



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.71 OF 2015

BETWEEN

YUNUS ABDUL RUBI 1ST PETITIONER

SKYBLUE TRAVEL BUREAU LTD 2ND PETITIONER

PETER DENNIS BWIRE 3RD PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

CHIEF MAGISTRATE'S COURT MILIMANI 2ND RESPONDENT

LOIS HOLDINGS LIMITED 3RD RESPONDENT

JUDGMENT

Introduction

1. The 1st Petitioner, Yunus Abdul Rubi and the 3rd Petitioner, Peter Dennis Bwire, describe themselves as adults of sound mind while the 2nd Petitioner, Skyblue Travel Bureau Ltd, is a limited liability company incorporated in Kenya with its registered offices in Nairobi. They have instituted the present proceedings against the 1st Respondent, the Director of Public Prosecutions, whose office is established pursuant to **Article 157** of the **Constitution** as the office in charge of criminal matters; the 2nd Respondent, a Court of law established under **Article 169** of the **Constitution**; and the 3rd Respondent, Lois Holdings Ltd, a limited liability company incorporated in Kenya.
2. The Petitioners are aggrieved by the institution of criminal proceedings at the 2nd Respondent Court in which they have been charged with the offence of obtaining money by false pretences contrary to **Section 313** of the **Penal Code**. In their view, their continued prosecution is unconstitutional and a direct contravention of their various rights under the Constitution and have approached this Court by way of this constitutional Petition seeking to halt the same.

The Petitioners' Case

3. The Petitioners' case is contained in their Petition dated 25th February, 2015 supported by an Affidavit sworn on their behalf by the 1st Petitioner on the same date; a Further Affidavit sworn by the 1st Petitioner on 15th June, 2015, and Written Submissions dated 27th January, 2016.
4. The Petitioners stated that at all material times, the 3rd Petitioner is the 2nd Petitioner's Travel Manager and was in contact with one, Lorraine Obura, who was allegedly a regular client of the 2nd Petitioner. They contended that on 10th July, 2014, the said Lorraine brought a cheque dated 10th July, 2014 for Kshs 774,000/= issued to Lois Holdings Ltd with instructions for the 2nd Petitioner to issue air tickets for Kimbui Nina Wangai, Mumo Mbete Kaluki, Mumo Pamela Karabo, and Mumo Nyeera Kendi. That the aforesaid persons were supposed to travel on return air tickets on 11th July, 2014, a day after the cheque was issued and had not cleared, from Nairobi to Amsterdam and Atlanta then Chicago, and return from Chicago through Atlanta and London and finally back to Nairobi.
5. The Petitioners further contended that the 3rd Petitioner then approached the 1st Petitioner for advise as the customers wanted the tickets so as to travel the following day and yet the cheque that had been issued had not been cleared. The 1st Petitioner authorized the issuance of the tickets as requested by Lorraine and the cost of the said tickets amounted to Kshs 606, 060. On the same day, Lorraine additionally requested for e-tickets for her other clients namely Said Ismail Zakaria and Mohamud Yusuf, who were to travel on return tickets from Nairobi to Luanda and e-tickets Nos. 706 5447493493756 and 7065447493757 were duly issued by the 2nd Petitioner amounting to Kshs 163, 709/=. It was the Petitioners' allegation in that regard that out of the Kshs 774, 000/= paid to the 2nd Petitioner, a total sum of Kshs 769,769/= was utilized on the aforesaid tickets leaving a paltry Kshs 4,231/= which catered for the agency fee due to the 2nd Petitioner.
6. The 1st Petitioner in addition deponed that he later learnt while at Central Police Station, Nairobi that indeed Lorraine had received a sum of Kshs 264,000/= from the 3rd Respondent under her name vide cheque No. 700529 and which she had since refused to refund to the said company meaning that the company was not a client of the 2nd Petitioner, but was in fact Lorraine's client since the 3rd Respondent was not known to the Petitioners.
7. The Petitioners therefore argued that the prosecution against them is malicious as Lorraine ought to be the accused person and not a prosecution witness as she now is and further, that the complainant, the 3rd Respondent, is out to achieve a different purpose by using criminal proceedings to recover money owed by Lorraine and this Court ought to rise to its duty of protecting abuse of its process by litigants for selfish interests. Additionally, they contended that the jurisdiction to stay criminal proceedings in the circumstances is rooted in the imperative to ensure that the judicial process is only used for bonafide purposes which are in consonance with public policy and that, there is real and imminent danger that unless the orders sought herein are granted, they stand to suffer substantial prejudice, loss and damage.
8. As a result of the foregoing, the Petitioners urge the Court to grant the following remedies:
 - a. ***A declaration do issue directing that further proceedings in Nairobi Chief Magistrate Court Criminal Case No. 1227 of 2014, Republic vs Yunus Abdul and Others, be and is hereby prohibited and halted in its entirety.***
 - b. ***The Respondents do pay the costs of this Petition.***

The 1st Respondent's Case

9. In response to the Petition, the 2nd Respondent filed an affidavit sworn by on his behalf by one PC Margaret Omurumba on 2nd April 2015 and Written Submissions dated 1st December, 2015.
10. PC Omurumba deponed largely in regard to a complaint that was made at the Central Police Station by one, Douglas Kimbui on 17th July, 2014. She stated that upon receiving the said complaint, she conducted investigations which revealed that the payment in respect of the complainant's nieces' air-travel amounting to Kshs 200,000/= was paid by the complainant's bank while the payments in respect to the complainant's sister and parents' air-travel amounting to Kshs 274,350 and 774,000/=, respectively, were also paid by the complainant's bank. That the said payments were made to and received by the 2nd Petitioner's bank. Further, that the allegations made by the complainant were corroborated by Lorraine aforesaid and further that the complainant entered into an arrangement with Lorraine for the refund of monies paid in respect of cheque No. 700529 for Kshs 264, 000/=.
11. PC Omurumba also stated that at the conclusion of her investigations, it was clear that the acts of the Petitioners exhibited elements that substantiate criminal offences within Kenyan laws and as a result thereof, the Petitioners were questioned and thereafter arrested and charged. That they were then arraigned in Court and the matter was partly heard on 19th November, 2014.
12. The 1st Respondent further maintained that the allegations made by the Petitioners that the requisite number of tickets were issued as requested, are unfounded as invoice No. 09 dated 7th October, 2014 showed that air tickets were issued under the complainant's account to Mr. Said Ismail and Miss. Mohammed Yusuf, who are unknown to the complainant and have no relation to him at all.
13. It was the 1st Respondent's other contention that under **Article 157 (6) of the Constitution**, the Director of Public Prosecutions exercises State powers of prosecution and furthermore, he is required to discharge the said duties and functions while respecting, observing and upholding constitutional values. In that regard, the 1st Respondent argued that the Petitioners have not demonstrated that in making the decision to prefer criminal charges against them, the Director of Public Prosecutions acted without or in excess of the powers conferred upon him by law or in any way infringed their constitutional rights.
14. The 1st Respondent asserted that he independently reviewed and analysed the evidence contained in the investigation's file and that formed the basis for the institution of the criminal proceedings. That the Petitioners are merely seeking to curtail the mandate of the criminal justice system actors and yet they have not adduced sufficient evidence, on merit, to show that prejudice has been occasioned and damage suffered which may render their continued prosecution an outright abuse of the Court process.
15. Further, that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial Court which is best equipped to deal with the quality and sufficiency of such evidence properly adduced in support of the charges and that in any event, the DPP does not require the consent of any person or authority for him to commence any criminal proceedings.
16. For the foregoing reasons, the 1st Respondent urged the Court to exercise extreme care and caution and should not interfere with the exercise of his constitutional powers and that this Court can only interfere with his independent judgment if it is shown that the exercise thereof is contrary to the Constitution. Further, he contended that the Petitioners' allegations that the charges are trumped up and are geared towards harassment and intimidation or that they are well calculated to interfere with their enjoyment of rights, is misconceived, unfounded, unmeritorious and baseless.
17. The 1st Respondent therefore urged the Court to dismiss the Petition.

The 2nd and 3rd Respondents' Case(s)

18. The 2nd and 3rd Respondent did not in any way participate in these proceedings.

The Petitioners' Rejoinder

19. In their Further Affidavit, the Petitioners reiterated the contents of their Affidavit in support and denied knowing Douglas Kimbui, the alleged complainant, and stated further that Lorraine aforesaid has never been an agent or employee of the 2nd Petitioner but was merely its customer in issuing orders for air tickets. That in the said capacity Lorraine presented to the 2nd Petitioner a cheque for Kshs 200, 000/= only and they are unaware of the alleged USD 3000 given to her by the complainant and that she is the only person who can account for the same.

20. They argued further that when the cheque for Kshs 774, 400/= was brought to the 2nd Petitioner, Lorraine issued specific instructions, as a client, for issuance by the 2nd Petitioner of Kenya Airways tickets for Kimbui Nina Wangai, Mumo Mbete Kaluki, Mumo Pamela Karobo and Mumo Nyeera Kendi for travel on flights from Nairobi-Amsterdam-Atlanta then Chicago and then from Chicago-Atlanta-London and finally to Nairobi. In that regard therefore, their position was that, at no time did Lorraine give instructions to the 2nd Petitioner for issuance of tickets in respect of Jason K. Kimbui and Loise N. Kimbui as alleged.

21. According to the Petitioners, it is therefore clear that the 2nd Respondent admittedly received an initial sum of Kshs. 474, 350/= and if the complainants' two nieces and two sisters were to travel on the strength of that money from Nairobi to Canada and USA, the said amounts were clearly not enough for the said four individuals because the requisite tickets on an economy airflight for their trip would have costed about Kshs. 984, 000/= and not the said 474, 350/= allegedly paid for the air tickets for the four persons.

22. For the above reasons, the Petitioners asserted that their prosecution is not founded in law and is purely malicious as the 1st Respondent's Affidavit in reply is full of inconsistencies. Additionally, that their right to freedom has been totally infringed by the gross miscarriage of justice and is prejudicial to their entitlement to fair administrative justice.

The Parties' Submissions

For the Petitioner

23. The Petitioners submitted that their prosecution is malicious as it is founded on no or proper investigations capable of sustaining a charge of obtaining money by false pretence. Accordingly, that the police did not attempt to establish the truth in the complaint against them and they were never given an opportunity to be heard and the charges herein were hurriedly undertaken to embarrass, humiliate and coerce them.

24. While reiterating the contents of their Petition, they maintained that their rights to freedom of the person have been totally infringed by the gross miscarriage of justice in the institution and sustenance of the criminal proceedings. Furthermore, that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, and the fact that a Petitioner has a good defence in the criminal process is not a ground for denying such a Petitioner the prayer to halt the criminal proceedings.

25. The Petitioners relied on the decision in **Ronald Leposo Musengi vs Director of Public Prosecutions [2015] eKLR** in support of their submission above and urged the Court to follow that decision in its entirety and they additionally submitted that as this Court is only interested in the process that led to their indictment in the lower Court, they were satisfied that they have demonstrated that they were never heard when the decision to charge them was made and that the 1st Respondent did not take into account relevant matters in reaching the said decision.

For the Respondents

26. On the 1st Respondents part, his submission was that the Petitioners have not sufficiently demonstrated, with particularity, how each of their fundamental rights have been infringed and the violations faced and suffered by the alleged infringement as prescribed in the cases of **Anarita Karimi Njeru vs Attorney General (1979) KLR 54** and **Matiba vs Attorney General (1990) KLR 666**.
27. Further, according to the 1st Respondent, the Petitioners have also failed to discharge the burden imposed upon them by **Sections 107 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya**. That, he has in any event been constitutionally charged with the mandate to ensure that breaches of any Kenyan laws are investigated and subsequently culprits prosecuted where there is evidence and that in exercising that right, an automatic breach of the Petitioners' fundamental rights is not committed if the same was exercised within the confines of law.
28. The 1st Respondent's position was further that the basis upon which the charges were preferred against the Petitioners was solely on the evidence collected during the investigations vis-à-vis the public interest test and such a decision is not in any event based on whether there is a probable case and neither is it based on whether there is a *prima facie* case. Additionally, he submitted that **Section 193A of the Criminal Procedure Code** permits the existence of both criminal and civil proceedings concurrently and therefore such a submission is not an automatic ground to restrain him from rightfully exercising his constitutional mandate.
29. The 1st Respondent additionally submitted that the investigations carried out and the subsequent decision made to prosecute the Petitioners was not undertaken with ulterior motives as alleged but rather on the basis of the evidence on record. Accordingly, that the Petitioners have not adduced sufficient evidence to show that the investigations and the prosecutions amount to an abuse of the criminal justice system or has led to the infringement of their constitutional rights, but rather, that they merely seek the Court's sympathy by putting forth their defence before the wrong Court. Such an action, he contended, is not therefore directed at the appropriate forum.
30. The 1st Respondent relied on the decisions in **Danson Buya Mungatana vs Attorney General and 2 Others, Petition No. 46 of 2011, Cape Holdings Ltd vs The Attorney General, Civil App. No. 240 of 2011, Republic vs Kenya Revenue Authority and 2 Others, Misc App. J.R 186 of 2013, Michael Monari and Another vs The Commissioner of Police and 3 Others, Misc App. No. 68 of 2011, Mexnier and Another vs Attorney General (2005) 2 KLR, Paul Ng'ang'a Nyaga and 2 Others vs Attorney General and 2 Others, Petition No. 518 of 2012, and Francis Mbugua vs Commissioner of Police and 2 Others, Petition No. 79 of 2012** in support of his case and he finally submitted that the trial Court is sufficiently equipped under the **Criminal Procedure Code** to deal with all the issues now raised and is accordingly bound to observe the Petitioners' rights and freedoms and should there be any violations during the trial, the same can still be raised and addressed in accordance with the **Fair Administrative Action Act, 2015** among other avenues.
31. It was therefore the 1st Respondent's position that the Petitioners are not entitled to any of the orders sought in the Petition and the same ought to be dismissed.

Determination

32. Based on the Parties' pleadings and submissions, as I have reproduced above, the key issue for determination is whether the Petitioners have made out a case to warrant the stoppage of their prosecution in **Nairobi Chief Magistrates Court Criminal Case No. 1227 of 2014, Republic vs Yunus Abdul and Others**.
33. In that regard, it must not be lost to this Court and the Parties that the powers to institute any

criminal proceedings are vested in the office of the Director of Public Prosecutions by dint of **Article 157 (6)** of the **Constitution** which states that:

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;*
- b. *Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and;*
- c. *Subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

34. **Article 157 (10)** further stipulates 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.

35. Additionally, by dint of **Article 157 (11)** of the **Constitution**, in exercising the powers conferred on him, the Director of Public Prosecutions is required to have regard for the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

36. The foregoing makes it clear therefore that the Office of the Director of Public Prosecution is an independent office with the mandate to independently institute criminal prosecutions. That notwithstanding, the Courts have, in instances where the said office has acted in a manner that is contrary to the Constitution and in violation of the rights of accused persons, stepped in to check that mandate. For instance, this Court in **Justus Mwenda Kathenge vs Director Of Public Prosecutions and 2 Others, Petition No 372 of 2013**, made the observation that:

[8] *It is now trite that Courts cannot interfere with the exercise of the above mandate [exercise of prosecutorial powers] unless it can be shown that under Article 157(11);*

- i. *he has acted without due regard to public interest,*
- ii. *he has acted against the interests of the administration of justice,*
- iii. *he has not taken account of the need to prevent and avoid abuse of Court process.*

[9] *These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st respondent...*

37. Further, in **Gulam and Another vs Chief Magistrate's Court and Another [2006] eKLR** the Learned Judge held that:

“Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any Prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other improper purpose such as undue harassment of a party or abuse of the process of court... 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 institution of criminal proceedings, there must be in existence material evidence on which the Prosecution can say with certainty that they have a probable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and

probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable... Prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest. The rationale for prohibiting such proceedings is that for a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the Court (of its inherent power to prevent abuse of its process). On the score of cost alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup." (Emphasis added)

38. The effect of the foregoing authorities is that the High Court will only intervene in the clearest of cases and where there is manifest violation of the Constitution, abuse of process, and where a prosecution is instituted for improper purposes other than to meet the ends of justice.
39. Applying the above principles to the present case, based on the material before me, I note that the Petitioners' key grievance is that they were not given an opportunity to be heard prior to the institution of the criminal prosecution; that the investigation leading to their prosecution was biased as the evidence relied on pointed to the fact that no criminal case was sustainable against them, and that they had a legitimate expectation that due process would be adhered to and followed in the investigations leading to their prosecution.
40. Firstly, I must remind the Petitioners that it is not within the mandate of this Court to examine and determine the sufficiency or otherwise of the evidence to be relied upon by the trial Court as that is the exclusive mandate of the trial Court itself. It is also not for this Court to go into an evaluation of such evidence and that is why the Court in **Michael Monari and Another vs Commissioner of Police and 3 Others Miscellaneous Application No. 68 of 2011** rendered itself thus:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."
(Emphasis added)

41. In that regard and further to the above, this Court will be usurping the mandate of the trial Court by evaluating the sufficiency or otherwise of the evidence and to make a finding on whether the same can sustain a conviction. I must therefore decline the Petitioners' invitation to examine the merits of the evidence to be relied on.
42. The Petitioners' other complaint was that they were not accorded an opportunity to be heard during the investigation process and as such, the investigations conducted were in contravention of their right to fair administrative action as guaranteed under **Article 47** of the **Constitution**. The question that then begs for answers is whether the investigative authorities were under a duty to afford the Petitioners an opportunity to be heard. In that regard, **Article 47** guarantees the right to fair administrative action in the following terms:
1. ***Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
 2. ***If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

3. ...

43. Further, in **Section 2** of the **Fair Administrative Actions Act, No. 4 of 2015**, "**administrative action**" is defined to include-

- i. *The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or*
- ii. *Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.*

44. This then leads to the question whether the institution of criminal proceedings by the Director of Public Prosecutions constitutes an administrative action that warrants the invocation of the rules of natural justice at the investigation stage. The Court in the **Ronald Leposo case (supra)**, as relied upon by the Petitioners, was faced with the same question and the Learned Judge expressed the opinion that:

“[196] I, however, find no merit in the contention that the Petitioner ought to have been summoned by the Special Prosecutor, Senior Counsel Paul Muite, before the commencement of the criminal proceedings. A prosecutor is not bound to conduct further investigations on being retained to carry out a prosecution, though I have no quarrel with the prosecutor giving his view on the prospects of the prosecution to the person retaining him.” (Emphasis added)

45. Furthermore, in **George Taitumu vs Chief Magistrates Court, Kibera and 2 Others, Petition No. 81 of 2014 Majanja J.** pointed out that:

“[19] The petitioner relies on Article 47(1) of the Constitution which protects every person’s right to fair administrative action. Article 47(1) does not apply to criminal proceedings as the rights of the accused person are clearly protected in Article 50 of the Constitution (See Dry Associates Limited vs Capital Markets Authority and Another Nairobi Petition 328 of 2011 [2012]eKLR and Diana Kethi Kilonzo and Another vs Independent Electoral & Boundaries Commission (IEBC) and Others Nairobi Petition No. 359 of 2013 [2013]eKLR).”

46. It therefore follows that the contention that the Petitioners ought to have been consulted before the institution of the criminal proceeding is unmerited. I must also state that while the Petitioners herein have maintained that they were entitled to be accorded a hearing before the institution of the criminal proceedings, I note that the **Ronald Leposo Case (supra)** is distinguishable in that regard because, after his first statement was recorded by the police, investigations were subsequently undertaken and completed and the Director of Public Prosecutions, through a letter, directed that the file be closed and no further action ought to be taken. But subsequently, the file was reopened and criminal proceedings instituted despite the fact that the Petitioner had been assured that he was innocent. In that regard, the Court found that the actions by the Director of Public Prosecution were in breach of the Petitioner’s legitimate expectation not to be prosecuted but despite the assurance, the proceedings were instituted three years later on. The circumstances of the **Ronald Leposo Case (supra)** are therefore quite different from the present Petition. Here, no such assurances were at any time given.

47. In my view therefore, while the institution of criminal proceedings by the Director of Public Prosecutions may in some circumstances warrant the invocation of the rules of natural justice, each case has to be determined on its own merits and in instances, like in the **Ronald Leposo Case (supra)**, where an assurance had been given that there would be no prosecution, there is a legitimate expectation that that decision would be upheld.

48. In any event, in the present case the 1st Respondent has submitted that upon receiving the complaint against the Petitioners, the police carried out investigations, questioned the Petitioners

and subsequently he decided to institute the criminal proceedings. The Petitioners have not rebutted the depositions that they were questioned and as such, I am unable to find that the Petitioners were not in any way involved in the investigations. Had they not been interviewed and their side of the story heard, I may have been persuaded to take a contrary view but that is not the case.

49. That notwithstanding, **Article 50** of the **Constitution** provides safeguards to an accused person and moreover, pursuant to **Article 50 (2) (a)**, every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved. Additionally, under the **Criminal Procedure Code**, the trial Court is empowered not to put an accused person to his defence where no *prima facie* case has been established. Our laws additionally outline channels of challenging decisions of lower Courts through appeal and moreover, there is the additional right of institution of suits for malicious prosecution. The law will always protect the Petitioners if they are truly innocent of the charges they are facing.

Conclusions

50. In conclusion, I wish to reiterate the position taken by the Court in the **Ronald Leposo case (supra)** thus:

“[44] It is, in my respectful view, important to understand the principles which guide the grant of the orders in the nature sought herein before applying the same to the circumstances of this case. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. In these matters the High Court does not transform itself into a trial court and is not permitted to delve into the merits or otherwise of the criminal process as that would amount to unnecessarily straying into the arena exclusively reserved for the criminal or trial Court. This Court in determining the constitutional issues raised therefore ought not to usurp the Constitutional and statutory mandate of the Respondents to investigate and undertake prosecution in the exercise of the discretion conferred upon them.” (Emphasis added)

51. I wholly agree with the Learned Judge and based on the material before me, I have not seen any evidence that the Respondents acted in excess of their powers or outside their constitutional mandate and as such, it would not be appropriate in the circumstances for this Court to halt the criminal proceedings at the trial Court.

Disposition

52. For the above reasons, I am inclined to find that the present Petition is unmerited and is hereby dismissed.

53. Let each Party bear its own costs.

54. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

No appearance for parties at 10.30 a.m.

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE