



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 394 OF 2016

IN THE MATTER OF ARTICLES 22 (1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28 & 29 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INTENDED CRIMINAL PROSECUTION OF NICHOLAS MWANIKI WAWERU AND SAMUEL GATHUKU KIMORI

NICHOLAS MWANIKI WAWERU.....1ST PETITIONER

SAMUEL GATHUKU KIMORI.....2ND PETITIONER

VS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS....1ST RESPONDENT

AND

PAUL NGUGI KIHARA.....1ST INTERESTED PARTY

MAUREEN WANGUI KAMANDE.....2ND INTERESTED PARTY

JOSEPH MURAGE NICHOLAS CIURI.....3RD INTERESTED PARTY

JUDGEMENT

Introduction

1. The core issue for determination in this petition is the circumstances under which this court can halt, stop, prohibit or quash a criminal prosecution mounted against a citizen. It is important to point out that the Office of the Director of Public Prosecutions (DPP) is a constitutional office which plays a vital role in the administration of justice in criminal matters. The DPP is the sole Authority vested with the power and responsibility to exercise control over the prosecution of all criminal matters except the institution of cases at the Court?Martial.[1]

2. It is also important to point out that a fair and effective prosecution is essential to a properly functioning criminal justice system and to the maintenance of law and order. The individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution.

3. I appreciate that every case is unique and must be considered on its own merits but there are general principles which should underlie the approach to prosecution. The DPP must at all times uphold the rule of law, the integrity of the criminal justice system and the right to a fair trial and respect the fundamental rights of all human beings to be held equal before the law, and abstain from any wrongful discrimination.

4. Fundamentally, the primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to seek conviction. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion not to pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and conviction of the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and accused persons. The prosecutor should avoid any appearance of impropriety in performing the prosecution function.

Factual background of the case

5. On diverse dates in 2014, the first petitioner conceptualized what he describes as an investment opportunity comprising of a gated community of greenhouse plots, installation, equipping and management of greenhouse plots and their produce on behalf of plot buyers.

6. In furtherance of the concept, the first petitioner identified two five acre parcels of land being **Kajiado/Kitengela/71158** and **71159**. The plan was sub-divide them into eighth of an acre plots, and each plot was to be fitted with a greenhouse.

7. The petitioners case is that in order to achieve the concept, the first petitioner entered into a memorandum of understanding with Microstart Holdings Limited and a one Ann Gatwiri Gathuku dated 1st August 2014 the terms of which were that the said Ann Gatwiri Gathuku, the legal and beneficial owners of the said properties authorized the first petitioner to sell the plots and to promote the project. Pursuant to the said agreement, the proprietor undertook to execute all the necessary transfer documents.

8. It is the petitioners case that it was agreed that the first petitioner would promote the project, demarcate the plots into **40** plots from **Kajiado/Kitengela/71158** and **35** plots from **Kajiado/Kitengela/71159** and then sell the plots as per the concept plan. The proceeds of the sale would be applied towards paying the registered owner of the property on a pro-rata purchase price for the land and towards purchasing and installing the greenhouse.

9. The petitioners further aver that in reliance of the said agreements, the first petitioner promoted the project to *inter alia* the first and second interested parties who also introduced the project to their friends at a commission fee of 5%. Each buyer signed agreements as enumerated at paragraph **28** of the petition. The petitioners aver that they proceeded to purchase and assemble greenhouses on each of the plots. Management agreements were entered between the first petitioner and each prospective buyer for the cultivation of crops, management, and selling of farm produce by the first petitioner on behalf of each greenhouse owner.

10. The petitioners also aver that it was a term of the agreement that the first petitioner would ensure that the purchasers receive the completion documents upon full payment of the purchase price, and notwithstanding the said provision, on 27th April 2016, the petitioners received a demand notice from a firm of advocates acting for some purchasers alleging they had paid in full but had not received their completion documents and demanded refund of the amounts within 14 days, even though the contracts did not provide for completion dates. It is also averred that the third interested party alleged that the first petitioner had sold properties which did not belong to him without a power of attorney.

11. The petitioners also allege that upon realizing that the third interested party had no strict contractual rights to claim the refunds, he resorted to using the police in order to pressurize the petitioners to refund the money to Maureen Wangui Kamande, Paul Ngugi Kihara, Hassan Amir Musa Bulhan, Michael Mureithi Gaiko and Olive Wanjiru Kamande.

12. The petitioners case is that the criminal case is intended to harass, intimidate and or torment the third petitioner and its directors/nominees to arm-twist them into selling the majority stake in the third petitioner to the interested parties, and that the threatened arrest, incarceration and possible prosecution of the petitioners is oppressive, vexatious, unfounded, unreasonable and in bad faith/ulterior motives, hence a violation of the petitioners constitutional rights.

