



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CONSTITUTIONAL NO. 11 OF 2017

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 25(A) AND (C), 27, 28, 29, 31, 32, 40, 41, 47(1) & (2), 48, & 50 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE CONSTITUTION IN ARTICLES 2, 3, 10, 19(1) & (2), 20(1), & (2), 21(1), 22(1), 23, 258(1), & 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ANTI- CORRUPTION AND ECONOMIC CRIMES ACT, 2003 AND THE ANTI- CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003.

AND

IN THE MATTER OF: THE ETHICS AND ANTI- CORRUPTION COMMISSION ACT NO. 22 OF 2011.

AND

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE CAP 63 LAWS OF KENYA

AND

IN THE MATTER OF: THE LAW REFORM ACT SECTION 8 AND 9 CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE OATHS AND STATUTORY DECLARATIONS ACT

BETWEEN

OSCAR KIPCHUMBA SUDI.....PETITIONER

VERSUS

THE ETHICS & ANTI-CORRUPTION

COMMISSION.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

THE CHIEF MAGISTRATE'S COURT(ANTI-CORRUPTION)

AT NAIROBI MILIMANI.....INTERESTED PARTY

JUDGEMENT

1. **Oscar Kipchumba Sudi** the Petitioner herein is the Member of Parliament (M.P) for Kapseret Constituency elected on 4th April, 2013. The 1st respondent is a Commission established under Section 3 of the Ethics & Anti-Corruption (EACC) Act pursuant to Article 79 of the Constitution.

The 2nd respondent is the Director of Public Prosecution (DPP) whose office is established under Article 157 (1) of the Constitution. It is the office responsible for instituting and undertaking criminal proceedings against any person before Courts of law.

The 3rd respondent is the Office of the Attorney General (AG) established under Article 156 of the Constitution. This office is vested with the responsibility of being the principal Legal Advisor to the Government of Kenya.

2. The petitioner was charged in **NAIROBI ACC No.14 of 2016** with the following offences;

i. Three Counts of Forgery of an official document contrary to Section 345 as read with Section 351 of the Penal Code.

ii. Three Counts of uttering a false document contrary to Section 353 of the Penal Code.

iii. Two Counts of providing false information to a person acting under the Leadership and Integrity Act contrary to Section 46(1) (d) as read with Section 46(2) of the Leadership and Integrity Act.

iv. One count of making a false statutory declaration contrary to Section 11 of the Oaths and Statutory Declarations Act, cap 15 laws of Kenya.

3. In his petition dated 10th April, 2014 and filed on 11th April, 2014, the petitioner seeks the following orders;

i. A declaration that his Constitutional rights to human dignity and freedom and security of the person as guaranteed by Articles 25(a), 28 and 29 of the Constitution were violated by the Respondents, their agents, employees, representatives and/or servants.

ii. A declaration that his Constitutional right to privacy as guaranteed by Article 31 of the Constitution has been violated by the Respondents, their agents, employees, representatives and/or servants.

iii. A declaration that his right to fair administrative action as guaranteed by Article 47(1) and (2) of the Constitution have been violated by the Respondents, their agents, employees, representatives and/or servants.

iv. A declaration that he be compensated a total sum of **Kshs. Ten million (10,000,000/-)** or any other amount that the Court deems sufficient and/or appropriate by the respondents jointly and severally for violating his Constitutional rights.

v. A declaration that the 1st Respondent lacks power and jurisdiction to conduct criminal investigations.

vi. Judicial Review order of **certiorari** to move into this Court and quash the charge sheet in **Nairobi ACC No. 14 of 2016** and the charges therein instituted by the 2nd respondent against the Petitioner herein.

vii. Judicial review order of **prohibition** to move into this Court and prevent the 2nd Respondent from instituting any other of further criminal proceedings against the petitioner herein in respect of academic qualifications that form the subject matter of this petition.

4. The petition is opposed. The 1st respondent filed a replying affidavit on 20th April, 2017 and a further affidavit on 27th April, 2017 by **Derrick Kaisha Jumba**. The 2nd respondent filed a replying affidavit by **Gitonga** sworn on 26th April, 2017 while the 3rd respondent filed his grounds of opposition on 7th June, 2017. The petition was disposed- off by way of written submissions. The petitioner filed his submissions on 10th May, 2017 and further submissions on 19th May, 2017. While the 1st respondent, 3rd respondent and interested party filed theirs thereafter.

