



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL PETITION NO 230 OF 2014**

**JUSTUS ATIERI MALUNDA .....1<sup>ST</sup>**  
**PETITIONER**

**DEEPSEA WENDANO SELF HELP GROUP.....2<sup>ND</sup>**  
**PETITIONER**

**VERSUS**

**THE ETHICS AND ANTI – CORRUPTION COMMISSION .....1<sup>ST</sup>**  
**RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup>**  
**RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL .....3<sup>RD</sup>**  
**RESPONDENT**

**JOHN MUNENE .....4<sup>TH</sup>**  
**RESPONDENT**

**THE CHIEF MAGISTRATE’S COURT NAIROBI .....5<sup>th</sup>**  
**RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioners challenge the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondent to bring criminal proceedings against the 1<sup>st</sup> petitioner in **Nairobi Criminal Case No ACC 9 of 2014** on the allegation that he had solicited a bribe from the 4<sup>th</sup> respondent. The 1<sup>st</sup> petitioner was, at all times relevant to the present proceedings, an Assistant Chief in Highridge Sub-location, Nairobi, appointed to the position under the provisions of the Chief’s Act, Cap 128 of the Laws of Kenya.
2. The petitioners have filed the petition against the 1<sup>st</sup> respondent, the Ethics and Anti-corruption Commission, (EACC), an independent constitutional commission established under the provisions of Article 79 of the Constitution. The 2<sup>nd</sup> respondent is the Director of Public Prosecutions (DPP), the office responsible, under Article 157 of the Constitution, for the institution of all prosecutions in the country. The 3<sup>rd</sup> and 5<sup>th</sup> respondent are the Attorney General (AG), the principal legal

advisor of the national government, while the 5<sup>th</sup> respondent is the Magistrate's Court seized of the criminal case against the 1<sup>st</sup> petitioner. The petitioners have also joined the complainant against the 1<sup>st</sup> petitioner, Mr. John Munene, as the 4<sup>th</sup> respondent.

3. In the petition dated 13<sup>th</sup> May 2014, the petitioners pray that the Court grants the following orders:
  1. *That a declaration do issue, declaring as null and void the decision by the 1<sup>st</sup> and 2<sup>nd</sup> respondent the ETHICS AND ANTI CORRUPTION COMMISSION and DIRECTOR OF PUBLIC PROSECUTIONS to prefer and present the intended charges on 15<sup>th</sup> may 2014 against the 1<sup>st</sup> petitioner.*
  2. *That a declaration do issue, declaring as null and void the decision by the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent seeking that the 1<sup>st</sup> petitioner be summoned to take plea and be charged for alleged criminal offence of abuse of office and receiving bribery and in the alternative there be issued an order to stay the intended criminal charges pending hearing and final determination of this petition.*
  3. *To prohibit the 5<sup>th</sup> respondent, the Chief Magistrate Nairobi, and any other Magistrate from receiving and or continuing to entertain the intended alleged criminal charges of abuse of office and bribery preferred against the 1<sup>st</sup> petitioner.*
  4. *That an order do issue prohibiting and restraining jointly and severally the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent, DPP, and the 5<sup>th</sup> Respondent, the Chief Magistrate, Nairobi from presenting to court and or accepting into court, any counts and or charges relating to abuse of office as against the 1<sup>st</sup> petitioner, and or requiring the petitioner to take pleas and or stand trial on any counts and or charges relating to the afore-stated abuse of office charges in relation to matters arising between the disputed parcel of land between the 2<sup>nd</sup> petitioner and the 4<sup>th</sup> respondent.*
  5. *That declaration do issue that the fundamental rights of the 1<sup>st</sup> petitioner, to have details and reasonable access to the case against him were and are likely to continue being breached by requiring him to (i) Answer to a charge and to take a plea, without full details of all witness statements, documentary evidence and prosecution materials.*
  6. *That a declaration do issue that the petitioners' right to fair Administrative action, not to be discriminated against has been violated and will continue being violated unless and until the final determination of this petition.*
  7. *That in the alternative a declaration do issue staying the decision by 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents from either continuing and or proceeding with the intended malicious criminal case pending the determination of this petition and further restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondent from interfering with the 2<sup>nd</sup> petitioners only source of lively hood in their farfetched and malicious prosecution pending the final determination of this petition.*
  8. *That a declaration do issue that the action of 1<sup>st</sup> and 2<sup>nd</sup> respondent are null and void as they failed to appreciate the key role the chiefs play in solving disputes within their locality and both the 1<sup>st</sup> and 2<sup>nd</sup> respondent had no right to interfere with the well laid mandate of the judicial process and thus find that their decision to discriminately prefer malicious charges of the 1<sup>st</sup> petitioner is improper and lacks any legal backing.*
  9. *That a declaration do issue that the 2<sup>nd</sup> respondent, director of Public Prosecution and or 1<sup>st</sup> respondent, Kenya copyright Board were and are motivated by ulterior motives unrelated to the cause of criminal justice in its election and zeal to charge and prosecute the 1<sup>st</sup> petitioner.*