13. In its grounds of opposition, the first Respondent state that the petition does not disclose violation of constitutional rights, and that the third Respondent's acted in accordance with its powers under article 157 of the constitution.

14. The second and third Respondents Response is that the charges have been preferred against the petitioners for conspiracy to commit a felony and that the sale agreements relating to the transactions in question are not disputed nor is receipt of the payments disputed.

15. They also aver that the second and third Respondents registered charges over the said titles and obtained loan facilities after the said agreements, hence, they cannot purport to sell the properties on one hand and on the other secure a loan with the properties, which frustrated the sub-division and processing of titles. Thus, to them, the petitioners and the said company conspired to receive purchase price for plots that were non-existent pretending to transfer ownership while they continued to enjoy the amounts advanced to them. Further, no explanation was offered for the said borrowing despite the existence of the said agreements and that the facts in question do disclose the offence in question.

16. The first and second interested party's Responses is that they entered into sale agreements in August 2014 with the first petitioner for the purchase of one plot. They paid in full as per the agreement(s), but they never got completion documents. Upon visiting the property in April 2016, they noted that no farming was taking place. The land had over grown bushes. They opted to pursue refund for the money. A search on the property revealed that no sub-division or transfer in their favour had been done. The properties had charges registered over them, which had never been disclosed to them. Thus, they complained to the police.

17. The third interested party is an advocate of the high court of Kenya. He represented the first and second interested parties in pursuing their refund. He avers that:- **(a)** the sale agreements did not indicate whether the vendors had authority to sell the properties, **(b)** the memorandum of understanding relied upon by the petitioners was not legally executed/registered, **(c)** no sub-division was ever done, hence the plots in question do not exist, **(d)** a search revealed that the properties were charged, a fact that was not disclose to the purchasers.

18. In his supplementary affidavit, the first petitioner states that:- **(a)** the complaint was not recorded in the police occurrence book. (I find this allegation to be totally unfounded since he charge sheet annexed to the Replying affidavit sworn by Judith Muthoni shows both the O.B. number and a police case number).**(b)** that that the charge on Kajiado/Kitengela/71159 has been discharged in full. (However, the copy of discharge of charge annexed to the affidavit is evidently not registered. A search was not annexed either. This raises doubts on the truth of this averment).

Advocates submissions

19. The petitioners' counsel submitted that:- **(a)** the petition does not contest the mandate of the Respondents, but the manner in which the criminal process was invoked, **(b)** that criminal justice system should not be invoked in civil disputes, **(c)** criminal law should not be used to punish acts which contain no real vice and which can be handled under the civil process, **(d)** the institution of the criminal case was in bad faith, and in violation of the petitioners rights.

20. The second and third Respondents' counsel submitted that the police and the DPP acted within their constitutional mandate. He denied violations of the petitioners' constitutional rights, and insisted that the petitioners did not prove violations of constitutional rights.

21. Counsel for the interested parties submitted that; **(a)** the issues raised in this petition can be ironed out in the criminal proceedings, **(b)** that it is not for this court to determine the sufficiency of the evidence, **(c)** that no constitutional infringements have been proved, **(d)** that the existence of civil dispute is not a bar to criminal prosecution, **(d)** the court should take into account public interest in undertaking prosecutions in cases of this nature.

Analysis of the facts, submissions and the law

22. The core issue for determination is whether or not the Respondents acted within their statutory and constitutional mandate in mounting the prosecution in question. It is not disputed that the petitioners sold properties to the interested parties and that they received payments. The properties were to be subdivided, but this was not done. Transfer was not effected in favour of the purchasers. Also relevant is the fact that the properties were charged a fact that was never disclosed to the purchasers, and that titles were not registered in the vendors' names.

23. It is also not disputed that on each plot a green house was to be erected. This was not done. All these prompted the interested parties to seek a refund which was not made, hence they complained to the police prompting the prosecution complained about. The charge sheet annexed to the affidavit of Judith Muthoni contains several counts of conspiracy to commit a felony contrary to section 393 of the Penal Code.[\[2\]](#)

24. Whether the above facts disclose a reasonable suspicion resting on reasonable grounds to mount a prosecution must be viewed against established legal principles and the pertinent facts of the case before the court. The question as to whether there are reasonable grounds must be approached objectively. Accordingly the circumstances giving rise to the suspicion or the grounds must be such as would ordinarily move a reasonable man to form the suspicion that there are reasonable grounds to mount the prosecution.

25. The discretion vested upon the DPP by the law must be properly exercised. But the *grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed*. Exercise of the discretion will be clearly unlawful *if the DPP knowingly invokes the power to arrest and prosecute for a purpose not contemplated by the law*.

26. The decision to prosecute must be *based on the intention to bring the arrested person to justice*. Prosecution to frighten, harass, vex the suspect, or to punish the person or *to force the person to abandon his rights or to assist his opponent in a civil dispute is out rightly an abuse of the law*.

27. The constitutional approach to the nature of a discretion and how it should be exercised must of necessity take cognizance of the provisions of the fundamental right to the freedom and the dignity of the individual.[\[3\]](#) It must be borne in mind that the Bill of Rights is a cornerstone of democracy in Kenya.[\[4\]](#) It enshrines the rights of all people in our country and affirms the democratic values of *human dignity, equality and freedom*. The constitution directs the State and all persons to “... *respect, protect, promote and fulfill the rights in the Bill of Rights*; “*The Bill of Rights applies to all law, and binds all organs of state.*”[\[5\]](#)

28. A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose.^[6] 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. A careful analysis of the facts before me shows that the petitioners have not demonstrated that the prosecution was instituted without a factual basis nor has it been shown that it is an abuse of court process.

29. The decision whether or not to prosecute is very important. It can be very upsetting for a person to be prosecuted even if later found not guilty. However, a decision not to prosecute can cause great stress and upset to a victim of crime. Therefore, the DPP must carefully consider whether or not to prosecute. This decision must be seen to have been arrived at by the DPP independently. Under no circumstances should the DPP appear to have been prompted by another person to institute any proceedings. Such a scenario, even if it is mere reasonable suspicion in the eyes of reasonable persons would amount to a violation of article 157 (10) of the Constitution and Section 6 of the Office of the Director of Public Prosecutions Act^[7] cited above. The petitioners have not established that the DPP abused his powers under the law.

30. An official who has discretionary powers must, naturally exercise them within the limits of the authorizing statute, *read in the light of the Bill of Rights*. This is supported by a further English law decision^[8] where it was held that 'Although Article 5 of the European Convention of Human Rights does not require the court to evaluate the *exercise of discretion* in any different way as it evaluates the exercise of any other executive discretion, *it must do so in the light of the important right to liberty which is at stake*.' No abuse of discretion has been alleged or proved in this case.

31. In the words of John Kelly TD, the prosecution system “*should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so.*”^[9] The following observations are useful to bear in mind:-

“...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice—impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one.”^[10]

32. There is nothing in this petition to suggest that the decision to prosecute was not undertaken impartially.

33. One key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. I am not persuaded that the petitioners have demonstrated that the prosecution is not in public interest.

34. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment or stop a prosecution if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of the petitioners fundamental rights.

35. Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.^[11] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am afraid, from the material before this court, there is nothing to show that the prosecution is an abuse of the court process or unfair, nor is there anything to show that the prosecution is wrong, baseless and an abuse of police powers or

judicial process. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.[\[12\]](#)

36. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[\[13\]](#) The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent '[a fair trial](#)' and if there is, then the court ought to stop the prosecution. In the present case, there is nothing to show that the criminal prosecution will not be fair.

37. The high court should prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process** because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[\[14\]](#) These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.[\[15\]](#) The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways. To me, no exceptional circumstances have been demonstrated in this case.

38. A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. As stated above, from the evidence before me, there is nothing to show that the prosecution was commenced without a proper factual foundation to warrant undertaking the prosecution in question.[\[16\]](#) It is important to point out that it is not disputed that the petitioners received money from the purchasers. No transfer has been done and that the properties were never sub-divided and above all, there exists legal charges over the properties details whereof were not disclosed to the purchasers at the time of entering into the sale agreements. In view of the above facts, and considering that it is not for this court to assess the sufficiency or otherwise of the evidence, I find nothing in the material before me (even mere reasonable suspicion) to suggest that the DPP did not act in accordance with article **157 (10)** of the Constitution and Section **6** of the Office of the Director of Public Prosecutions Act.[\[17\]](#)

39. In my view, the issues raised by the petitioners can effectively be dealt with at the criminal trial. Much of the averments in the petition in my view are issues which constitute "[a defence in the criminal trial](#)," among them the contents of paragraph 17, 18, 20, 25 only to mention but some.

40. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. [\[18\]](#)

41. There is nothing to show that the prosecution was conducted without due regard to traditional considerations of candour, fairness, and justice. Where a trial is conducted in a manner different from what is prescribed under the law, the trial is bad.[\[19\]](#) In my view, the petitioners have not demonstrated that the prosecution question was commenced on the wrong footing and with no factual basis.

42. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, mandamus or permanent stay of proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State

and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction. [20]

43. It is, however, not necessary that at this stage there should be a meticulous analysis of the case before the trial to find out whether the case ends in conviction or acquittal. [21] In *Kuria & 3 Others vs Attorney General* [22] the High Court held that the Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It has not been shown that extraneous matters divorced from the goals of justice guided the instigation of the prosecution.

44. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was formed to perform. [23] This has not been alleged or proved in this case.

45. A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and or where the proceedings are oppressive or vexatious. [24] Again this has not been demonstrated in this case.

46. The High Court has inherent powers to quash, stay or prohibit criminal proceedings. These powers are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India in a recent decision [25] revisited the law on the issue and held that 'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.' The said court delineated the law in the following terms:-

"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings.....The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers" [26]

47. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment or stop a prosecution in the magistrates courts if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*. [27] The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

i. Where it would be impossible to give the accused a fair trial; or;

ii. Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

48. The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances. **Chris Corns** in his Article entitled 'Judicial Termination of Defective Criminal Prosecutions: Stay Applications' [28] argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These

grounds can be classified under three categories;-

- i. When the continuation of the proceedings would constitute an ‘abuse of process,’*
- ii. When any resultant trial would be ‘unfair’ to the accused, and*
- iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.*

49. The latter ground is not limited to abuse of the trial court procedures and processes but extends more generally to abuse of the administration of criminal justice process as a whole. Clearly, there can be significant overlap between these various grounds for the stay; an unfair trial, for example would tend to bring the administration of justice into disrepute. Conversely, in some circumstances the holding of a trial may not be technically unfair to the accused yet still undermine the integrity of the legal system because of some impropriety in the investigation or prosecution of the case. The justification for granting a stay extends beyond any abuse of process and includes circumstances where it would be ‘unfair’ to the accused for the proceedings to continue. [29] The foregoing test has not been established in the present case.

50. Criminal proceedings commenced to advance other gains other than promotion of public good are in my view vexatious and ought not to be allowed to stand. The word “vexatious” means “harassment by the process of law,” “lacking justification” or with “intention to harass.” It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court. In my view, it has not been demonstrated that the prosecution complained of is vexatious, lacks justification or is intended to harass. As mentioned earlier, the issues complained of in this case can be determined at the criminal trial.

51. In all honesty, I find nothing in the material before me to demonstrate unfairness or that the right to a fair trial has been threatened. There is no tangible evidence to demonstrate that the police acted maliciously. As stated above, there is nothing to show that the prosecution in question was commenced without proper or reasonable foundation.

52. It is my view that the petitioners have not demonstrated that their constitutional rights to a fair trial have been or will be infringed if the prosecution proceeds nor have they demonstrated that the said trial is an abuse of court process and it will inherently violate their constitutional rights as enshrined in the constitution nor did they demonstrate that the prosecution is without factual basis.

53. Accordingly, I find that this petition has no merits. Consequently, I disallow this petition and hereby dismiss it with no orders as to costs.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 21st day of September 2017

JOHN M. MATIVO

JUDGE

[1] Article 157 of the constitution

[2] Cap 63, Laws of Kenya

[3] Article 19 (2)

[4] Article 19 (1)

[5] Article 20(1)

[6] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[7] Supra

[8] Paul v Humberside Police [2004] EWCA Civ 308 para 30:

[9] <http://www.paclii.org/fj/other/prosecutors-handbook.pdf>

[10] Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007. (Now the Hon. Anna Katzmann, Judge of the Federal Court of Australia).

[11] *Hui Chi-Ming v R* [1992] 1 A.C. 34, PC

[12] *DPP v Meakin* [2006] EWHC 1067.

[13] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[14] See *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R v Methyr Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.

[15] *R v Birmingham and Others* [1992] Crim. L.R. 117

[16] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[17] Supra

[18] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94

[19] Indian Case of *Pulukiri Kotayya vs Emperor* L.R. 74 Ind App 65

[20] See *Kafnatakavs L. Muniswamy & Others* SAIR 1977 SC 21489

[21] *Mrs. Dhanalakshmi vs R. Prasanna Kumar & Others* AIR 1990 SC 494

[22] {2002} 2KLR 69

[23] Ibid

[24] Ibid

[25] See *Maharashtra vs Arun Gulab Gawali*

[26] See *State of West Bengal & Others vs Swapan Kumar Guha & Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. ugarSuri & Ano Vs State of U.P & Others*, AIR 2000 Sc 754

[27] {1993} All E.R 138, 151, House of Lords

[\[28\]](#) Chris Corns, Judicial Termination of Defective Criminal Prosecutions: Stay Applications, 76 University of Tasmania Law Review, Vol 16 No. 1, 1977

[\[29\]](#) Ibid