5. The parties highlighted their submissions on 19th May, 2017. **Prof. Ojienda** Counsel for the petitioner submitted that this petition relates to documents presented by the petitioner to Independent Electoral & Boundaries Commission (IEBC) while vying for a parliamentary position. He submitted that the petitioner challenges the 1st respondent's mandate and further that the 1st respondent violated the petitioner's right to privacy in their investigations. Counsel submitted that the Petitioner sought compensation in the sum of Kshs. 10,000,000/-for the violation of his rights. Submitting on whether the 1st respondent had the mandate to investigate a criminal offence, Prof. Ojienda stated that academic papers were not a requirement for any person seeking any elective position in 2013 and that the investigations into the petitioner's academic papers was ancillary as the 1st respondent was investigating other things.

6. Regarding prayer No. (i) in the petition, Counsel stated that the criminal charges against the petitioner were not brought in the public interest and that it was selective prosecution meant to cause injustice to the petitioner. He wondered why it had taken so long for the petitioner to be prosecuted yet the alleged offence was allegedly committed in 2013. It was his submission that the charges were only pressed when the petitioner was going to present his nomination papers yet he did not make any of the documents alleged. He argued that the documents were not uttered or submitted and therefore public interest does not lie as there was no requirement for such submissions. He submitted that the charges violated Articles 28, 29 and 31 of the Constitution and were an embarrassment and unnecessary exposure of the petitioner, as the Ethics & Anti-Corruption Commission (EACC) had no powers to investigate him.

7. On Prayer (ii), Counsel impugned the manner of investigations and stated that the petitioner was never asked to explain anything on his qualifications or level of education. Relying on **Otieno Mak'onyango – vs- Attorney General & Another [2012] eKLR**, and **Republic –vs- Secretary of State exparte Doody [1994] 1 AC 531** he argued that the petitioner's right to fair administrative action was infringed. He submitted that the EACC had no power to investigate criminal matters and that the 1st respondent only had power to investigate acts of corruption and matters on Chapter 6 of the Constitution and the Leadership and Integrity Act. He contended that the 1st respondent did not have power to investigate

criminal cases and that there was no requirement for academic documents before 2013 making investigations in respect of the petitioner herein to be illegal.

8. **Mrs. Shamalla** for the 1st respondent opposed the petition and relied on the replying and further affidavits by Derrick K. Jumba. She submitted that the 1st respondent investigated the petitioner for giving false information to IEBC and the 1st respondent. She stated that a complaint against the petitioner was received under the Leadership and Integrity Act and the 1st respondent commenced investigations. She said that even if academic documents and qualifications were not a requirement for clearance of candidates in the 2013 elections, Section 13 of the Leadership and Integrity Act was applicable to the petitioner. He filed and submitted a declaration form to the IEBC indicating that he was a diploma holder and had not misrepresented information to the public.

9. She further submitted that the petitioner was summoned to the 1st respondent's office twice and asked to bring all his academic papers which he did and even gave a statement laying out all the schools he had attended and again gave false information. That the petitioner gave a further statement on 16th September, 2015 and gave a copy of his diploma certificate which upon verifications and investigations by the Director of Criminal investigations was found to be a false document. The said document and statement had been voluntarily submitted by the petitioner.

10. Mrs. Shamalla also submitted that Section 43(1) of the Leadership and Integrity Act gives the 1st respondent and other institutions power to refer any information to relevant authorities and that as a commission, the 1st respondent forwarded their report to the DPP. She argued that besides the forgery, there were other charges in the charge sheet. She cited the case of **Michael Sistu Mwaura Kamau & 12 Others –vs- Ethics And Anti-Corruption Commission & 4 Others [2016] eKLR**, and submitted that the 2nd respondent could rely on any source to carry out its mandate. It was her submission that the petitioner failed the test on the moral and ethical standing of an MP as provided for under Section 13 of the Leadership and Integrity Act. She further argued that Article 252 (1) (a), (b) and (d) and Section 23 of the Anti-corruption & Economic Crimes Act (ACECA) empowered the 1st respondent to investigate complaints. Referring to Section 4 of the ACECA, Counsel stated that the 1st respondent was well within its mandate in trying the petitioner for the criminal offences and that the 1st respondent did not overstep its mandate.

