACECA) and Ethics and Anti-Corruption Commission Act (EACCA) to conduct investigations on its own initiative or on a complaint made by any person. It claims to have conducted investigations following a complaint lodged by members of the public and traders within Litein town. They complained that that officers of the 3<sup>rd</sup> respondent were arresting traders and taking bribes within the town on the day in question.

23. He depones that the investigations established that the petitioners had received bribes from the said traders. That pursuant to Section 35 of the ACECA they compiled their report on the investigations and forwarded it to the 1<sup>st</sup> respondent recommending the petitioners' prosecution. He avers that the petitioners have not challenged the 2<sup>nd</sup> respondent's constitutional or statutory mandate neither have they demonstrated how its mandate infringes upon their rights under the Constitution.

24. It is of the view that the petitioners are raising issues of evidence which should be left for the trial court to determine being the court with original jurisdiction to deal with the case. Further, the 2<sup>nd</sup> respondent states that the petitioners were investigated under the ACECA hence the 3<sup>rd</sup> respondent's policy on ADR does not apply. It contends that it is an independent constitutional office and is therefore not subject to the control of any person or authority in undertaking its functions.

25. According to the 2<sup>nd</sup> respondent, the petitions are an abuse of the court process meant to delay their prosecution. It maintains that the petitioners' suspension was undertaken in accordance with Section 62 of the Anti-Corruption and Economic Crimes Act.

26. The 2<sup>nd</sup> respondent was represented by **Ms. Natome**. Her submission was that the 2<sup>nd</sup> respondent derives its mandate to conduct investigations under Article 79 of the Constitution, Section 11 of the EACCA and Section 35 of the ACECA. She contended that the petitioners have not challenged this mandate and have also not demonstrated how the investigations undertaken by the 2<sup>nd</sup> respondent are unlawful and infringe upon their constitutional rights. To support this submission, Ms. Natome relied on the cases of **Anarita Karimi Njeru – vs- Republic [1976-1980] 1KLR 1272** and **Kenya National Examination Council –vs- Republic exparte Geoffrey Njoroge & Others**.

27. Concerning the alleged breach of Article 47 of the Constitution, Ms. Natome submitted that the petitioners' suspension was lawful in accordance with Section 62 of the ACECA. She argued that the petitioners have not demonstrated that the procedure for suspending them was not expeditious, efficient, lawful, reasonable or procedurally fair as far as Article 47 of the Constitution is concerned.

28. According to counsel, the petitioners are essentially asking this court to hear the case that is at the magistrate's court. She cited the case of **William Samoei S. K. Ruto –vs- Attorney General Nairobi High Court Misc. Application No. 1192 of 2005** and **Eng. Michael Mwaura Kamau-vs- EACC & 3 Others Court of Appeal Misc. Appl. No. 173 of 2015** to submit that this court does not have jurisdiction to entertain the case.

29. Counsel submitted that the petitioners have not demonstrated any apprehension that they may not be accorded a fair trial. To support this submission, Ms. Natome relied on the case of **John Mutembwa Wambua –vs- The Principle Magistrate's Court, Kibera Nairobi High Court Misc. Appl. No. 328 of 2000** where the court observed that a Magistrate cannot be barred from discharging his legal mandate, to conduct a trial in accordance with the law, in the absence of any complaint of impropriety on the part of the Magistrate.

30. It was contended for the 2<sup>nd</sup> respondent that the petitioners were charged under the ACECA and as such, the Anti-Counterfeit Agency's policy on ADR has no place in these proceedings. Ultimately, counsel for the 2<sup>nd</sup> respondents urged the court to dismiss the petitions.

### **THE 3<sup>RD</sup> RESPONDENT'S CASE**

31. The 3<sup>rd</sup> respondent's case is contained in its notices of preliminary objection filed on 13<sup>th</sup> November 2017 and the replying affidavit of **Fridah Kaberia** sworn on 1<sup>st</sup> January, 2018. She avers that the petitions do not disclose any cause of action against it. Its case is basically that the petitioner's suspension from duty was in accordance with the law. In this respect, it relied on Section 62 of the ACECA which requires the petitioners to be suspended if charged with corruption or economic crimes.

32. It maintained that the petitioners are personally liable for their conduct in the course of their employment. Further, it states that although it has put in place an ADR policy which the petitioners were at liberty to apply, the question of whether or not the same was properly applied is to be left to the trial court. According to the 3<sup>rd</sup> respondent, the petitions are frivolous and vexatious and amount to an abuse of the court process.

33. **Ms. Miima** appeared for the 3<sup>rd</sup> respondent who joined issue with the 1<sup>st</sup> and 2<sup>nd</sup> respondents. She submitted that the 3<sup>rd</sup> respondent acted in accordance with the law to suspend the petitioners at half pay and give them reasons for their suspension. According to the 3<sup>rd</sup> respondent the requirements under Article 47 of the Constitution on fair administrative action were duly complied with.

34. She cited the case of **Thuitha Mwangi & 2 Others –versus- EACC & 3 Others [2013] eKLR** to submit that suspension at half pay pending conclusion of the case is not really an infringement of the right to be presumed innocent until proven guilty since the petitioners are entitled to their full benefits and emoluments in the event they are acquitted by the trial court.

35. It was also submitted on behalf of the 3<sup>rd</sup> respondent that the petitions do not meet the threshold of a constitutional petition laid down under Rule 10 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and in the cases of;

**(i) Anarita Karimi Njeru –vs- Attorney General (No.1) [ 1979] KLR 154, Mumo Matemu –versus- Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR,**

**(ii) Ledidi Ole Tauta & Others –vs- Attorney General & Others Constitutional Petition No. 47 of 2010,**

**(iii) Samson Otieno Bala t/a Missam Enterprises –vs- Kenya Bureau of Standards & 4 Others.**

**(iv) Northern Nomadic Disabled Person's Organization (Nondo) –versus- Governor, County Government of Garissa & Another Petition No. 4 of 2013 and**

**(v) Matiba –vs- The Attorney General, Nairobi High Court Miscellaneous Application No. 666 of 1990.** Accordingly, the 3<sup>rd</sup> respondent is of the view that the petitions are fatally defective and ought therefore to be stuck out.

36. According to the 3<sup>rd</sup> respondent, prosecution of corruption related offences provides an opportunity for the court to restore public confidence in public officers and this court should not interfere with the ongoing criminal proceedings. To support this submission, counsel cited the cases of;

**(i) Paul Ongili Owino –vs- Benard Omondi Onginjo & 2 Others Petition No. 508 of 2015,**

**(i) Kuria & Others – vs- Attorney General [2002] 2 KLR 69 and**

#### **THE 4<sup>TH</sup> & 5<sup>TH</sup> RESPONDENTS' CASE**

37. The 4<sup>th</sup> and 5<sup>th</sup> respondents did not file any replying affidavit but filed grounds of opposition to the petitions. They argue that the injunction orders sought by the petitioners have already been overtaken by events since they have been charged in court. They argue that the petitioners have not set out clearly in their respective petitions what their grievances are. They further contend that the petitioners have not demonstrated that substantial loss which cannot be compensated by an award of damages may result to them if the orders sought are not granted.

38. They further argue that the petitioners' suspension from duty by the 3<sup>rd</sup> respondent was lawful. According to them, the orders sought by the petitioners are anticipatory, premature, speculative and disclose no reasonable cause of action. They state that the petitioners have not demonstrated that they are deserving of the orders sought neither have they showed that the orders are in the interest of justice.

39. The 4<sup>th</sup> and 5<sup>th</sup> respondents relied on their written submissions in which they argued that pursuant to **Section 193A** of the **Criminal Procedure Code**, these proceedings cannot bar the criminal proceedings at the trial court. Relying on the case of **Republic –vs- Commissioner of Police & Another exparte Michael Monari & Another [2012] eKLR**, Counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that the police have a discretion to investigate any complaint once it is lodged and that this discretion will only be interfered with if exercised unlawfully.

40. Counsel reiterated that the decision to suspend the petitioners was lawful and the petitioners have not demonstrated that the decision was either unreasonable or malicious. Accordingly, the applications for the judicial review orders do not meet the threshold for issuance of such orders. **Ms. Mbilo** submitted that Article 160 (5) of the Constitution gives immunity to the 4<sup>th</sup> respondent against criminal or civil liability for lawful actions taken in the execution of its duties. She also relied on the case of **Maina Gitonga –vs- Catherine Nyawira Maina & Another [2015] eKLR** to support this submission.

