



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO 272 OF 2014
NICHOLAS MURIUKI KANGANGIPETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION...
RESPONDENT

JUDGMENT

Introduction

1. On 6th June 2014, the petitioner approached this Court by way of an application under Certificate of Urgency seeking interim orders to stay his prosecution in Criminal Case No. 764 of 2014 then pending before the Chief Magistrate's Court, Milimani.
2. The Court certified the matter urgent and directed the petitioner to serve the respondents for directions on 18th June 2014.
3. On 18th June 2014, the petitioner and respondent appeared before the Court and directions were given with regard to the hearing of the petition. The Court also issued orders staying the prosecution of the petitioner pending hearing of his application.
4. When the matter next came up before the Court on 22nd September 2014, the Director of Public Prosecutions (DPP) through Learned Counsel, Ms. Kithiki informed the Court that he had called for the police file in respect of the charges against the petitioner and had made a recommendation for the withdrawal of the criminal case. A copy of the decision of the DPP had been furnished to the petitioner. Ms. Kithiki therefore requested that the petition be marked as settled.
5. She also observed that upon perusing the petition, the DPP had noted that his role in the matter was limited to prayers b, c and d on the institution of proceedings. In respect of the conduct of the investigations by the police, it was her submission that it fell within the ambit of the Inspector General of Police, and the appropriate authority to represent the inspector General would be the Attorney General.
6. In reply, Mr. Karige for the petitioner observed that the DPP had not opposed the petition and had agreed that the petitioner could be granted prayers b, c, and d, and the institution of proceedings before the Magistrate's Court was informed by ulterior motives. It was Mr. Karige's submission therefore that the petitioner should be granted an order quashing the charges before the Chief

Magistrate, and that they should not be withdrawn under section 87(a) of the Criminal Procedure Code.

7. In a ruling delivered on 25th September 2014, the Court noted the wish of the respondent to withdraw the charges against the petitioner, and the resistance of the petitioner to their withdrawal under section 87(a) of the CPC. The Court observed that upon the withdrawal of the charges, there would no longer be anything for the Court to quash, but that the petitioner would be at liberty to pursue any of his claims not addressed by the withdrawal of the prosecution.
8. When the parties next appeared before the Court on 16th October 2014, they informed the Court that the trial court had declined to have the Criminal Case No. 764 of 2014 withdrawn under section 87(a) of the CPC.
9. The Court therefore directed the respondent to file its reply to the petition and the parties to file their submissions on the issues in dispute, and the matter was argued before me on 11th May 2015.

The Petitioner's Case

10. The petitioner sets out his case against the respondents in the petition dated 16th June 2014, his affidavit in support sworn on the same date, a supplementary affidavit sworn on 18th September 2014 and a further affidavit sworn on 8th December 2014. Submissions dated 16th September 2014 were also filed on his behalf.
11. In his affidavit in support of the petition, the petitioner averred that he was arrested on 20th May 2014 by CID officers in the company of DCIO Starehe Police Division, one Mr. Ndumba SSP. He was thereafter booked and incarcerated at Kilimani Police Station vide occurrence book numbers OB 13/19/5/2014 and OB 113/21/5/2014 for a period of three (3) days. He was also temporarily transferred to Starehe CID offices and booked at Starehe Police Station vide occurrence book no OB71/21/5/204 recorded at Kilimani Police Station. He states that he was thereafter charged before the Milimani Chief Magistrate's Court on 22nd May 2014 with the offence of abduction with intent to confine contrary to section 259 of the Penal Code. The offence allegedly was that on the 19th May 2014, he had, with intent to secretly and unlawfully confine, abducted Mr. Justus Kariuki Mate, the Speaker of Embu County Assembly at Utalii Hotel.
12. He also avers that his motor vehicles, namely a Reg. Nos. KBK 445K Toyota Caldina and KBL 1985 Nissan Wingroad were, on the same day, seized by CID officers from Starehe Police Division. They were released on 29th May 2014 without any explanation offered to the petitioner or his family.
13. The petitioner states that his constitutional rights under Article 49 were violated as he was not taken to court within the constitutional period of twenty four hours; his rights under Article 31 were also violated as his property was seized, as were his rights to property under Article 40 of the Constitution. He also contends that his rights were violated as the charges against him cannot be sustained.
14. He states that Mr. Justus Mate was later found alive, and that he gave interviews in which he stated that he did not know his abductors and could not remember anything regarding his abduction. The petitioner alleges that the respondent and his officers had ulterior motives in preferring hurried charges against him, and that this amounts to an abuse of power and of the court process.
15. In his supplementary affidavit, the petitioner maintains that his rights continue to be violated as the charges against him cannot be maintained. He avers that this has been confirmed by the respondent in the letter dated 5th September 2014.