10. *That a declaration do issue that the decision and election to charge the petitioner was selective and discriminative, informed by ulterior motives, wholly and un-related to any cause for criminal justice*
11. *That the court can be pleased to issue any other or further orders and or directions as it may deem fair and just*
12. *That the respondents be condemned to pay costs.*

### **The Petitioners' Case**

4. The petitioners' case is set out in the petition and affidavit in support sworn by the 1<sup>st</sup> petitioner. It is not clear from the pleadings or the submissions why the 2<sup>nd</sup> petitioner is a party, as there is no claim before the Court alleging violation of constitutional rights with respect to it resulting from the prosecution of the 1<sup>st</sup> petitioner.
5. The 1<sup>st</sup> petitioner alleges that he was acting in his official capacity when a complaint was referred to him by the 2<sup>nd</sup> petitioner. It was in respect of the actions that he took subsequent to this complaint, and the actions of the respondents pursuant thereto, that he alleges resulted in violation of his constitutional rights. In his affidavit sworn on 13<sup>th</sup> May 2014 in support of the petition, the 1<sup>st</sup> petitioner avers that he was an Assistant Chief in Highridge Sub-location. He states that allegations were made to him on 3<sup>rd</sup> May 2014 by the 2<sup>nd</sup> petitioner that the 4<sup>th</sup> respondent, Mr. John Munene, had demolished a kiosk, the property of the 2<sup>nd</sup> petitioner.
6. He further avers that he entered the complaint in the servicing register in which he registers all the daily occurrences, and which acts as his occurrence book. Thereafter, the 2<sup>nd</sup> petitioner, through the group coordinator, one Ms. Jennifer Nafuna, explained to the 1<sup>st</sup> petitioner the circumstances leading to the complaint. He avers that he then summoned the 4<sup>th</sup> respondent to appear before him on 5<sup>th</sup> May 2014, on which date all the parties, including members of the 2<sup>nd</sup> petitioner and village committee elders, deliberated on the issue.
7. The 1<sup>st</sup> petitioner avers that all the persons present, including the 4<sup>th</sup> respondent, were in agreement that the 4<sup>th</sup> respondent should pay for demolishing the 2<sup>nd</sup> petitioner's kiosk, and the amount was agreed upon at Kshs 7,010/-. They also agreed that they would all return to his office on 8<sup>th</sup> May 2014 for the payment of the compensation amount, and that he issued summons to the 4<sup>th</sup> respondent for that day.
8. The 1<sup>st</sup> petitioner makes further depositions with regard to the failure of the 4<sup>th</sup> respondent to appear at his office at the agreed time on 8<sup>th</sup> May 2014, but avers that he eventually appeared at about 5.00 p.m. with Kshs 5,000 which he insisted that he wanted to leave with the 1<sup>st</sup> petitioner and could not wait for the other parties involved in the matter to appear. The 1<sup>st</sup> petitioner states that upon receiving the money, and while he was in the process of putting the money away in his office drawer, the 4<sup>th</sup> respondent re-entered the office accompanied by four plain clothes officers whom he informed that he had given money to the 1<sup>st</sup> petitioner.
9. The 1<sup>st</sup> petitioner alleges that he was not given a chance to explain anything regarding the money; that he was subjected to a thorough search, as was his office, by the officers who informed him that they were from the Ethics and Anti-corruption Commission and that he was being arrested for receiving a bribe. He was later charged in Court with receiving a bribe. He avers that some of the members of the 2<sup>nd</sup> respondent who were present during the meetings have written statements on

the circumstances that led to the agreement to pay Kshs 7,010, and all were present when the compensation amount was agreed upon.

10. He states that the acts of the 1<sup>st</sup> and 4<sup>th</sup> respondent amount to entrapment. It is his case that the Chief's Act gives him the mandate to solve disputes, which is what he did in the present case, and he terms the acts of the respondents in aligning his conduct with abuse of office unconstitutional and an infringement of his constitutional right to perform his duties as an Assistant Chief.
11. In his submissions on behalf of the petitioners, learned Counsel, Mr. Mwangi contended that in disregard of Article 25, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not afford the petitioner a chance to be heard when they arrested him on 8<sup>th</sup> May 2014 on the allegation that he had received a bribe. It was his submission further that the petitioner has the right to be protected while discharging his duties.
12. Counsel further submitted that the right to trial commences from the time investigations begin to the time a party is charged, and that the 1<sup>st</sup> petitioner was not accorded this right when he was arrested and charged. It is also his case that there was an abuse of Article 157 with respect to the prosecution powers of the DPP in that the right of the 2<sup>nd</sup> petitioner to property which had been destroyed was not respected.
13. The petitioners submitted that there are avenues to appeal any decision that the 1<sup>st</sup> petitioner made, and the decision of the 4<sup>th</sup> respondent to engage the services of the 1<sup>st</sup> and 2<sup>nd</sup> respondent was in breach of the constitutional rights of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners. It was their case that the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> respondent is motivated by malice. They assert that the engagement of the services of the 1<sup>st</sup> respondent will lead to civil servants being instilled with fear and will lead to their being unable to execute their mandate.
14. It is also the contention of the petitioners that the monies alleged to have been a bribe were a decretal amount agreed on between the 2<sup>nd</sup> petitioner and the 4<sup>th</sup> respondent. They submit that criminalizing the acts of the 1<sup>st</sup> petitioner is to settle personal scores by the 1<sup>st</sup> and 4<sup>th</sup> respondent. They argue that the respondents had not indicated that they investigated the matter; and that the averments of the investigating officer dealt only with the issue of entrapment which, according to the petitioners, cannot be used by the 1<sup>st</sup> respondent to frame the 1<sup>st</sup> petitioner for acts which are legally and constitutionally guaranteed under the Chief's Act.
15. Counsel for the petitioners submitted that the institution of criminal proceedings against the 1<sup>st</sup> petitioner was intended to harass the 1<sup>st</sup> petitioner. He referred the Court to the decision in **Rosemary Wanja Mwangiri & 2 Others vs AG High Court Misc. Case No. 165 of 2011**, for the proposition that the criminal justice process should not be used to harass any person. He asked the Court to grant the orders sought by the petitioners and to quash the proceedings in Nairobi Criminal Case No ACC 9 of 2014.
16. The 2<sup>nd</sup> petitioner has, through Ms. Jennifer Nafuna, who describes herself as the co-ordinator of the 2<sup>nd</sup> respondent, filed an affidavit sworn on 9<sup>th</sup> September 2014 in support of the petition. The gist of the affidavit is to support the 1<sup>st</sup> petitioner's contentions with regard to the chain of events that led to his arrest, and his contention that the monies he received was in respect of compensation agreed upon as payable to the 2<sup>nd</sup> petitioner by the 4<sup>th</sup> respondent allegedly for demolishing the 2<sup>nd</sup> petitioner's kiosk.

### **The 1<sup>st</sup> Respondent's Case**

17. In his response, Learned Counsel, Mr. Ongondi, relied on the affidavit sworn in opposition to the petition by Mr. Reuben Njagi on 20<sup>th</sup> May 2014 and submissions dated 4<sup>th</sup> November 2014.