41. It was her further argument that the petitioners had not shown any unlawful conduct on the part of the 4<sup>th</sup> and 5<sup>th</sup> respondents. On the issue of the petitioners suspension from duty, Counsel submitted that the same was lawful in accordance with Section 62 of the ACECA.

42. She submitted that the petitioners had not shown that the 1<sup>st</sup> respondent's decision to charge them was based on an ulterior motive to warrant the intervention of this court. To this end Counsel relied on the cases of;

(i) **Elekia Ochola Odari & 2 Others –vs- Director of Public Prosecutions & Another [2016] eKLR**,

(ii) **Vincent Kibiego Saina –vs- Attorney General, High Court Misc. Civil Appl. No. 839 of 1999 (UR)** and

(iii) **Michael Sistu Mwaura Kamau & 12 Others –versus- Ethics and Anti- Corruption Commission & 4 Others, Petition No. 230 of 2015** to support this submission.

43. Finally it was the 4<sup>th</sup> and 5<sup>th</sup> respondents submission that the petitions do not meet the threshold of a constitutional petition laid down in the cases of **Anarita Karimi Njeru –vs- The Republic [ 1976-1980] 1KLR 1272** and **Mumo Matemu –vs- Trusted Society of Human Rights Alliance [2013] eKLR**. For these reasons, Counsel urged the court to dismiss the petitions.

#### **DETERMINATION**

44. The decision is about the issue as to whether the court should intervene and stay criminal proceedings being undertaken against the petitioners, who were employees of the 3<sup>rd</sup> respondent. They have each been charged with six counts of receiving a bribe contrary to Section 6 (1) (a) as read with Section 18 of the Bribery Act No. 47 of 2016. They also each face a 7<sup>th</sup> count of abuse of office contrary to Section 46 as read with Section 48 of the ACECA.

45. The petitioners claim that they applied the ADR policy to the businessmen at Litein in respect of the counterfeit goods impounded by them. That the businessmen paid for the goods as is provided for under the compulsory policy and receipts were issued. Their claim is that because of such compliance, they ought not to have been investigated and/or charged.

46. The respondents have raised issue with the petitions not being in compliance with the principle set out in the case of **Anarita Karimi Njeru (supra)** on filing of such petitions. I have considered the argument vis a viz the petitions filed. The petitions clearly set out provisions of the Constitution allegedly breached. They have also set out how the said provisions have allegedly been breached. The petitions cannot therefore be said to be incompetent. The rest is for the court to determine..

47. The 2<sup>nd</sup> respondent is established under Article 79 of the Constitution and its functions are set out in Chapter Six of the Constitution and Section 11 of the EACCA and provisions of the ACECA. It investigates corruption and economic crimes and compiles a report under Section 35 of the ACECA. The said report and recommendations are then forwarded to the DPP for his necessary action.

48. The DPP exercises State powers of prosecution under Article 157 (6) which provides;

**“(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;”***

49. The DPP exercises power to institute criminal proceedings without direction from anybody under Article 157 (10) which provides;

***“(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.***

It should also be noted that in exercise of his powers under Article 157 (10) of the Constitution, the DPP cannot be bound by the recommendations of the EACC.

50. Section 6 of the “Office of the DPP Act No. 2 of 2013 provides;

***“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.”***

51. The above are all duties and responsibilities bestowed upon the 1<sup>st</sup> and 2<sup>nd</sup> respondents which must not be exercised arbitrarily, oppressively or contrary to public policy. The petitioners claim that the action by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was unconstitutional and therefore null and void. It was their duty to demonstrate to this court the unconstitutionality of the decisions made in order for the court to intervene.

52. According to the petitioners, they were charged before the Anti-Corruption Court in Kericho because of implementing the ADR policy of the 3<sup>rd</sup> respondent. The 2<sup>nd</sup> respondent has explained that it received complaints from businessmen whose goods had been impounded in Litein by the petitioners.

53. It investigated the complaints and acted by arresting the petitioners and charging them. It is the petitioners case that because the 3<sup>rd</sup> respondent has an ADR policy which they implemented, they should not be penalized for implementing it.

54. It is clear that the petitioners were not being investigated and charged for implementing the 3<sup>rd</sup> respondent’s ADR policy. They have been charged with several counts of receiving bribes so as not to charge the various businessmen mentioned in Count 1 – Count 6. Those are the complaints that were received and investigated. The people who complained against the petitioners are available as shown in the charge sheet and they will testify as witnesses. What they allegedly gave to the petitioners has also been indicated in the charge sheet and their evidence must be heard so that the truth can be known.

55. The 2<sup>nd</sup> respondent has been bestowed with the mandate to investigate any complaint of corruption raised by a member of the public or received by the commission. The petitioners are not disputing or challenging the 2<sup>nd</sup> respondent’s mandate in investigating such complaints.

56. Their complaint is that since they were implementing the ADR policy of the 3<sup>rd</sup> respondent and they did it correctly, they should not have been investigated, nor charged by the 1<sup>st</sup> respondent irrespective of the complaints raised against them.

They may have been applying the 3<sup>rd</sup> respondent’s ADR policy but how was it applied? Were there any integrity issues involved as is alleged by the investigators? The answer to that is with the 1<sup>st</sup> and 2<sup>nd</sup> respondents who are in possession of the outcome of the investigation.

In the case of ***Republic –vs- Attorney General Ex parte Kipng’eno Arap Ngeny High Court Civil Application No. 406 of 2001***, the court states thus;

***“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise, the prosecution will be malicious and actionable.”***

57. Another case that speaks to this is the case of ***Republic –vs- Commissioner of Police & Another Ex parte Michael Monari & Another [2012] eKLR***. The court stated thus;

***“the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring***

**charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.**

58. For this court to intervene and issue the orders sought by the petitioners, it had to be shown that the process of investigation by the 2<sup>nd</sup> respondent and process of decision making by the 1<sup>st</sup> respondent was flawed. It was the duty of the petitioners to demonstrate to this court how the process undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was flawed. Yes, the petitioners may have applied the 3<sup>rd</sup> respondent’s ADR policy as submitted by Mr. Kenyatta, the issue, however, is what transpired during the application of the said policy.

59. It is only the evidence in the possession of the 1<sup>st</sup> and 2<sup>nd</sup> respondents that will enable the court (the “**court**” herein means the trial court) make a determination on the complaint by the complainants in Kericho Chief Magistrate’s ACC No. 1 of 2017.

I have found no sound reason to make this court interfere with the criminal proceedings in the Magistrate’s court.

60. I do associate myself with what **Onguto J.** (the late) stated in the case of **Paul Ongili –vs- Bernard Omondi Onginyo & 2 Others [2016] eKLR** as follows;

**“This court has stated previously that it is always in the interest of the public that persons accused of criminal conduct are made to face the criminal justice process without hindrance. Further, that the same public interest also dictates that such offenders are fairly treated and not subjected to prosecutor’s misconduct which would bring the criminal justice system to disrepute: See Godfrey Mutahi Ngunyi –vs- Director of Public Prosecutions and 4 Others [2015] eKLR. I come to the conclusion that the wider public interest would favour the petitioner facing the criminal justice system once the 3<sup>rd</sup> respondent gives his nod. I also hasten to add that the criminal justice system has enough constitutional and statutory safeguards to protect the petitioner’s rights even as the 3<sup>rd</sup> respondent institutes prosecution. This however, does not stop the 3<sup>rd</sup> respondent or even the trial court from encouraging a roundtable discussion between the parties.”**

It will therefore be in the interest of justice that the criminal proceedings continue to finality.

61. On the issue of suspension of the petitioners by the 3<sup>rd</sup> respondent my view is this. The policy in the public service is that any public officer charged with a criminal offence is suspended on half pay pending the finalization of the case. In relation to anti-corruption and economic crimes cases, Section 62 of the ACECA provides;

**“(1) A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge.**

**(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.**

**(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.**

**(4) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.”**

62. Suspension does not amount to a penalty but merely suspends certain rights of the person accused pending the determination of the trial. If the person is acquitted, he/she receives his/her full benefits. In the event of a conviction, the person loses the benefits.

63. In conclusion, I find that the petitioners have failed to demonstrate that there was malice, unlawful actions, excess or want of authority, harassment or intimidation, manipulation of the court process or even a hint that the petitioners would not get a fair trial. There was real need to show the basis upon which the rights of the petitioners are being violated or are under threat of being violated, or undermined by the criminal prosecution. They failed to prove all this.

64. In the end, I find that the petitioners have not made a case for the reliefs sought and I dismiss it with no order for costs.

**Delivered, signed and dated this 17<sup>th</sup> day of April 2018 at Nairobi.**

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**HEDWIG I. ONG’UDI**

**HIGH COURT JUDGE**