11. Counsel submitted that the petitioner being a State Officer and a public figure had nothing private about him as his academic qualifications are a public matter. She therefore argued that the petitioner had failed to show how his rights were violated and concluded that the petitioner had not proved his case.

12. **Mr. Ashimosi** for the 2nd respondent opposed the petition. Relying on the replying affidavit sworn on 26/4/2017 and the written submissions, he submitted that the 1st respondent commenced investigations pursuant to Section 4 of the **Leadership & Integrity Act** and forwarded its report to the 2nd respondent under Sections 11(1) (d) of EACC Act and Section 35 of the ACECA. The said report was acted on by the 2nd respondent who preferred charges against the petitioner. He added that the investigations herein were a multi-agency investigations, even though the 1st respondent had all the powers to investigate, under Article 252 of the Constitution. In response to Prof. Ojienda's question on whether academic qualifications were necessary as at 2013 when the petitioner submitted them to IEBC or EACC, he stated that that is an issue for determination by the trial Court in **Nairobi ACC No. 14 of 2016**.

13. He referred to **Michael Sistu Mwaura Kamau & 12 Others –vs- Ethics & Anti-Corruption Commission & 4 Others** (*Supra*) where a three judge bench held that the DPP had the power to rely on any source of information as long as it is lawful. He submitted that the DPP can act without referring to the commission or any other agency adding said that the 1st respondent was a lawful authority. He further submitted that the only circumstances under which a Court can interfere with an ongoing case is in cases of; breach or violation of the Constitution, breach of rules of natural justice and fair administration of justice, and where a decision is unreasonable or irrational and that the petitioner had proved none of these

to warrant this Court's intervention. He concluded that the petitioner had failed to prove his case.

14. The 3rd respondent did not highlight his submissions filed on 7th July, 2017. In his written submissions dated 31/5/2017, the 3rd respondent submitted that the petition raised two issues for determination which were: (i) whether the 1st respondent's conduct constituted a violation and contravention of the Constitution and (ii) whether the Court should issue the orders sought. Referring to ***Anarita Karemi Njeri -vs- Republic High Court Nairobi Misc. Criminal application NO. 4 of 1979 [1979] eKLR***, the 3rd respondent submitted that for the petitioner's claim on infringement of rights to succeed, he must state clearly with precision how the rights have been or will be infringed. He submitted that the petitioner herein had failed on this particular limb.

15. He argued that the 1st respondent being a constitutional commission is enjoined under Articles 2,2,10,19,20,21 and 249 to *inter alia* secure the observance of democratic values and principles. These include the rule of law and due process in promoting constitutionalism and the promotion and protection of the rights enshrined in the bill of rights. He opined that Article 252 of the Constitution empowers the 1st respondent to investigate any integrity and corruption issues and that the 1st Respondent is further mandated to push for prosecution of persons with such issues. He concluded that there is no evidence that the 1st respondent acted without jurisdiction and that its acts of investigating the petitioner were guided by the due process of the law. That the 3rd respondent has not been cited for any omission or commission in the entire petition.

16. In reply, **Mr. Rutto** for the petitioner submitted that the 1st respondent in their submissions dated 11.5.2017 and in reference to the affidavit of Derrick Kaisha Jumba had confirmed that they had no mandate to investigate such crimes. He stated that Article 252 limits the commission's scope and so the 1st respondent couldn't usurp powers of the National Police Service. Referring to ***Michael Sistu Mwaura Kamau & 12 Others -vs- Ethics and Anti-Corruption Commission & 4 Others Petition 230 of 2015 Consolidated with Petition 305, 324 and 203 of 2015***, he argued that the 1st respondent's investigations were unlawful and urged the Court to allow the petition.

17. I have read the petition, the supporting affidavits, the replying affidavit as well as the grounds of opposition, and authorities filed together with the written and oral submissions by Counsels herein. I find that the petition raises three issues for determination viz;

- i. Whether in conducting the said investigations, the petitioner's Constitutional Rights and freedom have been infringed and if so, whether he is entitled to the relief/compensation sought.
- ii. Whether the 1st respondent had the mandate to investigate the criminal offences that the Petitioner is charged with.
- iii. Whether or not to issue the writs of Certiorari and prohibition as sought by the Petitioner herein against the 1st Respondent herein in respect of ***Nairobi ACC No. 14 of 2016***.

ANALYSIS AND DETERMINATION

18. Chapter Four of the Constitution of Kenya, 2010, grants each person rights and fundamental freedoms which form what is known as the Bill of Rights. So important are these rights that Article 19 (1) (2) & (3) of the Constitution provides as follows;

“19 (1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

(2) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

(3) The rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.”

19. In the ordinary course of things the rights set out under Chapter Four of the Constitution of Kenya, 2010 (*supra*) are prone to denial, violation, infringement and outright threat at the behest of either natural or juristic persons. Remedial measures to address such circumstances have been set out in Article 22 (2) and (3) of the Constitution.

20. Article 23 (1) of the Constitution confers jurisdiction upon the High Court pursuant to Article 165, 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. Article 23(3) sets out the remedies which are available to an aggrieved party whenever his/her fundamental rights or freedoms have been violated to wit;-

“23 (3) 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; the remedies

d)

e)

f)”

21. It is not enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be demonstrated. Section 107 (1) of the Evidence Act CAP 80 Laws of Kenya is clear in this regard and provides as follows,

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

The letter and spirit of the above provision has been captured in several decisions of the superior Courts. The principles governing the precision with which a constitutional petition should be pleaded were well stated in *Anarita Karimi Njeru –vs- Republic (supra)*.

22. The petitioner should specifically set out the provisions of the Constitution that are alleged to have been violated; provide the particulars of the alleged violation; and, how the respondent has violated those rights. This position was reiterated in *Mumo Matemo –vs- Trusted Society of Human Rights Alliance and 5 Others, Court of Appeal, Nairobi Civil Appeal No. 296 of 2012 [2013] eKLR*. Ancillary to the foregoing is the requirement that any prospective petitioner ought to set out his or her complaint with precision and clarity to enable the Court to ascertain whether or not a given right or fundamental freedom has been infringed.

23. Prayer No (i) of the petition is for a declaration that the petitioner’s inherent right to human dignity and freedom and security of the person to have the same respected and protected was violated. In the

same breath, the petitioner avers that his right to freedom and security of his person was violated. In **Anarita Karemi -vs- Republic (supra) Trevelyan & Hancox, JJ**, summarized the threshold for proof of infringement and violation of Fundamental rights as follows;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

24. Prof. Ojienda for the petitioner submitted that the 1st respondent’s act of investigating the petitioner’s academic qualifications amounted to an infringement of his right to human dignity and freedom and security of the person. The principle in the **Anarita case (Supra)**, is clear that mere mention of infringement by itself is not enough. The Petitioner ought to set out with a degree of precision that which he complains of; the provision and the manner of the alleged infringement. It has not been shown how the investigation violated his right to human dignity and freedom and security of the person. Prayer (i) fails.

25. The petitioner alleges that by investigating his academic qualifications, the 1st Respondent allegedly infringed his right to privacy as provided for under Article 31 (c) of the Constitution. Article 31 (c) provides;

“31. Every person has the right to privacy, which includes the right not to have—

(c) information relating to their family or private affairs unnecessarily required or revealed;”

He contends that the investigations to confirm or disprove whether he possessed the requisite academic credentials posed a threat to his right to privacy since it was never a requirement at the outset. **But what was the genesis of the investigations mentioned herein above?** Simply put, the petitioner filled a **“self-declaration form”** issued pursuant to Section 13 of the 1st schedule of the Leadership and integrity Act wherein he disclosed *inter-alia* that he had obtained an “A” level qualification and that his highest academic qualification was a Diploma from Kenya Institute of Management (KIM) in 2008.

26. The 1st respondent subsequently, came to learn through an informer that the petitioner did not possess the said academic qualifications. The 1st respondent’s officers then commenced investigations to confirm the veracity or otherwise of the emerging divergent information.

27. Among the requests that the 1st respondent made thereafter were for the Petitioner to; - report to the 1st respondent’s office with copies of his original academic certificates which request was heeded to leading to the recording of a statement by the petitioner, a request also followed in quick succession by the petitioner for a meeting to be convened at his office situated on the 16th Floor of KICC which meeting was held on 16th September, 2016. The petitioner voluntarily recorded a further statement thereat.

28. The aggregate of the said statements was an affirmation that the information contained in the **“self-declaration form”** was factual. The 1st respondent continued with its investigations through various officers, institutions and persons. The rest are averments which amount to evidence which this Court will not want to deal with here. At the end of this exercise, the 1st respondent did a report of its findings. The report was then forwarded to the 2nd respondent under Section 35 of ACECA and Section 11 (1) (d) of EACC Act. Upon independent evaluation of the report, the 2nd respondent instituted criminal proceedings against the Petitioner vide **Nairobi ACC No. 14 of 2016** wherein he was charged with (9) Counts of the offences mentioned at paragraph 1 hereinabove.

29. Would the above chronology of events meet the threshold of precision set out in the **Anarita Karemi Case (supra)** or the **Mumo Matemu** case (supra)? When the facts contained in the petition are placed

against the requirements of the **Anarita Case** (*supra*), the petitioner falls short of the threshold set therein. The petitioner merely mentions in passing that the investigations and subsequent prosecution infringes on his rights to privacy and fair administrative action. It is not shown how these two rights were violated.

30. Even if the petitioner had met the threshold set in the **Anarita Case**, it has to be remembered that not all rights and fundamental freedoms are absolute. A position which has been sufficiently exemplified is at Article 25 of the Constitution which sets out rights and fundamental freedoms which cannot be limited. Article 25 provides;

“25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus.”

31. The right to privacy is not one such rights. In any event, the petitioner volunteered the information to the IEBC and later to the 1st respondent with the expectation that he met the dictates of integrity as required under Chapter Six of the Constitution. When he gave this information to the 1st respondent, he was already an M.P for Kapsaret Constituency within Uasin Gishu County who knew or ought to have known that his conduct both in public and in private was of public interest. Pertinent in this regard would be Article 260 which defines “state office” to include a person or persons appointed to the office of Member of Parliament.

32. A State Officer is required and expected to comply with the requirements of Chapter Six of the Constitution and specifically Articles 73 (1) (a) (i) (ii) (iii) (iv). A State Officer should always remain alive to the guiding principles of leadership and integrity set out in Article 73 (2) (a) (b) (c) (d) (e) of the Constitution. Most importantly and of relevance to this petition would be the provisions of Article 75 (1) (c) as read with Article 75 (2) (a) which provide as follows;

“75. (1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids —

(c) demeaning the office the officer holds.

(2) A person who contravenes clause (1), or Article 76, 77 or 78 (2) —

(a) shall be subject to the applicable disciplinary procedure for the relevant office”

33. It follows therefore that the 1st respondent acting in conjunction with the 2nd respondent were merely enforcing the aforesaid provisions which trickled down to the relevant Acts of parliament namely the Leadership and integrity Act and the Anti-Corruption and Economic Crimes Act. Any act committed which is contrary to the provisions of the Leadership and Integrity Act, whether it’s criminal or otherwise falls under the mandate of the 1st and 2nd respondents for necessary action. I find prayer (ii) not to have been proved.

34. I now move on to the right to fair administrative action, whose definition was surmised by the Constitutional Court of south Africa in ***President of the Republic of South Africa and Others –vs- South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1***, at paragraphs 135 -136 where the Court stated;

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see Section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a Constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of Section 33, but also its content. The principal function of Section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the Constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

Article 47 (2) provides;

“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.”

35. In this case, I see a deliberate effort on the part of the 1st respondent to give the petitioner a hearing with a view to getting his side of the story/version of the events. The 1st respondent’s officers went as far as visiting his offices at KICC and inviting him to their office. In both instances, the petitioner voluntarily recorded statements which in my considered view amounted to an opportunity to exculpate himself from the allegations levelled against him. Furthermore, he would still have another opportunity to defend himself in the pending criminal proceedings through cross-examination of witnesses or in the event that he is called upon to do so. He cannot therefore claim that his right to fair administrative action was violated.

36. Having failed to demonstrate to the required precision, the violation of that right, prayer (iii) of the petition fails.

37. Prayer (v) of the petition sought a declaration that the 1st respondent lacked power and jurisdiction to conduct criminal investigations. The 1st respondent is established by Section 3 of the Ethics and Anti-corruption Commission Act. The petitioner alleged that by investigating into his academic qualifications the 1st respondent usurped the powers of the National Police Service which is the only body mandated to conduct investigations in criminal matters. With respect, nothing can be further from the truth as Section 23 as read with Section 2 of the ACECA donates investigative powers to the 1st respondent. Section 23 of ACECA provides;

(1) The Secretary or a person authorized by the Director 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.

(3) For the purposes of an investigation, the Secretary and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Secretary or investigator has under this Part.

(4) The provisions of the Criminal Procedure Code (Cap. 75), the Evidence Act (Cap. 80), the Police Act (Cap. 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator.

The 1st respondent is an independent commission with powers to investigate. Article 252 (1) (a) and (d) of the Constitution provides;

(1) Each commission, and each holder of an independent office—

(a) may conduct investigations on its own initiative or on a complaint made by a member of the public;

(b)

(c)

(d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

38. In *Thuku Kirori & 4 Others –vs- County Government of Murang’a [2014] eKLR, Ngaah, J.* expressed himself as hereunder:

“Moreover, where a statute or the Constitution for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs...this Court will be hesitant to intervene and curtail these organ’s efforts to execute their statutory or Constitutional mandates; it is the duty of this Court to interpret the Constitution in a purposive rather than a restrictive manner.”

I agree with the finding.

Article 252 (1) (a) of the Constitution gives the 1st respondent power to conduct investigations on its own initiative or on a complaint made by a member of the public. Article 252 (1) (d) gives it power to exercise and perform any other functions prescribed by legislation in **addition** to the functions and powers conferred by the Constitution which to me is Article 252 (1) (a) (*emphasis is mine*). This Court cannot therefore take away this power which is anchored in the Constitution.

I therefore find the petitioners allegations to be uninformed.

39. Prayer No. (vi) is for judicial review order of *certiorari* to move into this Court and quash the charge sheet in Nairobi ACC No. 14 of 2016 and the charges therein against the petitioner. The main reason advanced by the petitioner for this prayer is that the 1st respondent had no powers to investigate a criminal offence. Having found above that the 1st respondent had statutory power to investigate into the alleged offence, it is my considered view that this prayer must fail.

40. On prayer (vii), the petitioner wants the Court to grant a judicial review order of prohibition to move into this Honorable Court and prohibit the 2nd respondent from instituting any other criminal proceedings against the Petitioner herein in respect of the academic qualification that forms the subject of this petition. The 2nd respondent is established of Article 157 of the Constitution. Its mandate as provided by Article 157 (6) is to;

i. institute and undertake criminal proceeding against any person before any Court (other than a Court martial) in respect of any offence alleged to have been committed,

ii. 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

iii. 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).

Article 157 (10) provides;

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.

41. The 2nd respondent received a report from the 1st respondent, evaluated the evidence independently and made a decision to charge the petitioner. There is no evidence to show that the DPP acted unreasonably, maliciously or with bias. Article 50 of the Constitution provides for the right to a fair trial. Article 50 (2) (0) specifically protects an accused person from being tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted. This Court cannot therefore direct the DPP on what to charge or what not to charge an individual with.

After trial in the lower Court and in line with the above, this constitutional provision will protect the petitioner from any further subsequent prosecutions in regard to the charges he is facing at the trial Court.

42. Prayer (iv) fails since the Court has found no violation of any of the rights as claimed by the petitioner.

43. The upshot is that the entire petition is devoid of merit. It is dismissed with costs.

Date and delivered this 27th day of July 2017 at NAIROBI

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE