



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.426 OF 2009

BETWEEN

ALBERT GACHERU KIARIE T/A WAMAITU PRODUCTIONS.....PETITIONER

AND

JAMES MAINA MUNENE.....1ST RESPONDENT

MUHIKO NEBSTER GATANGA.....2ND RESPONDENT

SYMON NJOROGE MATINDI.....3RD RESPONDENT

ELIJAH WAINAINA MIRA.....4TH RESPONDENT

JOYCE MUTHONI MUHIKO.....5TH RESPONDENT

PERPETUAH WANGUI MWANGI.....6TH RESPONDENT

DENIS MWANGI MATINDI.....7TH RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner herein obtained permission from the Magistrates' Court to privately prosecute the Respondents in **Criminal Case No. PP 06 of 2004**, in accordance with the **Criminal Procedure Code, Cap 75**.
2. The Respondents are the accused persons in the Trial Court, charged with offences under the **Copy Right Act, Cap 130**, in **Criminal Case No. PP 06 of 2004**.

3. The Interested Party is the Office of the Director of Public Prosecutions, enjoined in this matter due to its interest in the prosecution of criminal cases in the Republic, by virtue of its role as the bearer of State powers of prosecution, in accordance with **Article 157 of the Constitution of Kenya, 2010.**
4. Through his Notice of Motion Application dated 24th June 2013, the Petitioner seeks orders:
 - a. *That this Honourable Court review the previous Court's decision and declare the subordinate Court's ruling unconstitutional.*
 - b. *That this Honourable Court declares the Petitioner free to prosecute Criminal Case No. PP 06 of 2004 personally as provided for by Section 88 (3) of the Criminal Procedure Code.*
 - c. *That this Honourable Court orders that the Petitioner be allowed to continue prosecuting his case personally pursuant to the private prosecution permission given to him in accordance with the provisions of Sections 88 (1), (2) and (3) of the Criminal Procedure Code.*
 - d. *That this Honourable Court give directions on the issue of costs.*
 - e. *That this Honourable Court be pleased to grant such other orders it shall deem fit.*
5. The Petitioner's prayers are based on grounds that:
 - a. *This matter was heard by Honourable Jean Gacheche J and a ruling on the same was delivered in Court on 15th June 2010, against which ruling the Petitioner intended to appeal, for it upheld the ruling of the subordinate Court, against which he had petitioned.*
 - b. *The file of his Petition against the subordinate Court's ruling went missing immediately before the Petitioner had received a copy of the ruling.*
 - c. *The said file has since been reconstructed as a result of a Court order following the Petitioner's Application on the same dated 29th November 2011.*
 - d. *Even after reconstruction of the file, the record of proceedings of the hearing and the ruling thereof are still not available because the proceedings got lost along with the original file, while the ruling was never availed to the Petitioner. The Honourable Judge had read the ruling from her computer and she had promised to print and have copies of the ruling availed to the Petitioner. The ruling was however never availed to the Petitioner.*
 - e. *In the absence of the said ruling and a record of the proceedings of the hearing of the Petition, the Petition remains as if it was never heard. It would be technically impossible for the Petitioner to make an appeal to the Court of Appeal as he had intended to. His constitutional rights remain in the same status as they were at the time of filing this Petition, at threat.*
 - f. *Only a review of the Petition can prevent justice from being defeated.*
 - g. *It is only the intervention of this Honourable Court that can prevent the Petitioner's constitutional rights from being contravened through granting of the orders prayed for in the Petition.*

The Factual Background

6. The facts giving rise to the Petition are set out here below.
7. The defence Counsel in the aforementioned criminal case made an Application on 15th February