16. Mr Karige contended that the petitioner's rights were violated as he was not taken to court within the constitutional time period as he was arrested on 20th May 2014 and arraigned in court on 23rd May 2015 contrary to Article 49. It was his submission, further, that the petitioner's right to privacy guaranteed under Article 31 was violated as his motor vehicles were impounded for 10 days and were only released on 29th May 2014; and that he was also deprived of his property in respect of his motor vehicle following the act of impounding it.

17. The petitioner also alleges violation of his rights under Article 50. His contention is that this violation arose as he was taken to court without the case against him being investigated. He observes that on 5th September 2014, the respondent wrote a letter to the Director of Criminal Investigations stating that there was no sufficient evidence to support the charge against him. He contends that in preferring charges against him, the respondent considered extraneous factors and preferred the charges in breach of the law.

18. It was the petitioner's submission that the DPP is mandated under Article 157(11) to have regard to public interest. In this case, in his view, the respondent was perpetrating an abuse of the legal process and the Court has the jurisdiction to quash the proceedings. The petitioner therefore seeks the following orders:

- a. ***A declaration that the respondent has contravened the petitioner's rights under Articles 27, 29, 31, 40, 47, 48, 49, 50 and 157(6) of the constitution***
- b. ***An order that the criminal proceedings in Milimani Criminal Case No 764 of 2014 Republic – vs Nicholas Muriuki Kangangi be stayed permanently.***
- c. ***As an alternative to 3 above, an order of certiorari do issue to remove Milimani Criminal Case No 764 of 2014, Republic vs Nicholas Muriuki Kangangi and bring to this Honourable Court for quashing the charges preferred against the petitioner.***
- d. ***An order of prohibition stopping the prosecution of Milimani Criminal Case No 764 of 2014, Republic vs Nicholas Muriuki Kangangi.***
- e. ***An order of compensation for violation of petitioner's rights.***
- f. ***That the costs of this petition be provided for.***
- g. ***Any other orders that this Honourable court may deem fit to grant.***

The Respondent's Case

19. The respondent opposes the petition and has filed an affidavit in opposition sworn by PC No 56697 Cpl Kibue on 20th November 2014 and submissions dated 5th January 2015. CPL Kibue is a Police Officer with the National Police Service attached to the Directorate of Criminal Investigations stationed at Starehe Divisional Headquarters, Nairobi County.

20. Cpl. Kibue avers that the investigations into the matter the subject of this petition commenced following a report that the Speaker of the Embu County Assembly, Mr. Justus Kariuki Mate, who had been attending a meeting with the County Assembly at the Utalii Hotel, Nairobi, was missing.

21. He states that initial investigations established that the petitioner had an appointment with the Speaker before his abduction, and it was believed that the petitioner might have been involved in the abduction as he had been in constant communication with Mr. Mate. Investigations with mobile service providers established that the petitioner and Mr. Mate had been in constant communication, and this fact was also confirmed by the petitioner and Mr. Mate. According to Cpl. Kibue, it was on this basis that the petitioner was arrested, and he was charged on 22nd May

2014. The respondent avers that the petitioner was in police custody for 21 hours before he was charged in Court.
22. Cpl. Kibue concedes that the petitioner's vehicles were held until 29th May 2014. He avers, however, that the purpose of seizing the motor vehicles was to obtain DNA samples for comparison with those of Mr. Mate as part of investigations. He further states that the petitioner's motor vehicles KBL 198S Nissan and KBK 445K Toyota Caldina fitted the description of the vehicle which was used in the alleged abduction of Mr. Mate from Utalii Hotel, and it was therefore deemed necessary to subject the motor vehicles to DNA investigation.
23. Cpl. Kibue further avers that DNA investigation is time consuming as it is not a simple process, a fact that the petitioner, who is a police officer, knows. It was his deposition that after the collection of the DNA samples from the two motor vehicles, an exhibit memo was prepared and forwarded to the Government Chemist for examination, and in a letter dated 7th November 2014, the Government Chemist confirmed that the analysis of the samples submitted for DNA analysis is still ongoing and will be completed in the near future.
24. It is Cpl. Kibue's deposition that the seizure and collection of evidence from the two motor vehicles is an essential and normal procedure of investigation and the police had no ulterior motives in seizing them.
25. It is also his averment that after the investigations, the police file was forwarded to the DPP on 18th June 2014 for advice, and by a letter dated 5th September 2014, the DPP directed that leave be sought for withdrawal of the criminal case against the petitioner under section 87(a) of the Criminal Procedure Code, a decision that was taken at the earliest opportunity before any proceedings could be taken in the criminal case.
26. Learned Counsel, Mr. Ashimosi, submitted that the charges were preferred against the petitioner in May 2014, but the letter from the DPP indicating that there was insufficient evidence to support the charges against the petitioner was written in September 2014. It is the DPP's position that the petitioner was charged in accordance with the requirement that a complainant should be placed before the court within 24 hours.
27. The respondent asked the Court to consider two things. First, that the DPP operated at the earliest opportunity to withdraw the case before the criminal case could proceed. Secondly, that the DPP did not oppose the application for stay of the criminal case by the petitioner. It was the case for the DPP that these two acts were evidence of good faith on his part.
28. With respect to the withdrawal of the case, it was the DPP's submission that the letter from the DPP to the CID does not imply that investigations have been completed. His submission was that the letter should be read with the affidavit of CPL Kibue which indicates that investigations are still ongoing, and the Court should ask itself what would happen if the charges are withdrawn under a section that does not give the DPP the leeway to prefer charges once investigations are complete. It was his submission that this would leave the victim with no remedy.
29. Mr. Mule submitted that the substratum of the petition had collapsed; that if the limb of the letter CID to the effect that the petitioner should be dealt with by the Inspector General of Police and the National Police Service is what is of concern to the petitioner, that was not the subject of this petition.
30. It was also the DPP's submission that most of the complaints in the petition are against the Inspector General and the National Police Service who were not parties to the proceedings, and they ought to have been joined as the extent to which the DPP can respond to acts of the police is limited to prosecution.
31. The DPP, however, stated with respect to the complaints directed at the police that the police had explained why the petitioner's vehicles had been held and urged the Court to consider the period

for which they were held and the reasons given.

32. With regard to the period during which the petitioner was held in custody before being taken to court, the respondent submits that he was taken to court on 22nd May 2014, not 23rd May 2014, a fact confirmed by annexure WK2 in the respondent's affidavit and by the police Occurrence Book (OB) entry of 22/5/2014 annexed to the affidavit of Cpl Kibue and marked WK3. The DPP asked the Court to find the petition without merit and to find that the petitioner has made it difficult for the DPP to withdraw the criminal case the subject of the petition.

33. In his reply to the respondent's submissions, Mr. Karige observed that the letter from the DPP should be considered against the submission that the DPP has not considered extraneous matters, noting that the DPP had conceded that there was no evidence against the petitioner yet he was still claiming that there are investigations still going on.

34. With respect to the DPP's submission that the Attorney General should have been joined to the petition to represent the Inspector General of Police, Counsel responded that the IG is under the DPP who directs him on how investigations are to be conducted, and he could not now claim that the two offices are independent and should be sued separately.

Analysis and Determination

35. While the petitioner has alleged violation of his constitutional rights and sought damages for such violation, at the core of the petition, and what the petitioner seems to be concerned about primarily, is the question whether the respondents can terminate the case against him in the circumstances of this case but leave the possibility of prosecution later open. While the respondent sought to withdraw the prosecution against the petitioner under section 87(a) of the Criminal Procedure Code, the petitioner insists on having the prosecution quashed entirely.

36. I will therefore address myself to two issues in this judgment:

- i. ***Whether there has been a violation of the constitutional rights of the petitioner under Articles 40 and 49 of the Constitution;***
- ii. ***Whether the Court should quash the proceedings against the petitioner in Milimani Chief Magistrate's Court Criminal Case No. 764 of 2014.***

Violation of the Petitioner's Rights under Article 49

37. The petitioner alleges violation of his rights under Article 49 of the Constitution. He claims that he was arrested on 20th May 2014, but was not brought before the Court until the 23rd of May 2014. The respondent argues that he was held for the period provided by law: he was arrested on 20th May 2014 and was charged in Court on 22nd May 2014.

38. I have considered the averments of the parties and the documents relied on in support. I note that the petitioner was arrested late on 20th May 2014, which was a Tuesday, and was taken before the Court on 22nd May 2014, a Thursday. This fact is confirmed both by the charge sheet annexed to the affidavit of the petitioner, as well as the letter from his Counsel, Anyoka & Associates Advocates, dated 27th May 2014 addressed to the Director, Independent Police Oversight Authority, which is also annexed to the petitioner's affidavit in support of the petition. The evidence thus indicates that the petitioner was charged in court within the 24 hour period stipulated in Article 49 of the Constitution. There was therefore no violation of the petitioner's right guaranteed under Article 49 (f) which requires that an accused person.

"...be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

Violation of the Petitioner's Right to Property under Article 40

39. The petitioner alleges violation of his right to property under Article 40. This Article provides that:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

40. Article 40(2) prohibits the enactment of legislation that permits the arbitrary taking of property, while Article 40(3) requires the payment of prompt and just compensation for any property acquired for public purposes.

41. In the present case, the petitioner's property, namely, two motor vehicles Reg. Nos. KBK 445K Toyota Caldina and KBL 1985 Nissan Wingroad were seized by CID officers from Starehe Police Division. They were released on 29th May 2014. The explanation from the respondent is that the vehicles were seized for DNA testing as they corresponded to the vehicles alleged to have fitted the description of the vehicles used in the alleged abduction of the Speaker of Embu.

42. It is evident that there was no arbitrary taking of the petitioner's property, and therefore no deprivation of his property that would amount to violation of his right under Article 40. The vehicles were, in my view, taken for the legitimate purpose of investigating the alleged abduction of the Speaker of Embu. There appears to have been some legitimate basis for this. As is evident from the petitioner's own statements dated 21st and 25th May 2014 in connection with the alleged kidnapping of the Speaker of Embu, there were a number of telephone exchanges between the petitioner and Mr. Mate, as well as a meeting between them, in the two or three days prior to the alleged abduction, so that the actions of the police cannot be said to be arbitrary. Further, the motor vehicles were returned to the petitioner upon completion of the collection of samples. There was therefore no violation of Article 40 in respect of the petitioner.

43. For the same reasons, I cannot find a violation of the petitioner's right to privacy under Article 31. This Article provides that

31. Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

(b) their possessions seized;

44. The reasons advanced by the state for the seizure of the motor vehicles which I have considered above related to the collection of evidence in respect of the alleged abduction of the Speaker of Embu. It was in my view reasonable and justifiable in the circumstances of this case.

Whether the Court should quash the proceedings against the petitioner in Milimani Chief Magistrate's Court Criminal Case No. 764 of 2014

45. From the proceedings and submissions of the parties before me, it appears that the core of the petition is a desire by the petitioner for the charges against him to be withdrawn or quashed, so that there are no circumstances under which he can be charged with an offence relating to the alleged abduction of the Speaker of Embu County. When the parties appeared before me on 22nd

September 2014, the DPP through Ms. Kithiki sought to have the matter marked as settled, and subsequently sought to withdraw the matter before the Magistrate's Court, which was resisted by the petitioner. The Court consequently declined to allow the DPP to withdraw the prosecution.

46. The question that I should consider is when and under what circumstances the power of the DPP to withdraw a prosecution against a person should be exercised. Article 157(6)(c), (7) and (8) provide that the DPP may:

(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).

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

47. Following the promulgation of the Constitution, the Criminal Procedure Code was amended to provide as follows at section 82:

82.(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Republic intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged; but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.

48. Section 87, which deals with withdrawal of prosecutions in trials before subordinate courts, provides as follows:

87. In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal -

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

(b) if it is made after the accused person is called upon to make his defence, he shall be acquitted.

49. The case before me presents two important, but conflicting, public policy considerations. The first is that a person should not be hauled into court when there is insufficient evidence to sustain a charge against him, only for the DPP to withdraw the case immediately thereafter. The integrity of the petitioner in this case was put to question on insufficient evidence in his being charged before the police had sufficient evidence to sustain a charge against him, and before they had sought the advice of the DPP on whether they should proceed with the case against the petitioner.

50. The case also raises a second critical public policy consideration: whether it is in the interests of the administration of justice to fetter the powers of the DPP in a case where, as appears to be the case in this matter, he has been called upon for advice after the police have taken precipitate action to charge a person without having properly investigated a matter. I pose this question as the

petitioner asks the court to quash his trial, and to prohibit the respondent permanently from charging him with an offence arising from the same facts.

51. When one considers the provisions of Article 157(6)(c), (7) and (8), it appears that the intention was to ensure that an accused person, who has gone through a trial and has tendered his defence, is not prejudiced by the prosecution withdrawing from the prosecution or entering a *nolle prosequi* or withdrawing from a prosecution, having heard the accused person's defence, only to bring the same charges on the same facts against him.

52. A similar consideration, however, cannot apply in circumstances such as this. From the material before me, the police acted in a hurry: they arrested the petitioner, charged him in court, and only thereafter, by a letter dated 27th June 2014, sought the advice of the DPP. The DPP, once seized of the matter, and after considering the evidence relied on, advised in his letter dated 5th September 2014 that there was insufficient evidence to sustain the charge against the petitioner, and accordingly sought for withdrawal of the charges against him.

53. The petitioner has accused the DPP of malice and ulterior motives in bringing the charges against him. However, from the material before me, I am unable to discern a basis for such an allegation. As submitted by Mr. Mule for the DPP, he consented to the prosecution of the petitioner being stayed on the first day that this matter came up before this Court *inter partes*. Upon consideration of the evidence presented to his office by the CID, the DPP advised that there was insufficient evidence to sustain the charges and advised that the case should be withdrawn.

54. Article 157(6) vests state powers of prosecution in the office of the DPP. Article 157(9) requires that:

(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.

55. The facts before me demonstrate a proper exercise of power by the DPP in the sense that he conceded to the stay of the proceedings against the petitioner, and upon consideration of the evidence presented to him, directed that the prosecution be withdrawn as it was based on insufficient evidence. There was therefore no abuse of his powers, and in my view, he properly sought to withdraw the prosecution before the trial court, a request that should have been allowed in view of the stage at which it was being sought: even before a single prosecution witness had been called.

56. In this case, it is my finding that the DPP properly exercised his power in seeking to withdraw the case under section 87(a) of the Criminal Procedure Code. Such withdrawal should be allowed, so that in the event that the investigations alleged to be ongoing yield any credible evidence, the DPP would be at liberty to prefer charges against the petitioner. It would be to undermine the administration of justice if a precedent were to be set in which the DPP is prevented from withdrawing a prosecution and the prosecution is quashed and prohibited permanently, because the police have, as in this case, rashly charged a person in court, without seeking the advice of the DPP, and with insufficient evidence.

57. Which brings me to what I consider the most egregious failure on the part of the Police and the DPP.

58. As observed above, the Constitution vests state powers of prosecution in the DPP. My understanding of this provision is that all prosecutions should be undertaken under the direction and control of the DPP. There should be no prosecutions undertaken before the DPP has considered the evidence, found it sufficient, and authorized the prosecution of a suspect to proceed. Indeed, the Constitution gives the DPP power to direct the Inspector General of Police with regard to the carrying out of investigations. Under Article 157(4), it is provided that:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

59. It appears, however, that the necessary shift in the way matters relating to prosecutions are handled has not taken place, and the conduct of investigations and prosecutions has not kept step with the changes in the Constitution. As this case demonstrates, the police act as they used to: they arrest a person, it would appear as a result of pressure, either from a complainant or from the public, take him to court, and then realize they need to seek advice from the DPP. The co-operation and co-ordination that the Constitution contemplates, and the people of Kenya expect, between the office of the DPP and the National Police Service, seems to be lacking.
60. If this case is anything to go by, police officers, in reaction to a report of a crime, arrest first, charge someone in court in order to comply with Article 49(f) with respect to the constitutional time line for bringing an accused person before the court, and then begin to investigate. Only then, it appears, does the need to seek the advice and concurrence of the DPP occur to the police.
61. It must be acknowledged, from the many cases that are prosecuted successfully in this country, that we have excellent investigators and state prosecutors who painstakingly do their work, and do not effect an arrest or prosecution until they have sufficient evidence to present before a court. Such officers are to be commended, and encouraged. But we also have many others who arrest first, and seek to investigate later. This court does not need to emphasise that it undermines the administration of justice, and the public confidence in the justice system, when arrests are made and shoddy investigations undertaken.
62. In the present case, for instance, and the irony in the situation the petitioner, himself a police officer, found himself in is inescapable, what necessitated the rush to arrest the petitioner and charge him in court, before gathering evidence that was sufficient to withstand scrutiny, and seeking the advice of the DPP? Is there not, or should there not be, a practice of first gathering evidence, taking statements from suspects and witnesses, submitting such statements to the DPP, and awaiting his approval before presenting persons in Court? Should there also not be a practice, if it has not been developed already, of officers from the DPP's office working with the police to ensure that sufficient evidence is collected before a matter is presented to Court?
63. The court recognizes that the police, and at times the DPP, may be under pressure from various quarters to be seen to be taking action against persons who are perceived to have committed one offence or another. However, while recognizing the need for the expeditious investigation of offences, and the need to bring those suspected of having committed offences before the courts to face justice, the police and DPP must guard their independence and must not succumb to pressure from any quarter. Doing so not only compromises the quality of their investigations and prosecutions, but also undermines the entire justice chain, including the courts. It also undermines the independence of the DPP which is protected under Article 157(10) of the Constitution:

(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.

Disposition

64. I believe I have said enough for it to be obvious that while I deprecate the conduct of the police, and to some extent the DPP, in this matter, I am not satisfied that the public interest is served when prosecutions which have been undertaken hurriedly and without seeking the advice of the DPP lead to a permanent prohibition against prosecution. The DPP is at liberty to withdraw the prosecution, but should sufficient evidence be gathered that satisfies him that a prosecution is warranted, he should be at liberty to proceed against the petitioner.

65.The DPP, however, must take action to ensure that his office is sufficiently in control of prosecutions in accordance with his constitutional mandate.

66.In the event, the prayers sought by the petitioner are denied.

67.This matter was necessitated by the acts or omissions of the police, who, under the provisions of Article 157(4), are subject to the direction of the DPP with regard to investigation, and the DPP has the final word with respect to prosecution. In the circumstances, it is my view that the petitioner is entitled to the costs of this petition against the respondent.

68.It is so ordered.

Dated, Delivered and Signed at Nairobi this 30th day of July 2015

MUMBI NGUGI

JUDGE

Mr. Karige instructed by the firm of Waigambo Wachira & Co. Advocates for the petitioner.

Mr. Mule instructed by the office of Director of Public Prosecution for the respondent.