



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NO. 26 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY**

**FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF CRIMINAL PROCEDURE CODE,**

**CAP 75 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE PENAL CODE, CAP 63 LAWS OF KENYA**

**AND**

**IN THE MATTER OF CRIMINAL CASE NUMBER 144 OF 2017**

**IN THE CHIEF MAGISTRATES COURT AT**

**MILIMANI LAW COURTS**

**BETWEEN**

**REPUBLIC OF KENYA ..... APPLICANT**

**VERSUS**

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

**DIRECTORATE OF CRIMINAL**

**INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**CHIEF MAGISTRATE’S COURT**

**MILIMANI LAW COURTS.....3<sup>RD</sup> RESPONDENT**

**AND**

**NATIONAL SOCIAL SECURITY FUND .....INTERESTED PARTY**

**EX PARTE: PIUS KIPROP CHELIMO & JONAH KIPROTICH TELO**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 6<sup>th</sup> February, 2017, the ex parte applicants herein **Pius Kiprop Chelimo** and **Jonah Kiprotich Telo**, seek the following orders:

**1) That the honourable court be pleased to grant an order of Certiorari to remove into this honourable court and quash the decision made by the directorate of Public Prosecutions, the 1<sup>st</sup> Respondent and the Directorate of Criminal Investigations, the 2<sup>nd</sup> Respondent to prosecute Ex parte the applicants in respect of compliance certificate reference number HILL/CC350 dated 12/11/2015 relating to Lavington Security Limited & National Social Security Fund the Interested Party.**

**2) That the honourable court be please to grant an order of prohibition directed to the Directorate of Public Prosecutions, Directorate of Criminal Investigations and any persons on their behalf or authorized by them, prohibiting them and each of them from the initiation and prosecution of criminal charges against the ex parte applicants in criminal case Number 144 of 2017, Republic Vs Pius Kiprop Chelimo & Jonah Kiprotich Telo at the Chief magistrates Court Milimanli in respect of compliance certificate reference number HILL/CC350 dated 12/11/2015 relating to Lavington Security Limited & National Social Security Fund the Interested Party.**

**3) That the costs be awarded to ex parte applicants.**

**Applicant’s Case**

2. According to the applicants, who aver that they are directors of Lavington Security Limited (hereinafter referred to as “the Company”) in the year 2015, National Social Security Fund (the Interested Party) advertised a tender No. 04/2015-2016 for provision of security services to various NSSF properties and the Company duly submitted its bid. Vide a letter dated 12<sup>th</sup> February, 2016 addressed to the Company, the Interested Party notified the Company that its bid for the said tender was not successful because they had submitted an NSSF compliance certificate that was not authentic.

3. It was averred that the Company was surprised by the contents of the said notification and vide a letter dated 18<sup>th</sup> February, 2016 addressed to the Interested Party it disputed the Interested Party’s position and requested the Interested Party to “order for our urgent investigations by involving Ethics and Anti-corruption Authority so that this enquiry be authentic and source of the compliance certificate issued to us can be unravelled”. The Company further indicated to the Interested Party that it is their intention to contest their decision at the Public Procurement Oversight Authority and therefore sought an immediate response. However the Interested Party neither responded to the said letter dated 18<sup>th</sup> February, 2016 nor updated the applicants on the Investigations undertaken. As a result, the Company instructed its advocates, **Messrs Kale Maina & Bundotich Advocates**, who issued another demand notice dated 16<sup>th</sup> March, 2016 to the interested Party who likewise did not respond to the same.

4. It was averred that in view of the conduct of the Interested Party, the Company proceeded to file a civil suit namely High Court Case Number 79 of 2016 against the Interested Party. Alongside the plaint, the Company filed an application dated 17<sup>th</sup> March, 2016 seeking orders of injunction and which orders were duly granted.

5. According to the applicants, in response to the said application the intended party filed an affidavit sworn by **Nancy Roktok** on 5<sup>th</sup> May, 2016 and in which she deposed that upon examining the compliance certificate No. HILL/CC 350 dated 12<sup>th</sup> November, 2015 she discovered that the same was not authentic as the signatures appearing thereon were neither hers nor did they belong to any of the said authorized compliance officers from Hill Branch. She also tendered a letter dated 17<sup>th</sup> March, 2016 addressed to Managing Trustee of the Interested Party in which she stated that the compliance certificate in issue was not issued by her.

6. The applicants urged the Court to take note of the fact that the letter dated 10<sup>th</sup> December, 2015 addressed to Branch Manager Hill Branch is from the Secretary Tender processing committee of the Interested Party while the letter dated 17<sup>th</sup> March, 2016 from **Nancy Roktok** is addressed to the Managing Trustee of the Interested Party and was issued way after Lavington Security Limited had been notified that its tender was unsuccessful and could not therefore have been part of the tender proceedings.

7. It was averred that the Interested Party did not update the Company on any investigations undertaken pursuant to the complaint and request but on 17<sup>th</sup> January, 2017 the officers of the 2<sup>nd</sup> respondent summoned the applicants to visit their offices at Mazingira House to record a statement on the said complaint and which request they duly honoured and recorded their statements. Alongside the applicants, the employees of the Company who applied and obtained the disputed compliance certificate also recorded statements. However, immediately after the applicants finalized recording their statements, the officers of the 2<sup>nd</sup> Respondent informed them that they were under arrest and that they would be charged in court with offences in respect of the said compliance and they were subsequently released on a payment of cash bail.

8. It was deposed by the applicants that the officers of the 2<sup>nd</sup> respondent informed them that the 1<sup>st</sup> respondent had recommended their prosecution. Shocked by the turn of events the applicants wrote a letter dated 16<sup>th</sup> January, 2017, through their advocates, addressed to the 1<sup>st</sup> respondent and copied to the 2<sup>nd</sup> respondent but they never received any response thereto. Instead, the 1<sup>st</sup> and 2<sup>nd</sup> respondents proceeded to lodge and file a charge sheet with the 3<sup>rd</sup> respondent under criminal case number 144 of 2017 in which they intended to charge the applicants with various alleged offences relating to the said compliance certificate and the case was scheduled to come up for plea taking on 31<sup>st</sup> January, 2017.

9. It was the applicants' case that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were abusing the legal process and more so powers vested to them under the law and the constitution because:-

i. The compliance certificate number HILL/CC 350 dated 12/11/2015 subject of the intended charges was issued to Lavington Security Limited and not to the applicants.

ii. Lavington Security Limited which is a duly incorporated legal entity has not been charged and no recommendation to charge them was made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

iii. The applicants did not submit any tender for provision of security services to the Interested Party.

iv. Lavington Security Limited was the complainant and or the aggrieved party in respect of the said compliance certificate.

v. The recommendation and or intended prosecution is solely intended to aid and or build a defence for the Interested Party in the said civil proceedings in which the subject matter is the said

compliance certificate and in which the interested party has not filed any defence despite having been duly served with summons to enter appearance on 22<sup>nd</sup> March, 2016.

vi. The recommendations and the intended prosecution is intended to punish, inconvenience, prejudice, ridicule and embarrass the applicants for authorizing their company to commence civil proceedings against the interested party.

vii. The recommendation and intended prosecution is intended to legally bar the company from exercising its legal and lawful rights under the **Public Procurement and Disposal Act, 2015** to lodge a complaint to the Director General in respect the said tender proceedings.

viii. The charge sheet as presented before the court has deliberately and by design omitted real bone of contention to the effect one **Nancy Roktok** alleges that she did not sign the compliance certificate in question.

ix. The 1<sup>st</sup> and 2<sup>nd</sup> respondents deliberately and by calculated design with a view to violate the applicants' legal and constitutional rights knew that no evidence was tendered before the interested party's tender committee to the effect that Lavington Security Limited's compliance certificate was not authentic.

x. The applicants' prosecution is designed, calculated and intended to achieve extraneous and collateral purposes and meant to obtain a judgment in favour of the interested party as a sole defence for the interested party in the said civil proceedings.

xi. The prosecution is aimed at aiding and giving forensics advantage to the Interested Party in the said civil suit so that it can file a defence.

### **1<sup>st</sup> and 2<sup>nd</sup> respondents' Case**

10. The application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

11. According to them, a complaint was made on 14<sup>th</sup> April 2016 by the acting CEO/Managing Trustee of National Social Security Fund (NSSF) on allegations of irregularities on issuance of a compliance certificate to Lavington Security Limited vide letter dated 6<sup>th</sup> April 2016.

12. Pursuant to the said report, investigations into the said allegation commenced which are still ongoing and so far revealed that a certificate of compliance was allegedly issued by NSSF Hill branch in Nairobi and was dated 12<sup>th</sup> November, 2015 and serial numbered HILL/CC350 which certificate had been submitted amongst other tender proposal documents by the Directors of Lavington Security Limited on a tender number 04/2015 -2016 which was for provision of security or guarding services of the NSSF properties. Accordingly, the statements of the alleged signatories, **Nancy Roktok**, the Branch Manager, NSSF HILL Branch and compliance officer **Irene Koros** who disputed their signatures on the compliance certificate and also the stamp impression were recorded and the certificate subjected to forensic examination and a report was prepared. In addition to the foregoing, investigations revealed that AON Insurance brokers Kenya Limited and Samo Security Limited had applied for NSSF compliance certificates and they were subsequently issued with the certificates on 18<sup>th</sup> November, 2015 and 25<sup>th</sup> November, 2015 respectively which bore similar serial number HILL/CC350. The signatories **Nancy Roktok** and **Irene Koros** in the two certificates also confirmed following the procedures in issuing the compliance certificates. However, the similar serial number was due to unavailability of the compliance register when Samo Security Limited was issued with the certificate.

13. According to the said Respondents, investigations into the matter are still going on and have not yet been concluded due to the complexity of the matter and as such the charge sheet in Criminal Case 144 of 2007 can be amended at any stage before judgment to include the others not before court as indicated in the charge sheet.

14. It was the said Respondents' case that the matters raised by the applicants in the pleadings filed herein whether **Nancy Roktok** did sign the compliance certificate in question from the basis of their defences which should be raised before the trial court and as such cannot be raised before the High Court in the manner proposed herein.

15. The said Respondents contended that they are strangers to the High Court Civil Suit no. 71 of 2016 which from the pleadings filed herein is for defamation against the interested party and claim for damages. To them, the laws of Kenya provide essential safeguards for a fair trial which is also entrenched in the Constitution of Kenya 2010 and it has not been demonstrated that the applicants will not be accorded a fair trial before the subordinate court to warrant the granting of the orders.

16. Based on legal advice, the said Respondents averred that:

- a. the respondents are mandated to investigate all possible criminal offences and attempt to stop such execution of mandate would result to an even greater injustice in the criminal justice system.
- b. the applicants are seeking to pre-empt and curtail the mandate of the law enforcement agency (investigate department) as enshrined within the Constitution of Kenya;
- c. if at all a crime has been committed, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceeding shall not be a ground for any stay, prohibition or delay the criminal proceedings;
- d. the applicant has not adduced sufficient evidence before this Court on merit to show that prejudice has been occasioned;
- e. the respondents do not require the consent of any person or of any person or authority for the commencement of criminal proceedings;
- f. the respondents do not acting under the direction or control of any person or authority;
- g. the applicants have not demonstrated that in executing its mandate, it has acted without or in excess of the powers as conferred by the law or acted maliciously, infringed, violated, convened or in any other manner failed to comply with or respect and observed the foregoing provision of the Constitution or any other provision thereof.
- h. the respondents in the discharge of the duties and functions, are required to respect, observe and uphold the following Constitutional provisions, *inter alia*:
  - i. To have regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process:
  - ii. Uphold and defend the Constitution;
  - iii. The national values and principles of governance enshrined in Article 10 in the application, interpretation of the Constitution as well in making and implementing the laws and public policy decision;
- iv. Respect, observe, protect, implement, promote and uphold rights and freedoms in the Bill of Rights enshrined in Article 21(1)
- v. To be accountable to the public for decisions and actions taken and generally observance Article 73(2) (d)
- vi. To be accountable for administrative acts and observances of the values and principles of public service Article 232 (e).

17. It was therefore argued that the court should exercise extreme care and caution not to interfere with the Constitutional powers of the respondents and as such should only interfere if it is shown that the exercise of their powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process. In this case however, the applicants have failed to demonstrate that the respondents have not acted independently or have acted capriciously, in bad faith or abused the legal process in a manner to trigger the High Court's intervention.

18. The Court was therefore urged to dismiss the application.

### **Interested Party's Case**

19. The application was opposed by the interested party.

20. According to them, it is correct that that the applicants herein are directors of Lavington Security Limited which company submitted a bid in response to tender No. 04/2015-2016 for the provision of security services to various properties belonging to the interested party.

21. Based on legal advice, the interested party believed that pursuant to section 23 of the **Penal Code** where an offence is committed by a company then every person charged with and/or concerned with and/or in control of the affairs of such a company shall be guilty of that offence and liable to be punished accordingly.

22. It was averred that upon examining compliance certificate Ref S/No. HILL/CC350 dated 12/11/2015 tendered along Lavington Security Limited's bid, it was discovered that the signature appended besides the name of the alleged signatory was not the authentic signature and the procurement department was immediately notified of this inconsistency.

23. It was further averred that the letter dated 12<sup>th</sup> February, 2016 was notifying Lavington Security Limited that its bid for the aforementioned tender was unsuccessful due to the inconsistency in the signatures appearing on the face of the compliance that it issued. It was disclosed that the interested party proceeded to report the incident involving the unauthentic compliance certificate tendered by Lavington Security Limited to the police.

24. The interested party's case was that the Director of Public Prosecution is the mandated under *Article 157 of the Constitution* to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed and that the courts will not usurp the constitutional mandate of the director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. Further, it is trite that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not a ground for halting those proceedings by way of judicial review since judicial review is not concerned with merits but the decision making process.

25. The interested party explained that Lavington Security Limited sought an injunction to restrain the interested party from further conveying defamatory information about itself pending the hearing and determination of Civil Suit No. 79 of 2016 and that the interested is not guilty of defamation noting the publication vide its letter dated 12<sup>th</sup> February, 2016 was justified since the compliance certificate in question was unauthentic. In its view, it merely truthfully restated a fact within its knowledge and as such the statement in its natural and ordinary meaning is not defamatory to Lavington Security Limited.

26. It was contended that because judicial review applications seek to question the process used to arrive at certain decisions by administrative bodies, and as the applicants herein preferred to lodge a judicial review application, it is disentitled from enjoining the interested party herein since the interested party is merely a complainant in the criminal case and cannot be said to have played an active role in the decision to prosecute the applicants.

### **Determinations**

27. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions made and the authorities cited.

28. The applicants raised an issue as to why charges were preferred against them yet none was preferred against the company itself, Lavington Security Limited. It is not in doubt that the applicants are directors of the said company. However section 23 of the **Penal Code**, provides as follows:

***Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.***

29. In this case the applicants readily admit that they are directors of **Lavington Security Limited**. They have not contended that they were not charged with, or concerned or acting in, the control or management of the said company. To the contrary they have disclosed that they requested the Interested Party to “order for our urgent investigations by involving Ethics and Anti-corruption Authority so that this enquiry be authentic and source of the compliance certificate issued to us can be unravelled”. They disclosed that they authorised their company to commence civil proceedings against the interested party. These averments on their face prove some level of being in charge of the affairs of the company though I cannot in these proceedings make a definite finding on that issue.

30. Prima facie, it cannot be determined at this stage that the applicants were not charged with, or concerned or acting in, the control or management of **Lavington Security Limited** in order for them not to come under section 23 of the **Penal Code**. However it will be upon the applicants to show that through no act or omission on their part, they were not aware that the offence was being or was intended or about to be committed, or that they took all reasonable steps to prevent its commission in which case the trial Court may well return a verdict of not guilty. That is however a bridge which cannot be crossed at this stage as the decision as to whether the applicants are guilty or not is for the trial Court.

31. It is now clear that this Court has the power and indeed the duty to bring to a halt criminal proceedings where the same are being brought for ulterior motives or for achievement of some collateral purposes notwithstanding the constitutional and legal powers conferred upon the DPP and the police. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, the Court of Appeal held:

**“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”**

32. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189**, the same Court expressed itself as hereunder:

**“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not**

subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”

33. Whereas the mere fact that the facts of the case constitute both criminal and civil liability does not warrant the halting of the criminal case, in **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another** [2002] 2 KLR 703, it was held:

**“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”**

34. It was therefore appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

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

35. In this case the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ case is that investigations are still ongoing and that the charge sheet may be amended to incorporate other persons. In fact it is disclosed that from the investigations so far, apart from the certificate issued to the applicants, there were in fact two other certificates bearing the same serial numbers issued to other parties who similarly tendered their bids for the subject tender. If I understand the said respondents’ case, it is these and other issues that have rendered the investigations complex thus necessitating more time to conclusively finalise the

investigations.

36. It is however clear that notwithstanding the forgoing charges have already been preferred against the applicants herein.

37. Whereas Article 157(10) of the Constitution provides that 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, Article 157(11) provides:

***In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.***

38. Apart from that, section 4 of the *Office of Public Prosecutions Act*, No. 2 of 2013 provides:

***In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—***

***(a) the diversity of the people of Kenya;***

***(b) impartiality and gender equity;***

***(c) the rules of natural justice;***

***(d) promotion of public confidence in the integrity of the Office;***

***(e) the need to discharge the functions of the Office on behalf of the people of Kenya;***

***(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;***

***(g) protection of the sovereignty of the people;***

***(h) secure the observance of democratic values and principles; and***

***(i) promotion of constitutionalism.***

39. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the *Office of the Director of Public Prosecutions Act*. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

***“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed***

but to give broader connotation to such words and connotation in the context of the changing needs of time...In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”

40. Whereas this is not the forum to determine the applicant’s innocence or culpability, the DPP owes this Court a duty of placing before this Court material upon which this Court can feel that he is justified in mounting the prosecution. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the *Office of the Director of Public Prosecutions Act*, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

“Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy.”

41. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect.

42. *The National Prosecution Policy*, revised in 2015 provides at page 5 that:-

*Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?*

43. Similarly, in **Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate’s Court Nairobi & Another [2006] eKLR** where **Nyamu, J** examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of **M. Devao vs. Department of Labour (190) in sur 464** at 481 as:

“The first is that the public interests in the administration of justice require that the court

**protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice...the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression.”**

44. In this case, the investigators and the prosecutor have themselves owned up to the fact that the investigations are incomplete and that once completed, amendments may be made to the charge sheet. No one can tell what the investigations will unearth at this stage.

45. In **Githunguri vs. Republic [1986] KLR 1** at page 18 and 19 a three Judge bench High Court constituted of Ag. Chief Justice Madan and Justices Aganyanya and Gicheru expressed themselves as follows:

**“But from early times...the Court had inherently its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse...The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure...every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court...Mr Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section 26 of the Constitution. This argument of his compels us to say that he kept freewheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General’s powers under section 26 can be interfered with. What this application is questioning is the mode (emphasis ours) of exercising those powers...No one will succeed in convincing us that the Court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity...A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed.”**

46. In this case the 1<sup>st</sup> and 2<sup>nd</sup> Respondents seem to be hoping that even after the conclusion of the investigations they will still have material upon which they will be able to mount a prosecutable case. In other words their current decision is informed by the future course of events. To me that cannot be said to be exercise of discretion in good faith. A prosecution that is based on results of futuristic investigation cannot be permitted to go on. At the time the prosecutor arraigns an accused before the trial court he must have formed an opinion based on credible evidence that he has a prosecutable case. That opinion can only be reasonably formed where the facts disclose a commission of an offence save for the procedure for prevention of offences under sections 43 to 46 of the ***Criminal Procedure Code***, provisions whose constitutionality, in my respectful view, are suspect and doubtful.

47. I reiterate that a person cannot be arraigned before the Court after which the investigators and prosecutors set out to gather evidence on the basis of which his already preferred charge will be supported. This seems to be what the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are doing in this case. While the Court appreciates that charge sheets can be amended in the course of the trial, that is an exercise of discretion that ought not to be abused.

48. In my view the invocation of criminal process towards that end reeks of abuse of power. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** while citing **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire Country Council [1986] AC:**

“A power which is abused should be treated as a power which has not been lawfully exercised...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers.” Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”

49. In is therefore my view that the said criminal proceedings cannot be allowed to proceed.

### **Order**

50. In the premises, I find merit in this application and issue an order of Certiorari removing into this Court for the purposes of being quashed the decision made by the Directorate of Public Prosecutions, the 1<sup>st</sup> Respondent and the Directorate of Criminal Investigations, the 2<sup>nd</sup> Respondent to prosecute Ex parte the applicants in criminal case Number 144 of 2017 - **Republic vs. Pius Kiprop Chelimo & Jonah Kiprotich Telo** at the Chief magistrates Court Milimani in respect of compliance certificate reference number HILL/CC350 dated 12/11/2015 relating to Lavington Security Limited & National Social Security Fund the Interested Party which decision is hereby quashed.

51. I also issue an order directed to the Directorate of Public Prosecutions, Directorate of Criminal Investigations and any persons on their behalf or authorized by them, prohibiting them and each of them from the initiating similar proceedings before completing investigations.

52. The costs are awarded to ex parte applicants to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

53. Orders accordingly.

**Dated at Nairobi this 21<sup>st</sup> day of November, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Makori for the Respondent**

**Mr Malenya for Miss Kiambi for the interested party**

**CA Ooko**