18. In the said affidavit, Mr. Njagi, an investigator with the Ethics and Anti-corruption Commission, deposes that he was one of the Case Officers in respect of the matters raised in this petition. He sets out in his affidavit the history and mandate of the 1<sup>st</sup> respondent before making various averments with regard to the events that led to the prosecution of the 1<sup>st</sup> petitioner.
19. According to Mr. Njagi, following allegations of bribe demands by the 1<sup>st</sup> petitioner in the course of his official duties, the EACC initiated investigations which culminated in the arrest of the 1<sup>st</sup> petitioner by EACC officers. The allegations against the 1<sup>st</sup> petitioner were made by the 4<sup>th</sup> respondent who personally lodged his complaint at the EACC offices to the effect that the 1<sup>st</sup> petitioner had demanded and/or solicited a bribe from him.
20. According to the 1<sup>st</sup> respondent, following the 4<sup>th</sup> respondent's complaint, it investigated the matter and established that the 4<sup>th</sup> respondent was a resident of Highridge area in Nairobi County in which the 1<sup>st</sup> petitioner serves as the Assistant Chief. The 4<sup>th</sup> respondent has, with the permission of the area Chief, built some structures on the road reserve. The 1<sup>st</sup> respondent states further that it established that on several occasions while on his visits within the sub location, the 1<sup>st</sup> petitioner would solicit for bribes from, among others, the 4<sup>th</sup> respondent, ostensibly to protect their structures from being destroyed or demolished.
21. It states that on the material day, the 1<sup>st</sup> petitioner summoned the 4<sup>th</sup> respondent to his office; that on 8<sup>th</sup> May 2014, the 4<sup>th</sup> respondent went to the 1<sup>st</sup> petitioner's office and upon arrival, the 1<sup>st</sup> petitioner demanded the sum of Kenya Shillings Five Thousand (Ksh 5000) to protect the 4<sup>th</sup> respondent's structures from possible demolition.
22. The 1<sup>st</sup> respondent states that the 4<sup>th</sup> respondent as a consequence visited its offices and made a complaint about the demand for a bribe; that the respondent recorded his statement and fitted him with tape recording equipment to enable the 1<sup>st</sup> respondent record the conversation; and it recorded the 1<sup>st</sup> petitioner demanding the sum of Kshs 10,000/-, which the 4<sup>th</sup> respondent negotiated to Kshs 7000/-. The 4<sup>th</sup> respondent then handed over to the 1<sup>st</sup> petitioner the sum of Kshs 5000/- of treated notes which the 1<sup>st</sup> petitioner voluntarily received and kept in his desk, and he was subsequently arrested.
23. The 1<sup>st</sup> respondent states that the 1<sup>st</sup> petitioner is a public officer employed by the Government of Kenya to serve as an Assistant Chief of Highridge Sub-location. He deliberately solicited and received a bribe of Kshs 5,000 ostensibly to protect the 4<sup>th</sup> respondent's structures from being demolished.
24. EACC further avers that the 1<sup>st</sup> petitioner is a public officer as defined under Section 2 of the Anti-corruption and Economic Crimes Act, 2003; that under the said provision, it is an offence for a public officer to receive or solicit for a benefit; and further, that the actions of the 1<sup>st</sup> respondent do not amount to entrapment as alleged by the petitioners.
25. In his submissions on behalf of the 1<sup>st</sup> respondent, Mr. Ongondi denied the allegations of malice directed at the 1<sup>st</sup> respondent by the petitioners. He reiterated the averments by Mr. Njagi that on 8<sup>th</sup> May 2014 the 4<sup>th</sup> respondent had gone to the offices of the 1<sup>st</sup> respondent and lodged his complaint regarding an alleged bribe demand; that the complaint was recorded and, in order to confirm the veracity of the complaint, EACC devised techniques for verifying the complaint. Mr. Ongondi submitted that bribe demands are unique and the 1<sup>st</sup> respondent uses tape recording techniques and treated money in order to establish the allegations made by a complainant.
26. EACC states that it confirmed the facts alleged and arrested the petitioner and recommended that he be charged. The criminal case is ongoing as the DPP agreed with the 1<sup>st</sup> respondent that the 1<sup>st</sup>

petitioner should be prosecuted.

27. The EACC submits that it did not know the complainant or the nature of the businesses he was engaged in; nor was it a party to the alleged meeting with the petitioners. It states further that there was no collusion between it and the 4<sup>th</sup> respondent. It is its case that it acted solely within its mandate in arresting the 1<sup>st</sup> petitioner, and it followed all the procedures in law in so doing.

28. The 1<sup>st</sup> respondent denies that there was any violation of the 1<sup>st</sup> petitioner's rights. It asks the Court to be guided by decisions such as that of **Anarita Karimi Njeru (1979) 1 KLR 1272** on the requirements from a party alleging violation of constitutional rights. It submitted that parties should not rush to Court seeking protection of their rights with respect to offences committed, and asked the Court to dismiss the petition with costs as the issues being raised are defences which can be raised before the trial Court.

### **The Case for the 2<sup>nd</sup> Respondent**

29. The DPP filed submissions dated 18<sup>th</sup> July 2015 which were highlighted by Learned State Counsel, Ms. Kihara. In her submissions on behalf of the DPP, Ms. Kihara submitted that the prayers sought in the petition are unconstitutional as they seek to stop the DPP from exercising his mandate under Article 157. It is also the DPP's case that the decision to prosecute the petitioner is informed by the sufficiency of the evidence on record and not on any other factors or considerations.

30. The DPP argues, thirdly, that the 1<sup>st</sup> petitioner has failed to prove that the criminal proceedings have been instituted for purposes other than the honest enforcement of the criminal law; that the veracity of the facts raised by the 1<sup>st</sup> petitioner can be raised at the trial Court which is better placed to assess the veracity of the evidence on record; and he therefore prayed that the petition be dismissed with costs.

### **The Case of the 3<sup>rd</sup> and 5<sup>th</sup> Respondents**

31. On behalf of the Attorney General, appearing for the 3<sup>rd</sup> and 5<sup>th</sup> respondents, Learned Litigation Counsel, Ms. Wawira, relied on the grounds of opposition and submissions dated 8<sup>th</sup> December 2014.

32. According to the Attorney General, the petitioners had not raised any constitutional issues in the petition, nor had they demonstrated how the rights of the 1<sup>st</sup> petitioner had been violated.

33. The Attorney General submitted that there had been insufficient material disclosure on how the 1<sup>st</sup> petitioner was discriminated against, and apart from mentioning the Articles of the Constitution allegedly violated in the title of the petition, the petitioners had not set out the manner of violation, which is prejudicial to the respondents. They had also failed to show which of their rights would be violated if the criminal trial against the 1<sup>st</sup> petitioner proceeds.

34. According to the Attorney General, the criminal case provides a platform for the petitioners to ventilate their case. Ms. Wawira concluded that the petition does not raise any constitutional issues and should therefore be dismissed.

### **Determination**

35. This petition raises one sole issue for determination: whether there has been a violation of the 1<sup>st</sup> petitioner's rights in his arrest and prosecution for allegedly soliciting a bribe from the 4<sup>th</sup> respondent. As noted above, there is nothing before the Court that explains the joinder of the 2<sup>nd</sup> petitioner as a party. Its role appears to be solely as a witness for the 1<sup>st</sup> petitioner, and its

- averments through the affidavit of Ms. Nafuna are of no assistance to the Court in this matter.
36. The law is clear with regard to what a party alleging violation of his or her constitutional rights needs to present to the Court. As was held in the case of **Anarita Karimi Njeru (1979)** (supra) which was further amplified in the decision of the Court in **Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012**, in a constitutional petition alleging violation of constitutional rights, the petitioner has an obligation to show, with a reasonable degree of precision, what provisions of the Constitution have been violated with regard to her, as well as the manner of such violation.
37. It is not clear, from the petitioners' pleadings and submissions, how Articles 25, 27, 28, 29, 31, 35, 40, 47, 49, 50 and 236 of the Constitution, which are set out in the heading to the petition, have been violated by the respondents. I note from the petitioners' pleadings and submissions dated 19<sup>th</sup> September 2014 that while they allege discrimination, shoddy investigation, entrapment and an intention to "subvert the whole intention of a fair hearing and justice, no attempt has been made to show how the provisions of the Constitution alleged to have been violated have indeed been violated.
38. The 1<sup>st</sup> respondent has demonstrated that in exercise of its powers under the Anti-corruption and Economic Crimes Act, it followed up on a complaint, against a public officer, of soliciting a bribe. It used the method of treating currency and tape-recording the 1<sup>st</sup> petitioner as he allegedly demanded a bribe from the 4<sup>th</sup> respondent. It was satisfied that an offence had been disclosed; it forwarded the matter to the DPP, who agreed that an offence was disclosed, and commenced prosecution against the 1<sup>st</sup> petitioner.
39. As this Court observed in **High Court Petition No 482 of 2013 (Consolidated with Petition No 483 of 2013) Weldon Kechie Langat & Another –vs- The Director General of Police & Another:**
- "...the fact that criminal charges are preferred against a person is not a violation of constitutional rights. The criminal justice system is underpinned by the Constitution, with safeguards placed in the Constitution and statute to ensure protection of the rights of accused persons. Further, the discretion on when and whether to bring criminal proceedings against a party is vested in the Director of Public Prosecutions, who under Article 157(10), must be independent and not subject to the direction or control of any party."*
40. The office of the DPP is constitutionally mandated to institute and undertake all prosecutions in Kenya. Under Articles 157(10) and (11), the Constitution provides as follows with regard to the exercise of power by the DPP:
- (10) 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.*
- (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.*
41. It has been held in several decisions of the High Court that the Court will only be entitled to interfere with the exercise of powers by the Director of Public Prosecutions if it is clearly demonstrated that he has acted without due regard to the public interest, has acted against the interests of the administration of justice, or has not taken account of the need to prevent and avoid abuse of the process of the Court. In the case of **Peter George Anthony D'Costa vs AG & Anor, Petition No. 83 of 2010** in which an allegation of abuse of the powers of the Director of Public Prosecutions had been made, the Court (Majanja J), observed as follows:

***“The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioners’ fundamental rights as the petitioner will not receive a fair trial. It is the duty of court to stop such abuse of the justice system.”***

42. Similarly, in **Thuita Mwangi Ors –vs- The Ethics & Anti-Corruption Commission & 3 ORS Consolidated Petitions No. 153 & 369 of 2013**, the court stated as follows:

***“The Court may only intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of court process.”***

43. It is indeed true, as submitted by the petitioners, that the Courts have held as in the case of **Rosemary Wanja Mwanjora vs AG** (supra), that the criminal process should not be used to harass anyone. However, the petitioners have not placed before me any evidence on the basis of which I can conclude that the exercise of power by either the 1<sup>st</sup> or the 2<sup>nd</sup> respondent has been in violation of either their constitutional or statutory mandates or that it has been used to harass the 1<sup>st</sup> petitioner.

44. What they have presented in the petition and the affidavits in support, as well as the annexures thereto, is the evidence that the 1<sup>st</sup> petitioner should be presenting before the trial court in his defence, should he be found to have a case to answer, for instance the statements by members of the 2<sup>nd</sup> petitioner or the affidavit of the coordinator of the 2<sup>nd</sup> petitioner which seeks to explain the facts leading to the 4<sup>th</sup> respondent giving to the 1<sup>st</sup> petitioner the amount of Kshs 5,000.

45. Such matters, as well as the allegation of entrapment, which goes to the admissibility of the evidence against the 1<sup>st</sup> petitioner, are all matters that should be placed before the trial Court, whose duty it is to hear the evidence, weigh it, and reach a conclusion on the guilt or otherwise of the accused person before it. As Warsame J (as he then was) held in the case of **Michael Monari & Another vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011**:

***"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."***

46. It may be, as alleged by the petitioners, that the amount that the 1<sup>st</sup> petitioner was supposed to receive from the 4<sup>th</sup> respondent was not a bribe but, as submitted by their Counsel, a decretal sum paid as compensation for demolition of the 2<sup>nd</sup> petitioner’s kiosk. However, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, who have the mandate to investigate cases of corruption among public officers and to prosecute respectively, have determined that there is sufficient evidence to charge the 1<sup>st</sup> petitioner. The matter is now in the hands of the 5<sup>th</sup> respondent, which is legally seized of the matter, to hear the evidence and reach a conclusion.

47. In the circumstances, I find that there is no merit in the petition, and it is hereby dismissed.

48. Each party shall bear its own costs of the petition.

**Dated Delivered and Signed at Nairobi this 15<sup>th</sup> day of April 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr. Mwangi instructed by the firm of Mwangi & Co. Advocates for 1<sup>st</sup> and 2<sup>nd</sup> petitioners.**

**Mr. Ongondi instructed by the firm of Anthony Ongondi & Co. Advocates for the 1<sup>st</sup> respondent.**

**Ms. Kihara for the Director of Public Prosecutions, the 2<sup>nd</sup> respondent.**

**Ms. Wawira instructed by the State Laws Office for the 3<sup>rd</sup> and 5<sup>th</sup> respondents.**

**No appearance for the 4<sup>th</sup> respondent.**