- 2005 before a Magistrate, Honourable Mrs. Mutoka, challenging the private prosecutor therein also serving as a witness in the same matter. Hon. Mutoka ruled on the Application on 18th February 2005, which ruling was apparently never delivered in Court.
8. On 25th September 2007, the defence made the same Application before another Magistrate, Honourable Mrs. S. Muketi. Although the Petitioner argued that the matter had been determined by Hon. Mutoka, the Court proceeded to rule on it on 14th December 2007, directing that the Petitioner appoint another person to privately prosecute the criminal case on his behalf, since he wished to serve as a witness in the case.
 9. The Petitioner then filed a constitutional Petition dated 16th July 2009, praying that the High Court ought not to allow termination of the subject criminal case before he could challenge the 14th December 2007 ruling of the subordinate Court, as such termination would violate his constitutional rights. The Petition was heard by Gacheche J and a judgement thereon delivered in Court on 15th June 2010. From what I can get from the petitioner's pleadings, on that day, the Parties were called into the Lady Justice's chambers, having been informed that although she had typed the judgment in her computer, the Lady Justice could not print it as her printer was not functioning. She informed them that she had upheld the ruling of the Subordinate Court that the Petitioner could not serve as a witness in the criminal case that he was privately prosecuting and therefore had to appoint an Advocate to conduct the private prosecution on his behalf.
 10. There is no doubt that the High Court file disappeared thereafter and save for the settled verbal pronouncements of Gacheche J in her chambers, there was no other record of the proceedings of the Petition. The Petitioner desired to appeal the judgment but could not and therefore filed the instant Petition dated 24th June 2013, seeking review of the judgment of Gacheche J.

The Petitioner's Case

11. Relying on his Notice of Motion Application dated 24th June 2013, his Affidavit also dated 24th June 2013, his written submissions dated 15th September 2014 and oral submissions before this Court on 16th February 2016, the Petitioner's case is as follows:
12. That his case is founded on the **Constitution 2010** and other relevant law. He contends that in accordance with the finding in the case of **Shah v Patel [1954] 21 EA CA 236**, the ruling by Gacheche J, (which upheld the ruling of the subordinate Court) is **unconstitutional as it has the effect of threatening an infringement upon his rights** by denying him the right to represent himself and be heard.
13. It is also the Petitioner's case that the decision in Hon. Muketi's ruling of 14th December 2007, upheld by Gacheche J, stating that the Petitioner cannot be both private prosecutor and witness in **Criminal Case No. PP 06 of 2004**, and therefore has to appoint an Advocate to privately prosecute the case on his behalf, has several negative effects on him as he cannot afford to engage an Advocate.
14. He contends that the said decision is tantamount to an attack on Kenya's legal system as it is contrary to the **Constitution** and **Section 3 (1)** of the **Judicature Act, 1967**, which, as written laws, always supercede custom and practice, on which Hon. Muketi relied on when making the decision that she foresees difficulties arising if the Petitioner were to take the witness stand in a case which he is privately prosecuting. He adds that the Honourable Magistrate did not elaborate on which difficulties she foresaw and submits in this regard, that there is no prejudice that would be occasioned to any party by him conducting the private prosecution personally.
15. He further contends that the **Criminal Procedure Code, Cap 75**, allows him, by virtue of **Section 88 (3)**, to conduct a private prosecution personally or through an Advocate and that when he was

- granted permission to privately prosecute, the Court's *coram* in the criminal case changed to resemble one in a civil matter, as the public prosecutor was no longer a part of the proceedings thereof.
16. According to him, in a civil matter where the Petitioner appears in person, he himself would prosecute the case and would, when he appeared on the witness stand, lead his own evidence. This is the spirit of **Section 88 (3) of the Criminal Procedure Code, Cap 75**, which having been passed by Parliament, assented to by the President of Kenya, and not having been declared unconstitutional by any Court, should be obeyed.
 17. He avers that the Ruling in question threatened his right of choice, became even after having been granted the permission to carry out private prosecution, he is being denied the right to choose how he would like to conduct the same. That he chose to conduct the private prosecution himself and the Ruling therefore puts his decision under threat in circumstances under which he has not been given a fair chance to prosecute and that no one has shown that he bears any conflict of interest and will therefore conduct the prosecution unfairly.
 18. He reminds the Court, as he has always indicated, that he cannot afford a competent lawyer and in that respect, if the Ruling is upheld, he would not be able to proceed with the prosecution any further. This, he says will lead to a contravention of his rights to access to justice and to be heard as enshrined in **Articles 48 and 50 (1) of the Constitution of Kenya, 2010**.
 19. He asserts that the Public Prosecutor had declined to prosecute the subject criminal case and that even if he now offers to prosecute it in accordance with **Article 157 (6) (b) of the Constitution**, he (the Petitioner) may not be willing to accede to the same as he has completely lost confidence in the office. That if this Court allows him to prosecute, he will be assured that the case will be conducted in a fair manner and in the interest of all parties.
 20. According to him, if the Court denies a poor person with knowledge, capacity, ability and diligence, the right to privately prosecute a case, the Court's actions would amount to reserving justice for the mighty only.
 21. The Petitioner further claims that the Ruling in question was arrived at in an injudicious manner as Hon. Mutoka delivered it on 18th February 2005, within 3 days of the Application, which was made on 15th February 2005. It was in any event never delivered in open Court and he only learnt of it in August 2006 and that fact notwithstanding the defence still proceeded to make the same Application before Hon. Muketi who heard it despite the fact that it had been heard and decided upon by Hon. Mutoka.
 22. He adds that throughout the Court process, he has been subjected to unfairness and has undergone a lot of agony and therefore prays that although he has not requested damages, this Court should grant him compensation in accordance with **Sections 171, 174, 175 and 334 of the Criminal Procedure Code Cap 75**.
 23. He concludes by emphasising that it is only the intervention of this Court that can prevent his constitutional rights from being infringed upon through granting of the orders that he now seeks.

The 1st - 7th Respondents' Case

24. The 1st – 7th Respondents' case in opposition to the Petition is set out in their written submissions dated 18th December 2014 and Mr. Mwathe's oral submissions before this Court on 16th February 2016.
25. The 1st – 7th Respondents, associating themselves with the submissions of the Interested Party, submit that the subordinate Court's Ruling in question could not possibly be unconstitutional as it

was made by a Court that has competent jurisdiction and requisite discretion. In addition that the Petitioner has in any case not demonstrated with precision which of his rights have been infringed or violated and the manner in which those rights have been infringed or violated as per the principles espoused in the cases of **Shadrack M Ithinji & others v Republic HCCC No. 331 of 2002, Otieno Clifford Richard v Republic [2006] eKLR, Anarita Karimi Njeru v Republic [1979] 1 KLR 54** and **Cyprian Kubai v Stanley Kanyonga Mwenda NRB MISC 612/92**.

26. The Respondents reiterate that there is no constitutional right to private prosecution as it is a right provided for under **Section 88** of the **Criminal Procedure Code** according to which one must approach the Magistrates' Court to obtain permission to carry out the private prosecution.
27. They contend that the Courts have in various past decisions considered the requirements for a party to be permitted to carry out a private prosecution and in support of this, refer to the case of **Floriculture International Limited & Others High Court Misc. Civil Application No. 114 of 1997**. They emphasise in that regard that the Petitioner does not meet the requirement of not being motivated by malice or some ulterior motive that is devoid of good faith as he is only motivated by malice and therefore cannot conduct the private prosecution in good faith.
28. They further contend that the **Constitution** guarantees them their right to fair hearing as accused persons, which guarantee would be interfered with if the Petitioner is allowed to privately prosecute their case as:
- There would be confusion in the *coram* of the Court as the Petitioner, as prosecutor, would also be a witness in the matter.
 - The Petitioner has a vested interest in the matter and a vendetta against the Respondents and would hardly be objective in the prosecution.
 - The Petitioner, as the prosecutor, could have unprecedented access to the evidence used to prosecute the case, giving him ample room to interfere with the same to achieve conviction of the Respondents, whereas the role of an independent prosecutor is not to ensure conviction but to ensure justice is achieved through either acquittal or conviction following a neutral trial process.
29. They conclude by urging the Court to disallow the Petition as they have demonstrated that the Petitioner has a vested interest in the matter by virtue of the fact that he is the complainant and therefore would carry out the private prosecution with vindictiveness, thereby jeopardising any real chance of having the matter conducted fairly.

Interested Party's Case

30. The Interested Party's case is found in its written submissions, dated 22nd December 2014 and Miss Kithiki's oral submissions before this Court on 16th February 2016.
31. Relying on the principle that was established in the **Anarita Karimi Njeru v Republic (1979) 1 KLR 54**, the Interested Party (the DPP) submits that the Petitioner has not sufficiently demonstrated with particularity which of his constitutional right(s) have been infringed, the violations faced and the likely damages to be suffered through the alleged infringement. The DPP adds that in accordance with **Matiba v AG (1990) KLR 666**, when bringing an application under **Sections 70-83** of the repealed **Constitution**, one must plead, with precision, the section, subsection or paragraphs under which he alleges the breach and spell out the nature of infringement. That the Petitioner has failed in this regard and with that fact in mind, the Ruling cannot be deemed unconstitutional, as it does not infringe upon his rights.
32. The Interested Party, the above notwithstanding, recognises that the State's constitutional and legal rights over criminal prosecutions are not exclusive as a private individual may institute criminal proceedings in person in accordance with **Articles 157 (9) and (6)** of the **Constitution**

and **Sections 88 and 89** of the **Criminal Procedure Code** under conditions espoused in the case of **Richard Kimani & M Maina v Nathan Kahara, High Court Revision No. 11 of 1983**.

33. The Interested Party contends however, that the permission for private prosecution is at the discretion of the Magistrate and must be exercised judicially and with great caution. That the drafters of the provisions regarding private prosecutions must have intended to ensure impartiality and independence in the conduct of prosecution, so that the rights and freedoms of an accused person, as enshrined in the **Constitution** are given due regard, otherwise the criminal proceedings would be impartial and unfair.
34. They further contend that it is known practice that the right of private prosecutions is exercised by an Advocate, who is independent of the complaint, the defence and the evidence. That this is also echoed in the **Advocates Practice Rules** whereby an Advocate should remove himself/herself from the conduct of a case where there may be risk of a conflict of interest. That these checks and balances to ensure independence and impartiality of the Advocates (including State Prosecutors) apply to individual persons who seek to privately prosecute a matter.
35. According to the Interested Party's therefore, although the law provides for private prosecution of a matter by a person other than an Advocate, where there are glaring potential infringements of the rights of others, the private prosecution may not be fair and this would provide grounds for appeal by the accused persons or Applications to remedy constitutional violations. That the right to fair hearing and the right to conduct private prosecutions are therefore both legal and constitutional provisions but the former cannot be limited and therefore the right to conduct private prosecutions must take into account the right to fair trial.
36. Further according to the Interested Party, there is need for further conditions to be put in place to enable any petitioner undertake private prosecutions personally and ensure that the rights and freedoms enshrined in the **Constitution** are taken into account and upheld. In that regard, special considerations must be made and discretion ought to be exercised cautiously depending on the circumstances of each case.
37. The Interested Party relies on the cases of **Berger v United States, 55 S.CT. 629 (1953)** and **S v Manager, 1985 (1) ZLR 272** to describe the unique role of a prosecutor and the case of **Sharp v Wakefield [1891] AC 173** to define judicial discretion. The Interested Party also refers the Court to the case of **Republic v Cap. Van International Ltd [2004] 2 KLR 348** to describe the role of a complainant in a criminal trial.
38. The Interested Party concludes by submitting that the Ruling delivered in the subordinate Court should be upheld, as there is a real risk of infringement on the right to fair trial should the Petitioner proceed to testify and prosecute the case in his own capacity. That in this case, the judicial discretion to grant him permission to prosecute the case should be exercised with caution and besides, it would be in the Petitioner's best interest to appoint an Advocate to privately prosecute his case.
39. For the above reasons, the DPP prays that the Petition should be dismissed with costs.

Determination

40. Having considered the pleadings and submissions before, I now proceed to address all the issues requiring consideration herebelow.

Whether one can undertake private prosecution and serve as a witness in the same criminal case

41. The State prosecutorial powers are provided for in **Article 157 (6) (a)** of the **Constitution** as follows:

“The Director of Public Prosecutions shall exercise State powers of prosecution and may—

- a. *institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;...*”

42. **Article 157 (6) (b)** of the **Constitution** however presupposes prosecution not undertaken by the Director of Public Prosecution and specifically anticipates private prosecution. It states thus:

“The Director of Public Prosecutions shall exercise State powers of prosecution and may—take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority.”

43. More specifically, **Section 88** of the **Criminal Procedure Code, Cap 75** provides the following on permission to prosecute:

“(1) A Magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission.

(2) Any such person or officer shall have the same power of withdrawing from the prosecution as is provided by section 87, and the provisions of that section shall apply to withdrawal by that person or officer.

(3) Any person conducting the prosecution may do so personally or by an advocate. (Emphasis added.)

44. In the proceedings before the Magistrate’s Court, having already been granted permission to privately prosecute the subject criminal case, the Petitioner was then barred from continuing to undertake the private prosecution for the reason that he intended to serve as a witness in the same case.

45. In that context, **Subsection 3** above is of note and it provides that a person conducting private prosecution may do so personally or by an Advocate. As it is worded, this provision affords the person conducting a private prosecution the option to choose to conduct it himself / herself or by way of an Advocate. There is no prescription that compels a person conducting such private prosecution to engage an Advocate for the same purpose. I therefore do not find that the Magistrate was correct in ordering that the Petitioner, having been properly granted permission to conduct the private prosecution, must conduct the same by way of an Advocate or not conduct it at all if he wished to serve as a witness in the case.

46. But even having said that, I note that there is also no universal prohibition in law, known to me, against a person conducting a private prosecution also serving as a witness in the criminal case that he/she is privately prosecuting. In my view, any such prohibitions (compelling reasons to disallow private prosecutor from serving as a witness) would be, in these proceedings that are already of an unusual nature, arrived at only after consideration of accepted legal principles and the circumstances surrounding each specific case.

47. I believe I have partly settled the matter and I now proceed to specifically address the reasons offered by the Magistrate, the Respondents and Interested Party in support of their contention that the Petitioner cannot continue to privately prosecute **Criminal Case No. PP 06 of 2004** personally if wishes to serve as a witness therein. I will determine if, in the circumstances, the reasons are compelling enough to deny the Petitioner the already granted permission to carry out the private prosecution as he chooses.

Reasons offered by the Magistrate in support of the contention that the Petitioner cannot continue to privately prosecute Criminal Case No. PP 06 of 2004 personally if he wishes to serve as a witness therein

a. **That the *coram* will be irregular**

48. The Petitioner informed the Court that the Magistrate, in deciding that he could not serve as a witness in the case he was privately prosecuting said that if he does so, the *coram* of the Court would be irregular. This is uncontested by the Respondents.

49. According to the **Black's Law Dictionary, 2nd Edition**, "*coram*" means to be "***Before***" or "***in [the] presence of.***"

50. In that regard, I am of the view that terming *coram* for a case that is being privately prosecuted, with the private prosecutor serving as a witness, as irregular, is somewhat overstated as the term irregular carries a negative connotation. I am in agreement therefore that while the *coram* would be different than the typical *coram* in other criminal cases that are prosecuted by the Director of Public Prosecution, this is of course anticipated in private prosecution. At most, the *coram* under those circumstances can be termed as merely dissimilar or disparate and find that this is not a sufficient reason to determine that one must carry out a private prosecution by way of an Advocate or that one should cease from privately prosecuting the case altogether. To hold otherwise would be absurd.

b. **That she foresaw difficulties arising when the Petitioner takes the witness stand in a case which he is privately prosecuting**

51. The Petitioner also contended that the Magistrate decided that he could not serve as a witness in the case he was privately prosecuting as, if he did so, there would be some procedural difficulties. He notes however that the Magistrate did not specify which difficulties she foresaw in that regard. This contention is also unchallenged.

52. From there I sit, it is not clear to me what difficulties the Magistrate may have foreseen. From a pragmatic perspective, the process would certainly be feasible and uncomplicated because the private prosecutor would commence his case by calling his witnesses. Being the primary witness in this case, the Petitioner would leave the prosecutor's table and proceed to the witness dock to submit his witness testimony. The Court may interrupt him if need be for clarification of any unclear evidence and the Petitioner would do then be cross-examined by the defence Counsel and thereafter clarify issues arising as he normally would under cross-examination if he so wishes. He would then go back to the prosecutor's table and call other prosecution witnesses to testify on his behalf. The witnesses would also be cross-examined, and re-examined by the Petitioner if necessary. The Petitioner would then close his case and the remainder of the trial process would proceed as usual.

53. To my mind, having clearly explained how the prosecution and other proceedings would be carried out during the hearing of **Criminal Case No. PP 06 of 2004**, there are no difficulties that may impair and therefore interfere with apposite private prosecution of the case, even with the private prosecutor serving as a witness for himself. To hold otherwise would negate the very purpose of a private prosecution.

Reasons offered by the Respondents and Interested Party in support of their contention that the Petitioner cannot continue to privately prosecute Criminal Case No. PP 06 of 2004 personally if wishes to serve as a witness therein

a. **That the subordinate Court's ruling in question could not possibly be unconstitutional**

54. The Respondents and the Interested Party contend in the above regard that the Ruling by the

Magistrates' Court cannot be unconstitutional as it was made by a Court that has competent jurisdiction and requisite discretion. They specify that permission for private prosecution is at the discretion of the Magistrate and must be exercised judiciously and with great caution.

55. I am in agreement with the foregoing to the extent only that it is indeed within the mandate of the Magistrates' Court to grant permission for one to conduct private prosecution, and that the permission, being discretionary, has to be exercised judiciously.

56. However, the impugned decision of the Magistrates' Court may be unconstitutional for other reasons.

57. I say so because **Article 2 (4)** of the **Constitution** states thus:

“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

58. The import of the above provision is that any case law or any Court decisions that are inconsistent with the **Constitution** would be invalid. For example, such unconstitutionality may lie in decisions that infringe on or limit constitutional rights in a manner that is contrary to **Article 24** of the **Constitution**.

59. Accordingly then, I am not in agreement that a decision by virtue of having been made by a Court of competent jurisdiction cannot be unconstitutional and therefore invalid.

60. I will address the constitutional rights issues arising in this matter later in this judgment.

b. **That there is no constitutional right to private prosecution and therefore the Petitioner cannot claim that his constitutional rights are at threat of being infringed upon**

61. The Respondents and Interested Party contend that there exists no constitutional right to private prosecution and that the right to fair trial, being a non-derogable constitutional right must trump the Petitioner's permission to conduct private prosecution.

62. In that regard, while there exists no express constitutional right to conduct private prosecution, I have already highlighted the provision in the **Constitution** that presupposes the conduct of the same. In addition, this Court recognises the Respondents' non-derogable right to fair trial.

63. My understanding in that context is that the Petitioner contends that his constitutional right to be heard in accordance with **Article 50 (1)** of the **Constitution**, and not his constitutional right to private prosecution, is threatened by the Magistrate's Court's decision. I am of the opinion that the Respondent's non-derogable right to fair trial and the Petitioner's right to be heard are not mutually exclusive and can therefore be embodied in the trial process of the subject criminal case and on this question, the Petitioner approached the correct Court to determine the matter and I will do so later in this judgement, pursuant to **Articles 22 (1), 23 (1) and 23 (3)** of the **Constitution**, which provide thus respectively:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

“In any proceedings brought under Article 22, a court may grant appropriate relief,

including—

- (a) *a declaration of rights;*
- (b) *an injunction;*
- (c) *a conservatory order;*
- (d) *a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the*

Bill of Rights and is not justified under Article 24;

(e) *an order for compensation; and*

(f) *an order of judicial review.”*

c. That the Petitioner has not demonstrated which of his rights have been infringed or violated

64. The Petitioner contends that his right to choose how to conduct the private prosecution was infringed upon by the Magistrate’s decision. Essentially, he avers that his right to be heard will be infringed upon if he is compelled to engage an Advocate to conduct the private prosecution on his behalf as he cannot afford to engage any such Advocate.

65. The Respondents and the Interested Party on the other hand contend that the Petitioner has not demonstrated precisely which of his rights are at risk of or have been infringed by the Magistrate’s decision and the manner in which these rights are at risk of or have been infringed. Furthermore, they argue that there is a real risk of infringement of the Respondents’ right to fair trial as the Petitioner, being the complainant in the criminal case would carry out the private prosecution with vindictiveness and thereby jeopardise any chance of having the matter conducted fairly.

66. I have already discussed and concluded on the issue of choosing an Advocate to conduct the private prosecution and I reiterate that the law compels no one to conduct any private prosecution through an Advocate but rather provides one, once permission has been granted, with the opportunity to choose to conduct the private prosecution personally or through an Advocate.

67. Regarding allegations of infringement of rights, in the case of **Anarita Karimi Njeru v AG (No.1) 1979 Klr 154**, the Court stated thus:

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

68. In addition, the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others**, Civil Appeal No. 290 of 2012 [2013] eKLR held thus:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is

to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

69. It is therefore palpable that any person alleging that their constitutional rights have been infringed upon or are at risk of violation, must unerringly specify that of which he complains, the exact provisions said to be infringed and the manner in which they are alleged to be infringed, in order to enable the Court to adjudicate upon the matter.

70. The Petitioner in that regard alleges that the decision of the Magistrate, that was upheld by the Court infringes upon his right of access to justice in accordance with **Article 48** of the **Constitution** and right to be heard in accordance with **Article 50 (1)** of the **Constitution** because, if the decision is implemented, he would be forced to forfeit prosecution of the case and the case would not be heard because he would not afford to engage an Advocate to conduct the private prosecution.

71. **Article 48** provides thus about the State’s responsibility regarding access to justice:

“ The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access.”

72. **Article 50 (1)** states thus:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

73. The African Commission on Human and Peoples’ Rights Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 include among the essential elements on the right to fair hearing:

“(e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;...”

74. In that context, the Magistrates’ Court, having granted the Petitioner permission to privately prosecute the case, essentially determined that the case can and should proceed to be heard and resolved. This would enable the Petitioner to seek and obtain justice and would also include the opportunity to prepare the case and present arguments and evidence. This is augmented by the fact that the law allows the Petitioner, once he had been granted permission, to personally conduct the private prosecution, if he so wishes. In the circumstances therefore, that the result of the implementation of the decision of the Magistrate would be that legally grounded private prosecution of **Criminal Case No. PP 06 of 2004** (already determined as a case that can and therefore should be heard) is not undertaken, indeed poses a real threat to the Petitioner’s **Article 48** and **Article 50 (1)** rights.

75. The same legal test applies to the allegations of the Respondents that their right to fair trial would be infringed upon if the Petitioner conducted the private prosecution personally as the Petitioner, being the complainant in the criminal case would carry out the private prosecution with vindictiveness.

76. The non-derogable right to fair trial is provided for in **Article 50 (2)** of the **Constitution** as follows:

“Every accused person has the right to a fair trial, which includes the right—

a. *to be presumed innocent until the contrary is proved;*

- b. *to be informed of the charge, with sufficient detail to answer it;*
- c. *to have adequate time and facilities to prepare a defence;*
- d. *to a public trial before a court established under this Constitution;*
- e. *to have the trial begin and conclude without unreasonable delay;*
- f. *to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*
- g. *to choose, and be represented by, an advocate, and to be informed of this right promptly;*
- h. *to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
- i. *to remain silent, and not to testify during the proceedings;*
- j. *to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*
- k. *to adduce and challenge evidence;*
- *to refuse to give self-incriminating evidence;*
- (m) *to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;*
- (n) *not to be convicted for an act or omission that at the time it was committed or omitted was not—*
 - (i) *an offence in Kenya; or*
 - (ii) *a crime under international law;*
- (o) *not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;*
- (p) *to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*
- (q) *if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”*

77. I note that in the outset, the Respondents, as the accused persons in **Criminal Case No. PP 06 of 2004** neither specify in what respect their right to fair trial would be infringed upon, nor did they provide evidence of any vindictive or malicious actions the Petitioner has undertaken or, in this context, is likely to or has planned to undertake. In my view, their allegations are conjectural and lack substance; they are not precise or specific enough to justify a finding that the Respondents' right to fair trial would be at threat if the Petitioner served as both a witness and private prosecutor in the case, and I accordingly do not find in favour of the Respondents on this point.

78. The above finding is related to the Respondents' assertions that their right to fair hearing would be interfered with if the Petitioner is allowed to privately prosecute their case as the prosecutor could have unprecedented access to the evidence used to prosecute the case, thereby giving him ample

room to interfere with the same.

79. Although the Respondents offer more substance in this instance, by their words, they state that the Petitioner “could have unprecedented access to the evidence.” However I still find this allegation to be one that is also speculative and not specific nor sufficient to allow me to find that the same poses a threat to the Respondents’ right to fair trial. In any event, if in the course of trial, the actions in the allegation did occur, the Respondent would have an opportunity to challenge the conduct of the private prosecution in those circumstances as all Courts are guided by the provisions of the **Constitution** on fair hearing.

80. The above is also related to the Interested Party’s assertions that the right to fair hearing and the right to conduct private prosecutions are both legal and constitutional provisions but the former cannot be limited and therefore the right to conduct private prosecutions must take into account the right to fair trial, which will be infringed by the Petitioner.

81. While I am in complete agreement that the conduct of private prosecution must be within the context of the right to fair trial, I wish to add however that the nature of the right to fair trial must be appropriately understood. The non-derogable nature of the right to fair trial generally does not, in and of itself justify the infringement of other persons’ rights; in this case the Petitioner’s right to be heard. Both these rights, in this particular context, I am certain, are not mutually exclusive and can therefore subsist together throughout the criminal trial.

d. **That the Petitioner does not meet the requirement of not being motivated by malice**

82. The Respondents submit that the Petitioner is being driven by some ulterior motive and malice as he has vested interest in the matter and he therefore cannot conduct the prosecution in good faith.

83. In the case of **Floriculture International Limited and Others High Court Misc. Civil Application No 114 of 1997**, the Court set out six principles that the Magistrates’ Court should consider before granting a party leave to carry out a private prosecution. It held:

“For all these reasons criminal proceedings at the instance of a private person shall be allowed to start or to be maintained to the end only where it is shown by the private prosecutor;...

5. *the basis for the locus standi, such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith...*”

84. In the case of **Kimani v Kahara [1985] KLR 79** the Court held that locus standi and suffering any personal injury would serve as considerations for granting permission to conduct private prosecution.

85. The Respondents now contend however, that having malice and a vested interest in the matter, the Petitioner would conduct the private prosecution in a biased manner.

86. Firstly, the contention that the Petitioner is actuated by malice and lacks good faith is unfounded; no evidence of such malice and lack of good faith has been brought before this Court and I therefore cannot proceed any further in probing this contention.

87. Secondly, even without delving into the considerations at the Magistrates’ Court that led to the first decision that the Petitioner can privately prosecute **Criminal Case No. PP 06 of 2004**, I do not take issue with the Petitioner having a vested interest in the matter because this is the basis upon which he likely suffered injury and is therefore testament to the fact that he indeed has standing to allow him to seek and be granted permission to prosecute the case. Such interest, I resolve, cannot be arbitrarily equated to ulterior motive and malice. This Court would in nay

event be remiss in disqualifying one from privately prosecuting a matter personally within the confines of the law (and in this case effectively prevent private prosecution of the matter entirely) on the very same basis which informed the decision of the Magistrate to grant him permission to privately prosecute.

88. Lastly I am not blind to the fact that the vested interest may manifest itself in the form of bias during the conduct of the private prosecution. But even in consideration of this fact, there still does not exist sufficient reason at this point to interfere with the private prosecution of the case by the Petitioner, and his serving as a witness in the case, so that only when such bias manifests in the course of trial, can the Court interfere. The import of this in the present context is that, only when the Petitioner allows his interest (the current basis of his standing) to negatively impact the neutral and fair conduct of the trial, can the Court intervene and proceed to terminate such a private prosecution.

89. In this regard, the Respondents ought to know that the private prosecution will not be conducted contrary to the **Constitution** or other law and that is why in the case of **Githunguri v Republic [1985] KLR 34**, it was held that one of the reasons for interfering with the Attorney General's prosecution of a matter under the Repealed constitution, is when the prosecution is in contravention of a person's constitutional freedoms and rights. Termination of private prosecution would apply under similar circumstances. Comparably, in the case of **John Muruitu Kigwe & Another v Republic HCCRC 223 of 2000**, Rawal J (as she then was) held that the Court has inherent power to terminate proceedings that are an abuse of the Court process and thus protect citizens from malicious prosecutions that may lead to unnecessary infringement and curtailment of their rights. The same principle must of necessity apply in relation to private prosecutions.

Conclusion

90. In the case of **Gouriet v Union of Post Office Workers [1978] AC 435**, the opportunity to institute private prosecution was described as a valuable constitutional safeguard against lassitude or bias on the part of prosecuting authorities. The significance of the opportunity to privately prosecute cases can therefore not be dismissed.

91. On the other hand, in the case of **Shah v Patel [1954] 21 EA CA 236** it was held that even in a private prosecution, the prosecutor in law is the Republic at the instance of the private prosecutor who maintains residual control over every criminal proceeding at any stage thereof. This is similar to the decision in **John Muruitu Kigwe & Another v Republic HCCRC 223 of 2000**, (supra).

92. The significance of all the above is that even during the exercise of imperative private prosecution, the national prosecuting authority and especially the Courts, have the power to ensure that the private prosecution is undertaken within the law and will call into consequence such power to ensure that such prosecution is undertaken without contravention of the accused persons' constitutional rights during the trial. The matter before me is not an exception; in all matters, the Court will still maintain apposite control of the process of prosecution.

Disposition

93. For the above reasons, I am satisfied that the Notice of Motion Application dated 24th June 2013 is merited.

94. I therefore declare that the Subordinate Court's ruling, herein impugned, is unconstitutional as it constitutes a real threat to the constitutional rights of the Petitioner and the Petition is settled in those terms only.

95. I consequently refer **Criminal Case No. PP 06 of 2004** back to the Chief Magistrate's Court before whom it shall continue to be privately prosecuted by the Petitioner who shall also serve as a

witness therein. The Hon. Mutoka shall not sit in trial over the matter.

96.As for the costs, although the Petitioner has succeeded in his Petition, the error in the impugned proceedings was committed by the Magistrate's Court and not the Respondents or Interested Party. In the event, let each Party bear its own costs.

97.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Mwathe for 1st – 7th Respondents

No appearance for Petition

No appearance for Interested Party

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE