REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC JR MISC APPL. NO. 1 OF 2018

JAMES MOMANYI NYABERI.....APPLICANT

VERSUS

AMOS OLE TIREN.....1ST RESPONDENT

ETHICS & ANTI-CORRUPTION.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 21/02/2018, the Applicant seeks orders:-

a) An order of prohibition directed at the 1st and 2nd Respondents, their agents and or other officers prohibiting them from conducting further investigations against the applicant since this amount to harassment, intimidation and malice.

b) An order of prohibition directed at the 1st and 2nd Respondent or any other officers acting on the instructions of the 2nd Respondent from arresting and detaining the Applicant of any purported offence arising from the said allegations of bribery.

c) An order of mandamus directed to the 1st and 2nd Respondent their agents and or other officers to compel them to produce before this honourable court and to return to the Applicant his Samsung phone make A3 and confiscated cash of Kshs. 33,600/=.

d) An order of mandamus directed to the 1st and 2nd Respondents to produce before this honourable court other information arbitrary collected from the Applicant on the 18th August, 2018 and withdraw charges as made in the Makindu police station vide O.B. No. 28/8/8/17.

e) The costs of this application be in the cause.

2. The same is supported by Supporting Affidavit sworn by James Momanyi Nyaberi on 21/02/2018 and Verifying Affidavit on 24/01/2018 and statement dated 24/01/2018.

3. The Applicant case is that on 18/08/2017, the Applicant was arrested while in course of his duties at Makindu ODPP office by the Respondent No. 2 on allegation of bribery.

4. Upon arrival at Makindu police station the Respondent officers confiscated cash amounting to Kshs. 33,600/= and Samsung A3 Model mobile phone pending further investigations.

5. After conducting search on person of the Applicant Kshs. 33,600/= was confiscated from the Applicant and upon further comparison with sting money which Respondent 1 & 2 had prepared for their sting operations, no single note matched with the Applicants Kshs. 33,600/= confiscated from him.

6. Also his A3 phone was confiscated from him. The Respondent also confiscated Applicant ATM card for his salary account which they made copies and returned to him.

7. Further search was conducted in his ODPP desk in the office and his car with no recoveries. The whole operation was videotaped by the Respondent in full glare of the public.

8. Subsequently he was booked in Makindu police station vide OB No. 28/18/8/17 at 1620 hours and released on Kshs. 20,000/= cash bail. It is 7 months to date of swearing of the instant affidavit by the Applicant and no charges have been prepared against him nor items confiscated returned to him. Thus the Application has been rendered necessary.

9. The Respondents have opposed the Application and filed a Replying Affidavit sworn by Amos Ole Tiren on 01/03/2018.

10. The Respondents case is that the 2nd Respondent received various reports that the Applicant was requesting for benefits from members of public through his mobile phone in order to discharge his duties as a prosecution counsel through his mobile number.

11. A specific allegation was made that the Applicant had requested for a benefit of Kshs. 50,000/= to withdraw a case against Respondent informer, thus investigation was launched.

12. An informer was given treated money to hand over to the Applicant upon receipt of the money the Applicant was arrested by Respondent officers.

13. Right and left hand swab was done and Applicant was released on cash bail with instructions that he was to appear before 2nd Respondent office Machakos but he violated.

14. The instructions aforesaid upon presentation of the swab to government chemist, a report of testing was positive. APQ powder was traced on Applicant's left and right hands indicating that the Applicant came into contact with the treated money handed over to Applicant by the informer.

15. The confiscated items were phone and ATM cards for investigation purposes. Applicant account was investigated pursuant to warrant issued by court and also applicant's M-pesa transactions.

16. Applicant's Samsung Galaxy A3 was submitted for analysis to the Digital Forensic Analyst.

17. The Applicant has failed to appear in 2nd Respondent's office to record statement despite invitation to do so this hindering investigations.

18. The parties agreed to canvass the Application via Written Submissions which they filed and exchanged.

19. The Applicant commences submissions by urging court to note the following; that,

EX-PARTE APPLICANT'S SUBMISSIONS

a. Glaring inconsistencies on the face of annexture aot 1;

b. No trap (laced) amount of Kenya Shillings Thirty Thousand (Kshs. 30,000/-) was found in possession of the applicant;

c. No Mpesa records or evidence of any nature was presented before court to show and proof any corrupt dealings despite confiscating various items belonging to the applicant;

d. Having returned moneis and the Applicants mobile phone it is clear that the monies so returned were not laced.

20. Needless to add that the applicant herein has never not even once been summoned by the Respondents to even recording his statements. He has never been granted an opportunity to be heard by the Respondent. This is a knowing and deliberate breach of the right to fair hearing and the right to fair administrative action as protected in the constitution and this exceeds all permissible bounds of fairness.

21. From the aforementioned facts it is applicant's submission that the allegations, the complaint and the resultant investigations were fabrications and outright lies and that the same were made in bad faith, malicious and for ulterior motives.

22. In **R. VS. SECRETARY OF STATE FOR THE HOME DEPARTMENT EX PARTE DOODY [1994] 1 AC 531, 560G, Lord Mustill** held;

"Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both."

23. Similarly, in **REPUBLIC VS. TRUTH, JUSTICE AND RECONCILIATION COMMISSION & ANOR EX-PARTE BETH WAMBUA MUGO [2016] EKLR,** Justice G.V. Odunga was emphatic that;

"In my view the Commissions' recommendations are the kind of recommendations which were contemplated in Re Pergamon Press Ltd (supra). I therefore find that the Commission was under a duty to act fairly and before making adverse findings against the ex-parte applicant it had to afford the applicant a fair opportunity for correcting or contradicting what was said against her in the said literary work."

24. It is worth noting and reiterating that the right to fair hearing and fair administrative action is now a constitutional guarantee that cannot be taken away at the pleasure and sweet will of those in power. What constitutes fairness and fair hearing is now well settled by a consistent and firm jurisprudence that is unmistakable.

25. **Article 47 of the Constitution** provides for the right to fair administrative action in the following words;

> **i. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **ii. 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.**
>
> **iii. Parliament shall enact legislation to give effect to the rights.**

26. In the academic text by **S.A De Smith on Judicial Review of Administrative Action, Third Edition (1973) Stevens and Sons Limited, at page 60** it is stated that the term administrative refers to broad areas of governmental activity in which the repositories of power may exercise every class of statutory function, and that an administrative act cannot be exactly defined but includes the adoption of a policy, the making and issue of a specific direction and the application of a general rule to a particular case in accordance with the requirements of policy, expediency or administrative practice.

27. The allegations subject to investigations were lodged and registered at Makindu police station vide O.B. No. 28/18/8/17. Nearly Ten (10) Months later no formal charges have been preferred against the Exparte applicant. There is no justifiable reason whatsoever that was presented in the Respondents replying affidavit as to the cause of delay.

28. The requirement for an expeditious hearing in **Article 47 of the Constitution** must of necessity be read together with the requirement of efficiency in the conduct of administrative functions, as one for the key reasons for quick and timely administrative action is to ensure that no undue prejudice is suffered by any person affected by the said actions.

29. In determining whether an action is expeditious, the context and circumstances in which such action is being undertaken is therefore relevant both in evaluating whether in the circumstances the action was timeous, and also in light of any adverse effects on the person affected by the decision. Factors to be taken into account in determining the level of expeditious will include the type and complexity of the action being undertaken, and the conduct and diligence of all the parties involved.

30. In the present case the allegations against the Applicant were made on 18/08/2017 and were recorded on the same date. The Respondents since 18/08/2017 has never bothered to even record the statement of the applicant. He has never been granted an opportunity to be heard by the Respondent. This is a knowing and deliberate breach of the right to fair hearing and the right to fair administrative action as protected in the Constitution.

31. Interestingly, on the 23rd March 2018, the Applicant received communication through the ODPP office Makindu that the Respondents wished to return to the Applicant the confiscated items. Indeed on the 4th April, 2018 returned the items confiscated items i.e. Samsung phone make A3 and Kshs.33,600/-.

32. Having returned the alleged benefit of Kshs.30,000/- to the Applicant it is clear that there is no exhibit to support the allegations.

33. The requirement of expeditious and efficient administrative action by the Respondents has therefore to be evaluated in the light of this circumstance. There is no proof of any kind currently in the possession of the Respondents to sustain a prosecution. Their unjustifiable delay and reluctance to pursue the matter any further is informed by the unblemished fact no case worth prosecuting can stand without the exhibits.

34. It is therefore Applicant's submissions that the Respondents have failed spectacularly in failing to appropriately strike a balance between the right to an expeditious hearing and the substantive elements of the right to a fair administrative action.

35. In the circumstances it is prayed that the court makes a finding that the period of over 10 months taken to investigate the complaints made against the applicant is unfair unreasonable and irrational in light of the possible ramifications of the decision made by the respondents.

36. In **PASTOLI -VS- KABALE DISTRICT LOCAL GOVERNMENT COUNCIL AND OTHERS [2008] 2 EA 300,** a decision that has now been applied and;

> ***"Procedural Impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."***

37. In **hallsburys Laws of England 4th edition Vo. 1 (1) par. 12 pg 270** it states;

> ***"The remedies of quashing order certiorari, prohibition and mandamus are all discriminatory. The court has a wide discretion whether to grant the relief at all and if so, what form of relief, the court will take into account the conduct of the party applying and consider, whether it has not been such to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant the relief."***

38. Further, the **HALSBURY'S LAWS OF ENGLAND, (supra)** expound that:

> ***"where however a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard be afforded."***

39. **Articles 47 and 50 of the Constitution and the provisions of Fair Administrative Actions Act,** which are laws of general application binding on the Respondents like all other persons, and further the rules of natural justice required and mandated the Respondent to afford the Applicant an opportunity to be heard, to act fairly and in good faith and not to be moved by bad faith, malice and ulterior motives, especially noting the adverse and negative consequences of its actions.

40. As is elaborated in the **HALSBURY'S LAWS OF ENGLAND, 5TH EDN. VOL. 61 PAGE 539 AT PARA 639;**

> ***"The role that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge."***

41. In **ONYANGO OLOO VS. ATTORNEY GENERAL [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:-

> ***"It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair…. Denial of the right to be heard renders any decision made null and void ab initio."***

42. More, in **HOFFMANNLA ROCHE (F) & CO. AG VS. SECRETARY OF STATE FOR TRADE AND INDUSTRY [1975] AC 295, 368 D E** it was held that the commissioners;

> ***"……..must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely."***

43. In nearer shores, Justice G.V. Odunga in **REPUBLIC VS TRUTH, JUSTICE AND RECONCILIATION COMMISSION AND ANOTHER EX-PARTE BETH WAMBUI MUGO [2016] EKLR** has exposited thus**;**

> ***"In my view a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be fair not only should the case that the respondent is called upon to be meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it but also the authority concerned ought to approach the issue with an unbiased disposition.***
>
> ***In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, Halsbery's Laws of England, 5th Edn. Vol. 61 page 545 at para 640 states:***

44. It is therefore clearly and it is now not capable of dispute that persons making administrative actions or quasi judicial decisions are bound by the Constitution to afford the affected parties a fair hearing and fair administrative action, which on the incontrovertible facts of the case at hand, the respondents have violated the mandatory constitutional duty.

45. The Applicant thus invites this court to right these glaring wrongs by issuing the orders sought with costs, especially as the evidence suggest no trap (laced) monies was found in possession of the applicant, no Mpesa records or evidence of any nature was presented before court to show and proof any corrupt dealings despite confiscating various items belonging to the Applicant and having returned monies and the Applicants mobile Phone it is clear that the monies so returned were not laced and the retrieved records from the applicant phone were of any importance. Applicant thus prays that this court, grant orders sought.

RESPONDENTS' SUBMISSIONS

46. The Respondents submit on specific issues set out by Applicant that ought to be determined; namely,

> ***i. Whether the arrest was justifiable.***
>
> ***ii. Whether the investigation against the Applicant amount to harassment, intimidation and malice.***
>
> ***iii. Whether the Respondent can be stopped from arresting and detaining the Applicant for any offence arising from allegation of***

bribery.

Whether the arrest was justifiable.

47. The Respondents submit that arrest was justifiable. The Respondents in their replying affidavit explained that a complaint was made against the Applicant and preliminary investigation were carried out which led to the complaint being given treated money for onward transmission to the Applicant. The Applicant received the money and was subsequently arrested.

48. The officers were therefore justified in arresting the Applicant. In the case of **Hussein Khalid and 16 Others –vs- Attorney General and 2 Others (2014) eKLR**, Justice Lenaola reiterated the sentiments of Lord Diplock in the case of **Dillion –vs- O'Brien & Davis (1987)** where he stated that;

> ***"In the case of an arrest, reasonable grounds for belief of guilt at the time of the arrest are sufficient justification, though subsequent information or events may show those grounds to be deceptive."***

49. The Applicant at the time of his arrest, was clearly told why he was being arrested and taken to Makindu Police Station and was released on police bond. This is a process that is acceptable and within the confines of the laws. There was no infringement of the Applicant's right.

Whether the investigation against applicant amount to harassment, intimidation and malice.

50. The 1st Respondent is mandated under Article 252 of the Constitution to carry out investigation on its own initiative or on a complaint made by a member of public as well as Section 11 and Section1 3 of the Ethics and Anti-Corruption Commission Act, 2011. The said mandate is also echoed in Section 7 of the Anti-Corruption and Economic Crimes Act of 2003.

51. The Commission received a complaint (refer to annexure AOTI) and in exercising its mandate conducted preliminary investigation. The commission handed treated money to the complainant who in return handed it over to the Applicant who had requested for the same. The Applicant was arrested and released on cash bail pending further investigation.

52. Investigation is a process which is recognized by law. The Respondents are equally mandated to carry out investigations and the same cannot amount to intimidation, harassment and malice. The arrest and subsequent investigation against the Applicant were done within the confines of the law.

53. The fact that the applicant claims that the investigations amounts to intimidation, harassment and malice, implies that he feels that his fundamental rights and freedom were breached, violated and infringed. It's the Respondent's submission that his rights were not infringed in any way.

54. The onus of proving that the investigations amounts to intimidation, harassment and malice is on the Applicants. He has not presented such evidence as proof before this court. Investigation is a process which is recognized by law.

55. The Respondents were merely discharging their mandate and the same cannot amount to intimidation, harassment and malice. The arrest and subsequent investigation against the Applicant were done within the confine of the law.

56. The Applicant did not submit such evidence before the honourable court. And as such the court should be reluctant to intervene since the Respondents were acting within their mandate.

57. In the case of **REPUBLIC –VS- COMMISSIONER OF POLICE AND ANOTHER EX PARTE MICHAEL MONARI AND ANOR (2012) EKLR** it was stated that;

> ***"……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 establish reasonable suspicion before preferring charges. The rest is left to the trial court as long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene."***

58. It's the submission of the Respondents' that there was no threat to the fundamental rights and freedom of the Applicant and therefore an order prohibiting investigation against the applicant must fail.

59. In the case of **Fredrick Masanhwe Mukasa –vs- Director of Public Prosecution and 3 others (2016) eKLR** Justice Nyakundi reiterated the sentiments of Lord Diplock in the case of **COUNCIL FOR CIVIL SERVICE UNIONS –VS- MINISTER FOR CIVIL SERVICE (1985) AC 374 AT 401 D** that;

> ***"Judicial review has I think developed a stage today when one can conveniently classify under three heads, the grounds upon the first ground I will call illegality, the second irrationality and the third procedural impropriety. By illegality as a ground for judicial review, I mean that the decision making power and must give effects to it. By irrationality, I mean what can now be succinctly referred to as wednesbury (unreasonableness) it implies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…… I have described the third head has procedural "impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions."***

Whether the respondent can be stopped from arresting and detaining the applicant.

60. Investigations culminate to the arrest and detention of suspects and those are processes of our legal system and *per se* do not amount to infringement of fundamental rights of the Applicant.

61. The Respondents upon concluding the investigations, concludes that an offence has been committed and makes the recommendation to the director of public prosecution as provided under section 35 of Anti-corruption and Economic Crimes Act;

62. And if the director of public prosecution considers the recommendation and in exercise of his constitutional mandate directs that the petitioner be charged with the offence that would be due process. It is what our criminal justice system provides.

63. The Applicant if he is arrested and charged due to the recommendation of the DPP he will be accorded a fair trial. The constitution provides safeguarding to an accused person. In the case of **RONALD LEPOSO MUSENGI –VS- DIRECTOR OF PUBLIC PROSECUTION AND 3 OTHERS (2015) EKLR Justice Ngaah** stated;

> ***"I have reproduced the relevant provision of the article so an order to show that our constitutional has provided extensive safeguards to accused person when charged with a criminal offence and therefore, unless there is material upon which the court can find that the petitioner is unlikely to receive a fair trial before the trial court, the court ought not to interfere simply because the petitioner may at the end be found to be innocent."***

64. Further in the **REPUBLIC –VS- NATIONAL TRANSPORT AND SAFETY AUTHORITY AND 10 OTHERS EX PARTE JAMES MAINA MUGO (2015) EKLR** Odunga stated;

> ***"The rationale for this is that Judicial Review jurisdiction is a special jurisdiction which is neither Civil nor Criminal. It follows that where an applicant brings judicial review contested matters of facts and in effect determine the merits of the dispute the court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil courts or criminal courts."***

65. It is further illustrated in the case of **Kipoki Oreu Tasur –vs- Inspector General of Police and 5 Others (2014) eKLR** that:

> ***"It's not for this court to inquire into the evidence and the facts that give rise to the charges. Suffice to say that the authorities charged with investigation and prosecution have carried out investigation and found that offences under the penal code have been established."***

66. The role of Judicial Review is to supervise the exercise of public power to ensure that those who exercise the power do not exceed constitutional or statutory jurisdiction.

67. Judicial review should only be allowed if the decision or actions are made and or done without authority or in excess. And in this case the Respondents did not act without authority or in excess of authority.

68. The issues raised by the applicant in relation to the allegation of bribery are better placed to be handled by the trial court. This is not the proper proceeding in which the correctness of the evidence or truthfulness of the witnesses will be gauged. The task is solely reserved for the trial court which is constitutionally bound to determine the proceedings in accordance with the law.

ISSUES, ANALYSIS AND DETERMINATION

69. After going through materials before the court, I find the issues are;

- ***Whether the application has merit?***

- ***What is the order as to costs?***

70. Judicial review is seen as a deferential tool for supervising the exercise of public power without interfering with the decision itself. In **R v Secretary of State for Education and Science ex parte Avon County Council,** it was held that judicial review is not about private rights or merits but decision making processes towards fair treatment by decision makers.

71. This purpose was reiterated in **Chief Constable of the North Wales Police v Evans** where it was held that the purpose of judicial review is to ensure that the individual receives fair treatment, and that the authority, after according fair treatment a conclusion which is correct in the eyes of the court on a matter which it is authorized by law to decide for itself.

72. Similarly, American courts show deference to an agency's competence and uphold administrative findings if they are satisfied that the agency had examined the issues, reached its decision within the appropriate standards, and followed the required procedures.

73. Following on this common law tradition, Kenyan courts had in the period preceding the promulgation of the Constitution long held the view that judicial review was concerned with the decision making process and not the merits of the decision itself so that the court would only concern itself with procedural issues.

74. Accordingly, the courts repeatedly reiterated that they would not sit on appeal over the decisions under review by going into the merits of the decision itself such as the presence or absence of sufficient evidence to support the decision.

75. Literally the concept of judicial review means revision of the decree or sentence of an inferior court by a superior court. However, judicial review has a more technical significance in public law, founded on the concept of limited government. In this case, judicial review means that Courts of law have the power to test the validity of legislative as well as other governmental action with reference to the provisions of the constitution.

76. One theoretical foundation of judicial review is from the British legal system which we have largely inherited, the courts' judicial review jurisdiction is justified by the notion that this procedure merely enforces the will of Parliament, by ensuring that public bodies do not exceed the powers given to them by the legislature.

77. This theory **('ultra vires')** elevates the power of Parliament over the judiciary. Ultra vires has been described as 'the juristic basis of judicial review.

78. The other foundation of judicial review is based upon the role of the court as the guardian of the rule of law. In USA, although there is no express provision in the American Constitution for judicial review, the Supreme Court made it clear that it had the power of judicial review.

79. This duty and jurisdiction of the Judiciary is memorably etched in the words of Marshall J in, **"It is, emphatically, the province and duty of the judicial department to say what the law is."**

80. Prior to the promulgation of the Constitution of Kenya, 2010 judicial review took place along the common law grounds mainly derived from the British legal system such as 'proportionality', 'legitimate expectation', 'reasonableness' and principles of natural justice.

81. The Constitution of Kenya has however now given the judiciary the broad jurisdiction to rule on the constitutionality of legislative and administrative actions through the power of Judicial Review.

82. The High Court has jurisdiction, under Article 23(1), to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Thereafter the court is empowered—

> **"In any proceedings brought under Article 22, a court may grant appropriate relief, including—**
>
> **(a) a declaration of rights;**
>
> **(b) an injunction;**
>
> **(c) a conservatory order;**
>
> **(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
>
> **(e) an order for compensation; and**
>
> **(f) an order of judicial review."**

83. The phrase in Article 23(3) to "grant appropriate relief, including" has been the subject of interpretation in **NANCY MAKOKHA BARAZA V JUDICIAL SERVICE COMMISSION & 9 OTHERS [2012]EKLR** where the Court expressed itself as follows:-

> ***"The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises."***

84. Rationally, in a claim of violation of the constitution, the court has sufficient power to grant any appropriate remedy including an order of judicial review. Again, Article 47 of the constitution provides:-

> **"47. Fair administrative action.**
>
> **(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) 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.**
>
> **(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall;**
>
> **(a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**

(b) Promote efficient administration."

85. The jurisdiction under Article 23 is to be exercised in accordance with Article 165 which is a comprehensive catalogue on the jurisdiction ambit of the High Court:-

"3. Subject to clause (5), the High Court shall have -

(a) Unlimited original jurisdiction in criminal and civil matters;

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

(i) The question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) A question relating to conflict of laws under Article 191; and

(e) Any other jurisdiction, original or appellate, conferred on it by legislation.

…

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

86. The Supreme Court of Kenya in **COMMUNICATIONS COMMISSION OF KENYA V ROYAL MEDIA SERVICES [2014] EKLR** recognized that the principle of judicial review , and at the same time the key place of the courts in upholding of the Constitution, is enshrined in our Constitution **(Articles 23(3)(d) and 165(3)(d))**. The court held that whereas the American Court in Marbury declared its power to review the constitutionality of laws passed by Congress, by contrast, the power of judicial review in Kenya is found in the Constitution.

87. Again in **MARTIN NYAGA WAMBORA V SPEAKER OF THE SENATE [2014]EKLR** the High Court held that:

"It is clear that they -Articles 47 and 50(1)- have elevated the rules of natural Justice and the duty to act fairly when making administrative, Judicial or quasi-Judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases."

88. The Court was saying that the twin notions of natural Justice embodying the duty to act fairly: that "no man shall be a Judge in his own cause" (Nemo Judex in causa sua) and that "no man shall be condemned unheard" (audi alteram partem) are now cardinal constitutional principles and not merely common law derivatives.

89. Hence the concept of judicial review before Kenyan courts has evolved from a common law foundation to a constitutional principle with five major dimensions – fairness in administrative action under Article 47; protection of the constitutionally guaranteed fundamental rights and freedoms in the Bill of Rights; judicial review of the decisions of tribunals appointed under the Constitution to consider the removal of a person from office; jurisdiction on questions of legislative competence and the interpretation of the constitution; supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function (See Article 165(6)).

90. In express terms, the Constitution grants to the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.

91. The test for efficacy of judicial review therefore is now whether the person, body, or authority exercises a judicial or quasi-judicial function and no longer whether the exercise of power is private or public. If private bodies engage in quasi-judicial functions, they are amenable to judicial review.

92. Applicant seeks to bar Respondent from taking the acts of arresting, detention and charge against his person. He further seeks the Respondents to be compelled to return mobile phone, cash and any information collected from him during investigations. This is because the respondents arrested him on allegation of bribery, and confiscated above items and the information from him. This is because it is now over 7 months since the alleged incident and there is no charge preferred against him.

93. On Respondents' side, it is averred that they received complaint of bribery and thus laid a trap via user of treated money. The applicant was implicated on the issue of bribery and thus he was arrested and bonded. He has failed to hour bond terms thus impeding investigations.

94. Further the process of investigation has taken some time due to the nature of the issues involved including testing on substance swabbed from Applicant hands, analyzing phone confiscated and investigating accounts involved.

95. However court has noted that the Applicant submits that, he has now gotten back from the Respondents his phone and money which respondent had confiscated thus no other of Applicant items is in respondents' possession.

96. The Respondents have not denied and/or rebutted that nor given reasons of the return of the said items which were supposedly to be part of their evidence against Applicant and were assisting them in the investigations. It would thus appear that the Respondent is through with investigations.

97. The APQ test report from the government chemist was also submitted and a copy is in court. This court wonders which other thread or element of investigations is pending after now a span of almost a year since the investigation commenced. **The applicant raised 3 issues namely;**

i. Whether the arrest was justifiable?

ii. Whether the investigation against the Applicant amount to harassment, intimidation and malice?

iii. Whether the Respondent can be stopped from arresting and detaining the Applicant for any offence arising from allegation of bribery?

98. On whether the arrest was justified, the court finds that a complaint was made against the Applicant and preliminary investigation were carried out which led to the complaint being allegedly given treated money for onward transmission to the Applicant. The Applicant allegedly received the money and was subsequently arrested.

99. In the case of **HUSSEIN KHALID AND 16 OTHERS –VS- ATTORNEY GENERAL AND 2 OTHERS (2014) EKLR,** Justice Lenaola reiterated the sentiments of Lord Diplock in the case of **DILLION –VS- O'BRIEN & DAVIS (1987)** where he stated that;

"In the case of an arrest, reasonable grounds for belief of guilt at the time of the arrest are sufficient justification, though subsequent information or events may show those grounds to be deceptive."

100. The court finds that the 1st Respondent officers were therefore justified in arresting the Applicant.

101. On whether the investigation against applicant amounted to harassment, intimidation and malice, the court finds that The 1st Respondent is mandated under Article **252 of the Constitution** to carry out investigation on its own initiative or on a complaint made by a member of public as well as **Section 11 and Section1 3 of the Ethics and Anti-Corruption Commission Act, 2011 give same mandate**. The said mandate is also echoed in **Section 7 of the Anti-Corruption and Economic Crimes Act of 2003**. The arrest and subsequent investigation against the Applicant were done within the confines of the law.

102. The Applicant has not proved that the aforesaid exercise went beyond that mandate donated by the law.

103. In the case of **REPUBLIC –VS- COMMISSIONER OF POLICE AND ANOTHER EX PARTE MICHAEL MONARI AND ANOTHER (2012) EKLR** it was stated that;

"……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 establish reasonable suspicion before preferring charges. The rest is left to the trial court as long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene."

104. On whether the Respondents can be stopped from arresting and detaining the applicant, of course when the Respondents acted under the above stated mandate, they were within the law in arresting detaining and releasing on bond the Applicant.

105. Perhaps the issue now is whether the Respondents can re-arrest, re-investigate, and re-detain the applicant after the arresting, investigating, detaining and even returning Applicant items which were supposedly to be exhibits?

106. The role of Judicial Review is to supervise the exercise of public power to ensure that those who exercise the power do not exceed constitutional or statutory jurisdiction.

107. Judicial review should only be allowed if the decision or actions are made and or done without authority or in excess. And in this case

the Respondents did not act without authority or in excess of authority.

108. If the Respondents intends to repeat the process the same would amount to harassment, intimidation and malice and the court can stop it taking into account the period taken since the date the complaint was made. No justification has been shown as to why the respondents could not lodge charges against the Applicant in the last 10 0r so months since the matter commenced.

109. **Article 47 of the Constitution** provides for the right to fair administrative action in the following words;

i. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

ii. 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.

iii. Parliament shall enact legislation to give effect to the rights.

110. In the academic text by S.A De Smith on **Judicial Review of Administrative Action, Third Edition (1973) Stevens and Sons Limited, at page 60** it is stated that the term administrative refers to broad areas of governmental activity in which the repositories of power may exercise every class of statutory function, and that an administrative act cannot be exactly defined but includes the adoption of a policy, the making and issue of a specific direction and the application of a general rule to a particular case in accordance with the requirements of policy, expediency or administrative practice.

111. The allegations subject to investigations were lodged and registered at Makindu police station vide O.B. No. 28/18/8/17. Nearly Ten (10) Months later no formal charges have been preferred against the Exparte Applicant. There is no justifiable reason whatsoever that was presented in the Respondents replying affidavit as to the cause of delay.

112. The requirement for an expeditious hearing in **Article 47 of the Constitution** must of necessity be read together with the requirement of efficiency in the conduct of administrative functions, as one for the key reasons for quick and timely administrative action is to ensure that no undue prejudice is suffered by any person affected by the said actions.

113. In determining whether an action is expeditious, the context and circumstances in which such action is being undertaken is therefore relevant both in evaluating whether in the circumstances the action was timeous, and also in light of any adverse effects on the person affected by the decision. Factors to be taken into account in determining the level of expeditious will include the type and complexity of the action being undertaken, and the conduct and diligence of all the parties involved.

114. In the present case the allegations against the Applicant were made on 18/08/2017 and were recorded on the same date. The Respondents since 18/08/2017 has never bothered to even record the statement of the Applicant. There is no evidence that applicant has ever been summoned to appear before respondents office but failed to comply.

115. Interestingly, on the 23rd March 2018, the Applicant received communication through the ODPP office Makindu that the Respondents wished to return to the Applicant the confiscated items.

116. Indeed on the 4th April, 2018, the Respondent returned the items confiscated items i.e. Samsung phone make A3 and Kshs.33, 600/-.

117. The requirement of expeditious and efficient administrative action by the Respondents has therefore to be evaluated in the light of this circumstance. There appear to be unjustifiable delay and reluctance to pursue the matter.

118. Thus the court makes the following orders;

i. Prayers A and B are granted as they amount to harassment, intimidation and malice.

ii. Prayers C and D denied as confiscated items were returned and that the Respondents have mandate to lodge charges against Applicant if they have evidence to do so.

iii. Parties to bear their costs.

SIGNED DATED AND DELIVERED THIS 30TH DAY OF MAY, 2018 IN OPEN COURT.

C. KARIUKI

JUDGE

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