



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 563 OF 2015

JAMES MWANGI NGANGA.....1ST PETITIONER

VERSUS

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

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR, CRIMINAL INVESTIGATIONS DEPARTMENT.....3RD RESPONDENT

RULING

Introduction

1. The Petitioner through his Notice of Motion dated 16th December 2015 seeks the following orders:

1. **THAT(spent)**

2. **THAT....(spent)**

3. **THAT....(spent)**

4. **THAT.... (spent)**

5. **THAT** the Honourable court be pleased to issue conservatory orders against the 1st, 2nd and 3rd Respondents by themselves, their agents, servants or howsoever to stop further proceedings against the Petitioner in Criminal Case Numbers 1152 of 2015, 1153 of 2015, 1154 of 2015, 1601 of 2015 and 1602 of 2015 pending the hearing and determination of the Petition.

6. **THAT** the Honourable Court be pleased to issue conservatory orders restraining the 1st, 2nd and 3rd Respondents by themselves, their agents, servants or howsoever from introducing new charges against the Petitioner in regards to Joytharc International or Joy Vision for Youth and Children International pending hearing and determination of the Petition.

7. **THAT** the Honourable Court be pleased to issue conservatory orders for the immediate release of the Petitioner forthwith.

8. **THAT** the Honourable Court be pleased to order the 2nd and 3rd Respondents to conduct investigations on the arresting and investigating officers in the criminal cases instituted against the Petitioner.

9. **THAT** the Honourable Court be pleased to give further orders it may deem fit and convenient in the circumstances of this case.

2. The application was based on the various grounds stated on the face thereof and also on the Supporting Affidavit of the Petitioner's spouse Nancy Wambui Ndungu. The Petitioner also swore an affidavit in support of the Petition

3. The application was duly contested by all the Respondents. One Caroline Mumbi, the complainant in some of the criminal cases, despite having been given opportunity by Korir J on 23rd December 2015 to file an affidavit in these proceedings however failed to do so on the basis that the lawyer that the said complainant had intended to retain travelled out of town.

Background facts and relevant litigation chronology

4. The background facts to this petition may be gleaned easily from the Petition and the documents annexed to the affidavit sworn in support thereof by the Petitioner. Briefly, the facts may be colourlessly stated as follows.

5. There once existed two non-governmental organizations ("the NGOs"); namely Joytharc International and Joy Vision for the Youth and Children International. Both were registered by and regulated by the Non Governmental Organizations Coordination Board. The three recognized directors for the NGOs were Samuel Mburu Njenga, Mutura Isaiah Kirima and Irene Makena. The NGOs operated locally. They sourced and obtained goods and services from local companies as well as from individuals. They apparently never paid for all the goods or the services.

6. The Petitioner dealt with one of the NGOs as a 'proposed supplier'. The Petitioner was somehow known to the complainant, Caroline Mumbi. At a commission, the Petitioner assisted the complainant to obtain a tender for the supply of goods to one of the NGOs. The complainant claims the Petitioner introduced her, and companies she was associated with, to the NGOs and helped her conduct business with the NGOs. The Petitioner however denies he did the latter but admits having facilitated the introductions.

7. The NGOs were later deregistered and the public warned against dealing with the NGOs. Suppliers and service providers in the meantime were not paid and complaints were lodged with the 2nd and 3rd Respondents. The complaints were numerous. The Respondents investigated the complaints as they were obliged to. The 1st Respondent decided to prefer criminal charges against the Petitioner and six others on the basis of the evidence that was availed. The accused faced various counts nearly aggregating or exceeding fifty counts in the five criminal cases instituted against the accused by the Respondents. Some of the cases against the Petitioner and his co-accused were consolidated.

8. The charges involved millions of shillings in terms of the amounts unpaid following delivery of goods. The accused save the first three accused (the recognized directors of the NGOs), were duly arraigned before a trial court. They pleaded not guilty and bail terms were set. The accused found the terms onerous. They sought a revision before the same trial court, the court declined.

9. Holding the view that his rights and fundamental freedoms as guaranteed by the Constitution were being violated, the Petitioner moved to this court through a constitutional petition and alongside the petition also filed an application for conservatory orders. That application is the subject of this ruling.

10. When the application first came before the court on 17 December 2015, in chambers, I certified the same as urgent and directed its inter partes hearing for 22 December 2015. On 22 December 2015, the

application was adjourned to enable the parties try and reach an amicable settlement. They did not. They returned to court on 23 December 2015 when the court directed that the application be heard on 31 December 2015 and also allowed the one of the complainants to file an affidavit or appoint an advocate to urge her case on the hearing of the application.

11. The application was orally urged before me on 31 December 2015. As the application was being urged on the basis of affidavit evidence before me, I declined to hear any oral testimony by either the Investigating Officer or the complainant. I saw and still see no need for the oral testimony at this stage of the proceedings. I note too that the complainant has never been enjoined formally to these proceedings as an interested party or otherwise.

12. I also directed that the substantive application, for the stay of the criminal proceedings, itself be heard as if I allowed the application then, *a priori*, the Petitioner would be entitled to an unconditional release. This was a departure from both counsels' approach that they argue the application for reasonable and/or variation of bail terms. Better case management dictated that I proceed as I did.

Petitioner's case

13. The Petitioner's case can be gathered from the Petition and the supporting affidavit. The Petitioner states that he was charged with the offences of conspiracy to commit a felony contrary to Section 393 of the Penal Code as well as the offence of obtaining goods by false pretence contrary to Sections 312 and 313 of the Penal Code on or about 4 September 2015. The Petitioner had been arrested on 1 September 2015. The Petitioner states that he was charged alongside six other persons. The Petitioner's arraignment in court was pursuant to a complaint lodged by a company known as Meek General Supplies Ltd. The Petitioner denies ever supplying or obtaining goods from any of the companies he is accused of having dealt with. The Petitioner further denies that he is a director or shareholder or employee of either of the NGOs stated to have been the beneficiaries of merchandise supplied by Meek General Supplies Limited.

14. It is the Petitioner's case that he has been wrongly enjoined to the criminal proceedings and further that the only reason he has been enjoined to the said proceedings was after he failed to pay an extortion amount of Kenya Shillings Five Hundred Thousand which was being demanded by the complainant and the officers of the 2nd and 3rd Respondents. The Petitioner further states that none of the complainants in the criminal cases has made any reference to him and that the statements made and collected by the Respondents in the course of the investigations do not incriminate the Petitioner. It is the Petitioner's case too, that he is a stranger to all the charges and his continued incarceration following the heavy bail terms set by the trial court is impacting negatively both on this family as well as his business.

Respondents' case

15. The Respondents case can be put together from the Replying Affidavit sworn by Cpl Lucy Mbithe and filed in court on 23rd December 2015.

16. Briefly, the Respondents contend that none of the Petitioner's fundamental freedoms and rights guaranteed under the Constitution have been violated as the Respondents have only acted in accordance with and pursuant to Constitutional obligations which dictated that the complaint be investigated and that charges preferred against the persons deemed criminally culpable. The Respondents contend that the investigations revealed a web of conspiracy which also involved the Petitioner. The Respondents deemed the Petitioner a principal offender and opted to have him charged alongside others.

17. The Respondents contend further that matters regarding the Petitioner's innocence must be left to the trial court and that the court should not interfere with the Respondents' constitutional duties which were performed independently. The Respondents added that the investigations are still continuing.

18. As regards the bail terms, the Respondents hold the view that the bail and bond terms should only be reviewed by the trial court. It is also the Respondents' case that the decision made by the 1st Respondent should only be challenged through a judicial review application and not a constitutional petition.

Arguments in court

19. Arguments were made through the medium of oral submissions. *Petitioners' submissions*

20. Urging that the court has jurisdiction to grant , under Article 23 of the Constitution, the conservatory orders, Mr Charles Kanjama for the Petitioner submitted that the Petitioner had shown an arguable case that the prosecution of the Petitioner was an abuse of the legal process. Counsel relied on the case of **Gabriel Kirigha Chawana & 26 Others v Kenya Defense Forces Council & 6 Others [2014]eKLR** for this legal proposition.

21. Counsel also submitted that the facts of the case clearly exonerated the Petitioner from any criminal culpability. Counsel referred to the statements made by the various complainants and witnesses to demonstrate that none of the statements even made reference to the Petitioner. The fact too that the NGOs Co-ordination Board had confirmed that the Petitioner was not a director of either of the NGOs was also pressed home by Mr. Kanjama to demonstrate that the Respondents had no case against the Petitioner.

22. Counsel faulted the Respondents for failing to arrest and arraign in court the three recognized directors of the NGOs. Counsel stated that the Petitioner's association with the NGOs was neither as an employee or director but only through the introduction of one of the complainants Ms. Carol Wamuyu to conduct legitimate business for which the Petitioner was paid a commission.

23. In counsel's submission, there was no evidence upon which the criminal charges could be laid and upheld but instead the Respondents together with one of the complainants was using the criminal justice system for a purpose other than the ordinary purpose of criminal law. Counsel stated that the charges were prompted by the Petitioner's failure to pay an extortion amount of Kenya shillings Five Hundred Thousand demanded by the 2nd Respondent's officers together with Ms. Carol Wamuyu.

24. Counsel further submitted that the 1st Respondent had failed to have regard to public interest or observe the need prevent abuse of the legal process, contrary to the provisions of Article 157(11) of the Constitution. Counsel pointed out that the decision to charge the Petitioner with offences involving over 50 million was simply to ensure the Petitioner never had any reasonable bail terms. Further there was abuse of the legal process when the Respondents allowed the said Ms. Carol Kimuyu to use their offices for other ulterior motives, yet the amounts being claimed by the complainants could be recovered through ordinary civil proceedings.

25. Finally, counsel also submitted that the failure by the Respondents to arrest the three recognized directors of the NGOs was itself a demonstration that the Petitioner was only a sacrificial lamb and there was no public interest in ensuring justice for the various complainants.

26. While faulting the trial court for imposing onerous bail terms pegged on the value of the amount involved in the alleged offences, Mr Kanjama urged the court to allow the application and stay the criminal proceedings against the Petitioner. Counsel further urged the court to make orders directing an expeditious prosecution of the Petition.

Respondents' submissions

27. Mr Muranga argued the Respondents' case.

28. Counsel submitted the criminal cases the Petitioner was faced with were of a complex nature as they involved not only billions of shillings in lost revenue for the various complaints but also a complicated web of conspiracy which involved the Petitioner and other co-accused. Counsel submitted that the Petitioner was a principal offender and investigations against the Petitioner for engaging in other criminal activities were still ongoing.

29. Counsel submitted further that the Petitioner was challenging the decision making process of the 1st Respondent through a constitutional petition instead of filing for an order in judicial review. Counsel

added that the decision to prosecute the Petitioner was arrived at by the 1st Respondent following a review of the evidence collected during investigations which pointed to the Petitioner's criminal culpability. Counsel concluded this line of submissions by stating that the decision as to whether or not the Petitioner is guilty is for the trial court and not any other court.

30. With regard to the issue of bail, Mr. Muranga pointed out that no circumstances had changed and that if they did the Petitioner was at liberty to move for a revision of the bail terms.

31. For completeness and urging the court to dismiss the application for conservatory orders, Mr Muranga pointed out that the trial of the Petitioner and his co-accused was already slated for the months of January and February and there was no need to cause any stay of the trial.

Petitioner's rejoinder

32. In a pithy rejoinder, Mr. Kanjama stated that the court could review the bail terms. Counsel also pointed out that in all the cases the complainants were strangers and the only witness statement touching and concerning the Petitioner ' was the one made on 2 November 2015 , yet the Petitioner was arraigned in court and charged in September 2015'.

33. Counsel also pointed out that notwithstanding the scheduled hearing dates the history of the case before the trial court showed that the Respondents had continued to delay the trial's commencement and the Petitioner was entitled to be released as the Petition itself awaited determination. Counsel also saw no need to have both the criminal and constitutional proceedings run concurrently as this would result in an unreasonable use of judicial time and resources.

Discussion and Determination

34. Before proceeding to resolve the core issue raised herein which I may sum up to be whether the Petitioner is entitled to the conservatory orders sought, it would be important to reiterate the guiding principles on the grant of conservatory orders. This is necessary in view of the Petitioner's submissions that that what is critical is a demonstration that one has an arguable case or serious questions to be presented to the court at the hearing of the Petition.

Guiding General Principles : Conservatory Orders

35. Article 23(3) of the Constitution as read together with Rule 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 gives the court powers to grant conservatory orders. The general guiding principles applicable to the court when determining such applications can be derived from various decided cases. The basic recognition, foremost is that conservatory orders are not the same as ordinary interlocutory injunction applications: see **Kemraj Harrikissoon v Attorney General of Trinidad & Tobago [1980] A.C.** See also the case of **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others (2014) e KLR** where the Supreme Court stated as follows

***"Conservatory" Orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the "prospects of irreparable harm occurring during the pendency of a case; or "high probability of success" in the applicants case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the Constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes."* (Emphasis added)**

36. In the case of **Koech Kemboi -v- Halake Waqo & 2 Others HCCP No. 456 of 2015 [2015]eKLR** this court citing the case of **Kenya Small Scale Farmers Forum -v- Cabinet Secretary, Ministry of Education Science and Technology HCCP No. 399 of 2015 [2015] eKLR** summarized the principles as

follows:

“[30]... the principles which govern a court considering an application for interim or conservatory relief [are considered] to be the following:

- *The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.*
- *The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.*
- *If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.*
- *The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya’s decision in Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.*
- *The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.*

37. To the above principles may be added that it would be appropriate that whilst exercising the discretion the court also balances the conflicting positions taken by the parties and if necessary also invoke the doctrine of proportionality: see **Kevin K. Mwiti & 2 Others -v- Kenya School of Law & 2 Others [2015] eKLR**.

38. It is also to be pointed out that the principles outlined above need not be proven singularly and in category. It is the inherent merits of the case bearing in mind the public interest that matters: see **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others (supra)**. Even when a prima facie case is not shown or the court is not certain due to strong conflicting positions of the parties and facts appear even, the court is still possessed with the discretion to grant the conservatory order. At that point other factors such as where the higher risk of injustice lies may influence the court.

39. So while Mr. Kanjama was very right in pointing out that the court at this stage of the proceedings must bear in mind that it is not to make any final or definitive findings of law or fact (*see also Trade Union Congress of Kenya vs National Hospital Insurance Fund HCCP No. 61 of 2015*), in my view it is not right to state that the main consideration is an exhibition of an arguable case or serious question for determination. All questions of a constitutional nature are inherently serious and arguable. Consequently, I hold the view ,with unfeigned respect, that Muriithi J in **Gabriel Kirigha Chawana & 26 Others v Kenya Defense Forces Council & 6 Others(supra)** oversimplified the test for conservatory applications.

40. I now focus on the question whether the Petitioner satisfied the criteria set out for the grant of conservatory orders.

41. No less than fourteen Articles of the Constitution, to wit; Articles 27,28,29,39,40,47,48,49,50,51,73,75,157 and 232, have been stated in the Petition as having been violated. Save for Article 157, the precise particulars of violation of the rights and freedoms guaranteed under the Articles have not been brought out. All the complaints, however, gyrate the investigations as well as the arrest and prosecution of the Petitioner. Going through the Petition minutely, it is not hard to conclude especially when one keenly also reads through the reliefs sought, that the Petition is all about the investigatory and prosecutorial powers of the Respondents.

42. Foremost, it is not to be contested that the Respondents have a constitutional and statutory compulsion to ensure that any complaints regarding alleged criminal activities or conduct is investigated and the alleged offenders are brought to face justice through a fair trial system: see **Articles 157,245 and 252 of the Constitution** as well as **Section 5 of the Office of the Director of Public Prosecutions Act No.2 of 2013** and **Section 24 of the National Police Service Act (Cap 84)**. The investigation and prosecution must however be within the constitutional and statutory confines. Where it is apparent that the criminal justice system is bound to be brought into disrepute or is being abused, the court has an inherent jurisdiction and power to intervene and ensure that there is a proper administration of justice: see for example **Kuria & 3 Others -v- Attorney General [2002] 2 KLR 69 (CA)**, **Joram Mwenda Quantai – v- Chief Magistrate’s Court Nairobi [2007] 2 EA 170 (CA)**, **Koinange –v- Attorney General [2007] 2 EA 256**, **Githunguri –v- Republic [1986]eKLR** as well as the case of **George Joshua Okungu & Another v The Chief Magistrates’ Court & Others [2014]eKLR**.

43. Secondly, it is also to be pointed out that the court ought to be reluctant and hesitant in interfering with the other organs of State or independent offices enjoined by the Constitution to exercise specific mandates. Ordinarily exceptional circumstances ought to be shown before the court interferes with such organs or offices especially where the exercise of the functions involve an exercise of discretion: see for example **Kenya Commercial Bank Ltd & 2 Others -v- Commissioner of Police & Another HCCP No. 218 of 2011 [2013] eKLR** and also **Diana Kethi Kilonzo -v- IEBC & 2 Others NBI HCCP No. 359 of 2013**.

44. In the instant case, the Petitioner has faulted the Respondents for having instituted the Petitioner’s prosecution when there was no evidence upon which the criminal cases against the Petitioner could hold. The Petitioner referred to all the statements and stated that none incriminated the Petitioner and further that all the complainants are strangers. The Respondents submit otherwise and contend that the Petitioner was a principal player in the criminal activities and has been incriminated by one of the complainants.

45. It is not to be doubted that the true position in law is that a criminal prosecution ought not be commenced or allowed to stand when there is no factual foundation or basis: see **R v Attorney General Ex Parte Kipngeno Arap Ngeny HC Civil Appl No 406 of 2001** .

46. It is apparent in the instant case that the facts are in dispute with the Petitioner alleging none involvement whilst the Respondents allege that the Petitioner was involved in the wider scheme which entailed a conspiracy to defraud and ultimately obtain goods by false pretence. The Petitioner’s counsel, who submitted extensively on the facts, appeared to suggest that there was need to make a determination on whether the Respondents could institute the criminal prosecution.

47. Clearly, the facts are being disputed and determining factual issues at this stage of the proceedings would be plainly untenable, given that the Petitioner’s counsel has made it clear that he will need to cross-examine the Respondents’ investigating officer at trial on the contents of the Replying Affidavit as well as on the issue of some alleged extortion of Kenya Shillings Five Hundred Thousand.

48. Secondly, the legal position, as I understand it, is that this court should not be pronouncing on the criminal liability of or whether a charge can be sustained against the Petitioner or any accused person for that matter. To do so, would amount to an unnecessary impingement on the responsibility of the Respondents herein and the trial court. As was stated in the case of **Danson Buya Mungatana v Attorney General & 2 Others [2012]eKLR**:

“The duty of the Court in a Constitutional Petition is not about analyzing the sufficiency of evidence. That must be left to the trial court. It will suffice for the respondents to demonstrate that they have a reasonable or probable case that an offence may have been committed and therefore the accused persons should stand trial”(emphasis)

49. The same approach was also been adopted in the cases of **Meixner & Another v Attorney General [2005]2 KLR 189** as well as **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**.

50. The Court of Appeal case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** is also quite apposite. The court stated as follows, with regard to the High Court when called upon to deal with the decision of the public prosecutor to institute prosecution:

“The court should not act as a Court of Appeal or the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...”

51. Ultimately, the challenge as to sufficiency or veracity of evidence or charges ought to be left to the trial court. Suffice however to point out that, looking at and considering the documents before me as well as the statement annexed to the Replying Affidavit, I am for now satisfied that the decision to institute criminal proceedings against the Petitioner was not without foundation.

52. The Petitioner also contended that the failure to arrest the first three accused persons was a demonstration that the Petitioner is but a sacrificial lamb.

53. It is clear from the charge sheet that there are seven accused persons. That ideally should be a demonstration that there was no differentiation or preference following the investigations. The Respondents’ decision to charge the seven is quite separate from their arrest. I take judicial notice of the fact that persons who are accused of crime will ordinarily seek to avoid the arms of the law until they are finally taken in for questioning. Nobody volunteers his detention or guilt. The three accused persons are at large but the Petitioner has not suggested that no efforts have been made in trying to arrest them and that they can be traced with ease.

54. In closing, I have not been able to see any pointer to the fact that the Respondents actions in investigating the complaints as well as finally deciding to charge the Petitioner alongside others with various criminal offences was ill-motivated or patently unreasonable to prompt my interference with the criminal justice process as sought by the Petitioner. As was stated by the Court of Appeal in the case of **Manilal Jannadas Ramji Gohil –v- Director of Public Prosecution NBI Criminal Appeal (Appl) No. 57 of 2013** an order staying criminal proceedings should only be granted in the most exceptional circumstances. The Petitioner has not at this stage shown those particularly exceptional circumstances to invite my interference. I see no exceptional circumstances to also prompt me into staying or prohibiting any further charges against the Petitioner. That would be too speculative.

Conclusion

55. I am satisfied that in the totality of the material availed before me, the Petitioner has not established a prima facie case to entitle him to the orders sought at this intermediary stage of the proceedings. There are no exceptional circumstances to warrant a stay or prohibition of the ongoing criminal proceedings. I am also not satisfied that the circumstances of this case dictate that I interfere with the Respondents’ powers to continue investigating the Petitioner or any other person and preferring further or additional or fresh charges.

56. With regard to the prayer that the investigating officer(s) as well as the arresting officer(s) in the criminal cases instituted against the Petitioner be investigated by the 2nd and 3rd Respondents, my view is that there is already a properly laid out channel where any complaints against officers and members of the Kenya Police Service can lodged and processed. The Independent Policing Oversight Authority,

established under Section 3 of the Independent Policing Oversight Authority Act (Cap 88), is the body enjoined to receive and process such complaints. Section 6 of the Independent Policing Oversight Authority Act , in part ,states as follows:

6. Functions of the Authority

The functions of the Authority shall be to-

(a) investigate any complaints related to disciplinary or criminal offences committed by any member of the Service whether on its own motion or on receipt of a complaint and make recommendations to the relevant authorities including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief and shall make public the response received to these recommendations; (emphasis mine)

(b)...

57. On the issue of the bail terms, I am constrained to state that though the terms of the bail granted to the Petitioner are manifestly onerous, it would be appropriate that litigation is always directed to the right forum.

58. Besides parties should also when they come to court be explicit on the orders sought. The Petitioner herein came for specific orders. The orders sought to stay the criminal proceedings. Somehow and midstream the proceedings, the Petitioner sought to argue for the revision of the bail terms. Neither the Petition nor the application sought such orders. It was not alleged that the Petitioner's right to bail had been infringed. The argument is that the terms were too onerous. I note that the Petitioner had sought a review of the terms and the court below declined. Section 123(3) of the Criminal Procedure Code is relatively clear. The High Court may upon application reduce the bail terms required by a subordinate court. It would be appropriate that an application for reduction of the bail terms is made by the Petitioner as provided rather than coming under a Constitutional Petition and seeking a determination of the bail issue under an omnibus prayer.

Disposition

59. I answer the core question as to whether the Petitioner is entitled to the orders sought in the Notice of Motion dated 16th December 2015 in the negative. The application lacks the requisite merit and ought to be rejected. It is hereby dismissed.

60. The costs will however abide the outcome of the Petition

Dated, signed and delivered at Nairobi this 14th day January, 2016.

J.L.ONGUTO

JUDGE