



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.518 OF 2012

BETWEEN

PAUL NG'ANG'A NYAGA.....1ST PETITIONER
CHRISTOPHER GITHUI.....2ND PETITIONER
PETER MWANGI GATHOGO.....3RD PETITIONER

AND

THE HON ATTORNEY GENERAL.....1ST RESPONDENT
THE COMMISSIONER OF POLICE.....2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

AND

CHINA WU YI (K) LIMITED.....INTERESTED PARTY

JUDGMENT

Case for the Petitioners

1. The Petition herein is dated 9th November, 2012 and is supported by an Affidavit sworn on the same day by the 1st Petitioner on his own behalf and on behalf of his Co-Petitioners.
2. The 1st Petitioner has urged the point that he is an Advocate of the High Court of Kenya whose services were engaged by a local company known as Ujenzi Works Limited. The said company allegedly entered into an Agreement with the Interested Party and it is stated that the Interested Party later breached it. Ujenzi then instructed him to file a suit against the Interested Party for the recovery of Kshs.1,768,000/- which suit filed was filed as Nairobi Chief Magistrate's Court Civil Suit Number 3283 of 2011, Ujenzi Works Limited vs. China Wu Yi (K) Ltd (*hereinafter referred to as "the civil suit"*)
3. He also claims that the summons to enter appearance in the said civil suit were served upon the Interested Party, who was the Defendant and that the 2nd Petitioner who is a court process server,

effected service and an Affidavit of Service was then sworn as proof of service.

4. That the Interested Party did not enter appearance in the said civil suit neither did he file a statement of defence and so the 1st Petitioner requested for Judgment in default of appearance, which was entered, because the trial court was satisfied that service had been properly effected. The 1st Petitioner then proceeded to apply for a decree to enable him execute the same on behalf of his client.
5. The 1st Petitioner alleges that he obtained the said decree and then engaged the services of the 3rd Petitioner who is an auctioneer and who proceeded to obtain warrants of attachment of sale to enable him recover the decretal amount and that thereafter a number of vehicles belonging to the Interested Party were attached.
6. The Interested Party then moved to court after the said attachment, seeking to set aside the default judgment and to lift the attachment of the vehicles, on the grounds that it was never served with the pleadings and that the stamp confirming receipt on the said pleadings did not belong to it.
7. The 1st Petitioner admits that the Interested Party managed to obtain relief from the courts, albeit temporarily, because during the hearing of an interlocutory application interpartes, the Magistrate presiding, Hon. Mr. Obulutsa, found that service of the pleadings was properly effected on the Interested Party and consequently dismissed the Interested Party's application. The Interested Party, being aggrieved by the decision of the Magistrate, filed an appeal at the High Court, dated 5th July, 2012, being **HCCA No. 385 of 2012 China Wu Yi (K) Ltd vs. Ujenzi Works Ltd** which is still pending.
8. According to the Petitioners, at about the same time that the said appeal was lodged, the Interested Party registered a complaint at Muthaiga Police Station to the effect that the service of the summons in the civil suit was improper as it did not sign the summons to enter appearance and so there was a criminal offence disclosed. It is the Petitioners' belief that the Interested Party involved the police so that it does not permanently lose the attached vehicles and in a bid to scuttle the execution process.
9. The Petitioners also claim that the police then demanded their arrest, filed charges against them before the Chief Magistrate at Milimani and warrants were issued for their arrest. The Petitioners believe that the intention of the Interested Party was to interfere with the criminal justice system by ensuring that the Courts release the Petitioners only upon the payment of a cash bail which the Petitioners may not afford thus causing them to languish and suffer in custody. They also allege that the speed with which the charges were preferred against them in the Magistrates' Court was a clear ploy to ensure that they are not granted a fair hearing.
10. The Petitioners rely on the decision in; **Mohammed Gulam Hussein Fazal Karmali & Another vs. The Chief Magistrates Court Nairobi & Another [2006] eKLR** where Nyamu, J. stated as follows;

"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."

Further, that;

"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."

He proceeded to state that;

"Prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest."

The learned judge then concluded thus;

"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."

11. The Petitioners contend that the Interested Party cannot therefore use the Police to settle civil disputes and they also claim that the Interested Party, being financially able, may be compromising the police. The Petitioners now aver that they are under threat of unlawful arrest, incarceration and arraignment in Court and pray for the following orders;

"a) A Declaration that the Offices of the Respondents are institutions bound by the Constitution and that they are under a duty to respect, uphold and defend the Constitution in terms of Articles 2(1), 3(1), 27, 29, 47, 156, 157 of the Republic of Kenya.

b) A Declaration that any arrest, incarceration and prosecution of criminal proceedings in the Chief Magistrate's Court at Milimani in Criminal Case No. 1298 of 2012 against the Petitioners relating to a civil matter already pending before the subordinates court as well as the High court would be a nullity, illegal and gross breach of their fundamental rights and freedoms and thus a violation of the Constitution of Kenya.

c) A Declaration that the Petitioners are not criminally culpable for disputes emanating from civil courts where a litigant has lost fairly and judicially and that their arrest, incarceration and prosecution in any criminal proceedings relating to the same is a gross violation of their fundamental rights and freedoms.

d) An order for compensation to the Petitioners for the undue harassment, intimidation and embarrassment caused to them for the unlawful acts of the 2nd Respondent through his officers at Muthaiga Police Station by attempting to arrest them and laying unfounded charges before a criminal court and intimidating them to facilitate the Interested Party in satisfy its malicious intent.

e) Or such other orders as this Honourable Court shall deem just to grant.

f) Costs of this Petition be provided for."

1st and 2nd Respondent's Case

12. The 1st and 2nd Respondent's filed Grounds of Opposition dated 16th November, 2011 in which they state that the Petition lacks clarity and precision in setting out the alleged constitutional violations and discloses no cause of action and the basis of attributing the alleged action upon the Government and its agents has not been set out. They also state that the orders sought by the Petitioners are untenable against the Respondents as the claim is mainly against the Interested Party who was acting in its private capacity.

13. The 1st Respondent in its Submissions dated 10th April, 2013 adds that the Petitioners have not demonstrated how their fundamental rights and freedoms have been violated and that anyone who alleges something must prove it and that this is well stated in the **Evidence Act, Cap 80** of the

Laws of Kenya and specifically **Sections 107** and **109** thereof which provide that;

Section 107.

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Section 109.

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

14. In response to the Petitioners' specific case against the Attorney General, their response is that the duties of that office are clearly provided for in **Articles 156 & 157** of the **Constitution** and **Article 157 (4) (b)** provides that;

“The Attorney General shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings”;

That therefore by dint of the above provision the Attorney General is wrongly enjoined as a party to the Petition.

15. The 1st Respondent has also made the point that this Petition stems from criminal investigations against the Petitioners and it is therefore tailored to stop the investigations specifically and adds that the orders sought are geared towards defeating the wheels of justice generally. They all seek that the Petition should be dismissed as against them.

3rd Respondent's Case

16. The 3rd Respondent filed a Replying Affidavit which was sworn by Geoffrey Waruru Kinyua of the Criminal Investigations Department and who is the investigating officer in Milimani Criminal Case No. 1298 of 2012 where the Petitioners are facing charges of forgery and theft of motor vehicles contrary to **Sections 349** and **278 (a)** of the **Penal Code** respectively.

17. It is the 3rd Respondent's further case that upon obtaining the summons to enter appearance in the civil suit, the 1st Petitioner herein returned the summons to enter appearance claiming that the same had been properly signed and stamped by the Interested Party in acknowledgement of service thereof. That on the 18th of November, 2011 the 3rd Petitioner then proceeded to the Interested Party's construction site and took possession of a number of motor vehicles on the basis that the Interested Party had not responded to Court summons and that judgment had been entered against it, hence the execution.

18. That the Interested Party thereafter and accompanied by its counsel, proceeded to the Milimani Commercial Courts and allegedly discovered that the Court summons and warrants of attachment had all been forged and when contacted the 3rd Petitioner allegedly promised to return the said motor vehicles to the Interested Party upon payment of his fees as an auctioneer and although the Interested Party paid the said fees to the 3rd Petitioner, the motor vehicles were not released.

19. Subsequently therefore, according to the said Kinyua, on the 9th and 15th of December, 2011, the Interested Party reported the matter to the Criminal Investigations Department (CID) for investigations and upon completion of the same, it was discovered that the 3rd Petitioner had forged the documents in question drawing the conclusion that the vehicles were possessed through fraudulent documentation and all the Petitioners were implicated in the alleged criminal acts.

20. It is upon investigations therefore that the 3rd Respondent charged the Petitioners with the offences of forgery, uttering false documentation, false swearing and stealing of motor vehicles, each charge contrary to diverse Sections of the Penal Code. The 3rd Respondents reiterate that none of the fundamental rights and freedoms of the Petitioners have been violated and instead add that all the Respondents are empowered by the law to maintain law and order, preserve the peace, carry out investigations and apprehend offenders and they were therefore within their constitutional mandates when they took the actions that they did take.

21. It is the 3rd Respondent's further claim that according to the investigations that were conducted, the Interested Party was not served with the Pleadings in the civil suit and the alleged stamps and signatures on the said pleadings were all forgeries, and that **Section 193A** of the **Criminal Procedure Act** provides for the existence of concurrent criminal and civil proceedings; and all cases are in any event ultimately determined on merit. They conclude by stating that the Petitioners have not adduced reasonable evidence to show that the said criminal proceedings amounted to abuse of the criminal justice system or how they have been intimidated, coerced and harassed by the Respondents jointly and severally. They all pray therefore that the Petition be dismissed with costs.

The Interested Party's Case

22. The Interested Party filed a Replying Affidavit sworn on the 26th of November, 2012 by one Gao Kejan in his capacity as Director of the Interested Party. The Interested Party states that there was a handwriting examiners' report which formed the bundle of documents they relied on in the civil case and also that the said report was not challenged in the civil case and as such the Petitioners are estopped from challenging it in this Court.

23. The Interested Party also claims that the 3rd Respondent had indicated that he had been trying to trace the Petitioners in vain, and that even the 1st Petitioner had changed his mobile number to avoid being contacted by the 3rd Respondents. It adds that the complaints against the Petitioners were lodged immediately their vehicles were taken without any proclamation or service of the court documents and that to date they do not know where their motor vehicles are and whether they were auctioned, and if they were auctioned, who the bidders were or the documentation pertaining to change in ownership.

24. The Interested Party also states that **Article 157(4)** of the **Constitution** provides that;

“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.”

They submit in that regard that investigations were done and a finding was made and these findings have not been challenged or quashed in any competent Court of law.

25. Further, that **Article 157(4)** and **(10)** of the **Constitution** provides 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”.

“(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.”

It is the Interested Party's position therefore that these provisions depict that Courts should not be seen to interfere with the office of the Director of Public Prosecutions in a manner that would impede the independence of that office.

26. The other position taken by the Interested Party is that the Petitioners are seeking orders from this Court to prohibit the Chief Magistrate's Court and the Police from carrying out their constitutional and statutory duties under the guise that their fundamental rights and freedoms are being infringed.
27. The Interested Party further adds that fundamental rights are subject to the rights of others and the public interest which includes crime detection, control, prevention and prosecution and the Constitution allows the deprivation of personal liberty upon reasonable suspicion of a person having committed or about to commit an offence. The Interested party also submits that the Chief Magistrate's Court is capable of giving the Petitioners a fair hearing and as such none of their fundamental rights are threatened with infringement.
28. The Interested Party insists that the Petitioners have not demonstrated or exhibited anything to show that the investigations were mounted for an ulterior purpose or object and that the Petitioners have not demonstrated that the Court hearing the criminal case is incompetent or partial because no one knows the specific Magistrate or Court to hear the matter. They rely on Miscellaneous Application 68 of 2011 Michael Monari & Anor vs. The Commissioner of Police & 3 Others and Miscellaneous Application No. 240 of 2011 Cape Holdings Limited vs. The Attorney General & Another to buttress their position and in seeking that the Petition be dismissed with costs.

Determination

29. I have had an in-depth appreciation of the issues raised in this Petition and this Court is being called upon to determine whether the processes undertaken by the Police and the Director of Public Prosecution when investigating complaints lodged with them in this case were conducted constitutionally and whether they violate the fundamental rights and freedoms of the Petitioners.
30. I note that there exists a criminal case lodged at the Chief Magistrate's Court, Nairobi where the Petitioners have been charged with various offences including forgery and stealing of a motor vehicle. **Forgery** is defined in the Black's Law Dictionary as;

"The falsely making or materially altering with intent to defraud, any writing."

In the Penal Code Chapter 63 Laws of Kenya, "Forgery" is defined in **Section 345** as;

"The making of a false document with the intent to defraud or deceive."

Section 268 of the **Penal Code** defines the offence of "stealing" in the following words;

"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."

31. In that context, Petitioners have indicated that the issues to be raised in the Criminal Case were already ventilated in the Civil suit and as such any arrest or incarceration in relation to the Criminal Case pending in the Chief Magistrate's Court would be a breach of their fundamental rights and freedoms. My view on that point is that it has been well established that a civil suit in which the matters in issue are substantially in issue in separate criminal proceedings can both run concurrently. In that regard, **Section 193A** of the **Criminal Procedure Code** provides that;

"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."

Further, in the case of Peter George Antony D'costa v Attorney General and Another, Nairobi Petition No. 83 of 2010 (Unreported), the Court stated that;

“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.”

32.I will apply the principles above in determining the present Petition and before I delve into whether this Court should interfere with the criminal proceedings instituted by the 3rd Respondents at the Lower Court, I wish to comment on other issues raised in this Petition. The crux of this Petition as stated above is the case instituted at the Chief Magistrate's Court which is clothed with criminal jurisdiction to determine matters filed before it. Several players work together within the criminal justice system each with a different role such as those assigned to the Office of the Director of Public Prosecutions and the National Police Service. Elsewhere above I have reproduced **Article 157 (4) and (10)** of the **Constitution** of Kenya and I need not repeat the powers granted to both offices.

33.Further, **Article 243** of the **Constitution** of Kenya further provides that;

“There is established the National Police Service.

(2) The National Police Service consists of—

(a) the Kenya Police Service; and

(b) the Administration Police Service.

3. The National Police Service is a national service and shall function throughout Kenya.

(4) Parliament shall enact legislation to give full effect to this Article.”

34.The legislation contemplated under **Article 243 (4)** is the **National Police Service Act No. 11A of 2011** which was assented to on the 27th of August, 2011 and commenced on the 30th of August, 2011. **Section 24** thereof stipulates that the functions of the Kenya Police Service shall be the—

“(a) provision of assistance to the public when in need;

(b) maintenance of law and order;

(c) preservation of peace;

(d) protection of life and property;

(e) investigation of crimes;

(f) collection of criminal intelligence;

(g) prevention and detection of crime;

(h) apprehension of offenders;

(i) enforcement of all laws and regulations with which it is charged; and

(j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.” (Emphasis mine)

Section 49 then provides that;

“(1) *Subject to Article 244 of the Constitution and the Bill of Rights, a police officer may exercise such powers and shall perform such duties and functions as are by law imposed or conferred on or assigned to a police officer.*

2. *Where any duty, power or discretion is imposed or conferred by this Act or any other law on a police officer of any specified rank or holding any specified office, the police officer, shall, in the performance of such duty or the exercise of such power or discretion, and subject to the lawful orders and directions of any police officer to whom the police officer is directly subordinate, and any senior police officer, if the occasion arises where it is expedient to do so, perform an such duty or exercise any such power or discretion.*
6. *Every police officer shall be competent to serve or execute any summons warrant or other process whether directed to him or to any other officer.*” (Emphasis mine)

The foregoing dictates that the Constitution has created the office of the Director of Public Prosecutions and the National Police Service each tasked with functions and roles which are entrenched in the Constitution and in statute. In Luka Angaiya Lubwayo & Another vs. Gerald Otieno Kajwang & Another Petition No. 120 of 2013 this Court stated that;

"In that regard, I am alive (as stated above) to the fact that this Court under Article 165 (3)(a), cannot enter into matters reserved for another body established by statute. I am also aware that this Court, under Article 165 (3) (d) (i) and (ii) of the Constitution can exercise its jurisdiction to determine whether any law or anything done under the authority of the Constitution is inconsistent with the Constitution. Article 165 (3) (a) of the Constitution states that the High Court can; “hear any question relating to the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Court.”

35. Having said so, I maintain therefore that this Court can only interfere with and interrogate the acts of other Constitutional bodies if there is sufficient evidence that they have acted in contravention of the Constitution, *inter-alia* and one of the complaints made herein is that the Petitioners were unlawfully arrested. Arrest is a form of state constraint applied to a person, during which the person is placed under detention, is imprisoned and is deprived of his right to move freely. Paragraph 3 of Article 5 of the European Convention of Human Rights and Fundamental Freedoms (the Convention) of the Council of Europe stipulates the following criteria for arrest and detention;

- a. A reasonable doubt that an offence has been committed by the person
- b. There are grounds to presume that it is necessary to hamper a crime to be committed by him and prevent his escape after the crime has been committed.

36. Under the Constitution of Kenya, 2010 an arrested person has rights as provided for under **Article 50** thereof and if accused, his rights are also protected by the same Article. In the event that a person is aggrieved by the due process in the dispensation of justice, he also has recourse to institute proceedings under **Article 22** and seek appropriate reliefs as provided for by **Article 23** of the **Constitution**.

37. The Petitioners in this case have expressed fear that the warrants of arrest so issued or to issue will curtail their freedom and they have also indicated that the Interested Party has used its financial might to compromise the 3rd Respondent. The Petitioners also believe that the 3rd Respondent is acting in cahoots with the Interested Party to defeat the criminal justice system. If I may pause at this point, it is obvious to me that all these allegations are based on beliefs, thoughts and apprehensions which are ambiguous. It is trite law that he who alleges must prove. The Petitioners in this case must also demonstrate with particularity how their rights have been infringed and the violation or threat they face and the damages

suffered by this alleged infringement - See Anarita Karimi Njeru vs. The Attorney General (1979) KLR 154).

38. From the foregoing, there is a clear public interest in ensuring that crime is prosecuted and that a wrongdoer is convicted and punished. It also follows from this that it will generally be in the public interest to prosecute a crime where there is sufficient evidence to justify the contrary e.g. unless there is some countervailing reason not to prosecute. It is evident that the Petitioners are seeking protection after they have been arrested and charged but this Court cannot prevent the police and the DPP from carrying out their investigations if they have reasonable suspicion that an offence has been committed. The police ought to do their investigations and if they come to the conclusion that an offence has been committed, the suspect should be arrested and charged. The DPP and the Police working jointly have a constitutional duty and obligation to maintain law and order, initiate and conclude investigation and also apprehend and prosecute offenders.

39. If the Petitioners or any other party for that matter, are charged with a penal offence, they have the right to be presumed innocent until proved guilty according to law in a public trial at which they have had all the guarantees necessary for their defence. **Article 159 (2)** of the **Constitution** provides as follows in that regard;

“In exercising judicial authority, the Courts and tribunals shall be guided by the following principles—

- (a) justice shall be done to all, irrespective of status;*
- (b) justice shall not be delayed;*
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*
- (d) justice shall be administered without undue regard to procedural technicalities; and*
- (e) the purpose and principles of this Constitution shall be protected and promoted.”*

The same protection is also afforded by **Article 50** of the **Constitution** which has extensive provisions as to the right to a fair hearing. It provides as follows;

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

(2) Every accused person has the right to a fair trial, which includes the right—

- (a) to be presumed innocent until the contrary is proved;*
- (b) to be informed of the charge, with sufficient detail to answer it;*
- (c) to have adequate time and facilities to prepare a defence;*
- (d) to a public trial before a court established under this Constitution;*
- (e) to have the trial begin and conclude without unreasonable delay;*
- (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(I) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

(5) An accused person—

(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

(6) A person who is convicted of a criminal offence may petition

the High Court for a new trial if—

(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

(b) *new and compelling evidence has become available.*

(7) *In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.*

(8) *This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.*

(9) *Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.”*

40. The Petitioners have not claimed that any of the above rights has been violated and having established the foregoing, I will now revert to the question raised earlier on whether this Court should interfere with proceedings taking place in another Court albeit a lower one with competent jurisdiction. In order to ascertain whether indeed the Petitioners did not commit the offences they are charged with, either this Court will put on another hat and begin to investigate the complaints or the offices tasked with investigating the complaints will perform their statutory and constitutional duties and prove the same beyond reasonable doubt before a Court of competent jurisdiction.

41. I will reiterate the holding in **Francis Mbugua vs. Commissioner of Police and 2 Others Petition No. 79 of 2012** where this Court stated as follows and in agreement with the holding in **Elory Kraneveld vs. the Attorney General & 2 Others, Nairobi Petition No. 153 of 2012;**

“Whereas every person has a right to the protection of the Constitution, it is not in all cases that Orders as prayed should be granted. I say so because the Petitioner has conveniently forgotten that the Constitution must be read holistically for its real meaning and import to be discerned. Our judicial system is not one where a judge is granted such powers as to investigate criminal complaints. That power lies in Article 157(4) of the Constitution. Further, whether or not the investigations leading to the Petitioner’s arrest disclosed an offence is not for this court to determine as I am not seized of the evidence to be presented against him. The Petitioner has literally jumped the gun because he has presented his defence of innocence not before the trial Court but this Court. His actions are premature.” (Emphasis mine)

42. I must also associate myself with the findings of Warsame, J. in **Miscellaneous Application 68 of 2011 Michael Monari & Anor vs. The Commissioner of Police & 3 Others** where he held that;

"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."

43. I need not say more because his statements express my clear position in the present case.

44. It is therefore obvious to me that looking at the facts and the law as I have rendered above, the Petitioners are jumping the gun and are seeking orders that this Court cannot properly grant. In any event, I see no violation or threatened violation of any constitutional right or freedom due to them.

45. For the above reasons, I find no merit in the Petition before me and the same is dismissed. As to costs, clearly the Petitioners were pursuing personal interests. Costs follow the event and so they shall pay costs to the Respondents and Interested Party.

46. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF SEPTEMBER,
2013**

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Were for Interested Party

Mr. Wanyama holding brief for Mr. Gachie for Petitioner

No appearance for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE