REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL MISCELLANEOUS APPLICATION 435 OF 2011

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION.

IN THE MATTER OF: THE CRIMINAL PROCEDURE ACT AND THE STANDARDS ACT

REPUBLIC……...……...……..APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS…….....……..1ST RESPONDENT

CHIEF MAGISTRATE'S COURT, NAIROBI…….....…….2ND RESPONDENT

EX PARTE ……..HENRY KIPRONO KOSGEY

AND

PATRICK OMWENGA KIAGE…….....…….INTERESTED PARTY

RULING

THE BACKGROUND
The Parties to the Application.

Despite the fact that the Notice of Motion filed in respect of this matter refers to the ***Republic*** as the ***Applicant***, the Chief Magistrate, Nairobi, as the ***Respondent*** and Henry Kiprono Kosgey as the ***Ex parte,*** I will refer to the parties herein as follows, to avoid confusion.

(1)Henry Kiprono Kosgey will be referred to as the Applicant and Accused interchangeably.

(2)The Honourable The Attorney General as the Respondent and Prosecutor interchangeably.

The Criminal Case Sought to be Prohibited

The Criminal Case sought to be prohibited is the Chief Magistrate's Court Criminal Case No. ACC 1/2011, Republic - Versus - Henry Kiprono Kosgey.

The Charges Facing The Applicant
The charges before the court comprises of 12 counts.

(i) In count 1 the Applicant is charged with the offence of Abuse of office contrary to Section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 1 are that on the 19th day of November, 2009 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi Province of the Republic, being the Minister for Industrialization, used his office to improperly confer a benefit on Hussein H. Mohamed t/a Lagdera Technologies, by exempting four (4) units of motor vehicles imported by the said Hussein H Mohamed t/a Ladgera Technologies from the application of Kenya Standards (KS) 1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to do so.

(ii) In count 2 the Applicant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 2 are that on the 9th day of February, 2010 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi Province of the Republic, being the Minister for Industrialization, used his office to improperly confer a benefit on Simon Maina Kamau by exempting two(2) units of motor vehicle imported by the said Simon Maina Kamaufrom the application of Kenya Standards (KS)1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to do so.

(iii)In count 3 the Applicant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 3 are that on the 9th day of February, 2010 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi Province of the Republic, being the Minister for Industrialization, used his office to improperly confer a benefit on Lawrence Karanja Waweru by exempting one (1) unit of motor vehicle imported by the said Lawrence Karanja Waweru from the application of Kenya Standards (KS)1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to do so.

(iv) In count 4 the Applicant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 4 are that on the 23rd day of March, 2010 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi within Nairobi, being the Minister for Industrialization, used his office to improperly confer a benefit on Yuasa International Ltd, a motor vehicle importer, by exempting ten (10) units of motor vehicle imported by the said Yuasa International Ltd from the application of Kenya Standards (KS)1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to do so.

(v) In count 5 the Applicant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 5 are that on the 3rd day of June, 2010 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi Province, being the Minister for Industrialization, used his office to improperly confer a benefit on Yuasa International Ltd, a motor vehicle importer, by exempting twenty two (22) units of motor vehicle imported by the said Yuasa International Ltd from the application of Kenya Standards (KS)1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to

do so.

(vi) In count 6 the Applicant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 6 are that on the 10th day of May, 2010 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi Province, being the Minister for Industrialization, used his office to improperly confer a benefit on Pakens International Ltd, a motor vehicle importer, by exempting twelve(12) units of motor vehicle imported by the said Pakens International Ltd from the application of Kenya Standards (KS)1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to do so.

(vii) In count 7 the Applicant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 7 are that on the 19th day of May, 2010 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi Province, being the Minister for Industrialization, used his office to improperly confer a benefit on Pakens International, a motor vehicle importer by exempting three(3) units of motor vehicle imported by the said Pakens International Ltd from the application of Kenya Standards (KS)1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to do so.

(viii) In count 8 the Applicant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 8 are that on the 26th day of May, 2010 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi Province, being the Minister for Industrialization, used his office to improperly confer a benefit on Pakens International Ltd, a motor vehicle importer, by exempting eighteen (18) units of motor vehicle imported by the said Pakens International Ltd from the application of Kenya Standards (KS)1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to do so.

(ix) In count 9 the Applicant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 9 are that on the 8th day of June, 2010 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi Province, being the Minister for Industrialization, used his office to improperly confer a benefit on Pakens International Ltd, a motor vehicle importer by exempting eighteen (18) units of motor vehicle imported by the said Pakens International Ltd from the application of Kenya Standards (KS)1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to do so.

(x) In count 10 the Applicant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 10 are that on the 19th day of May, 2010 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi Province, being the Minister for Industrialization, used his office to improperly confer a benefit on Al Pacific Ltd by exempting eight (8)

units of motor vehicle imported by the said Al Pacific Ltd, a motor vehicle importer, from the application of Kenya Standards (KS)1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to do so.

(xi)In count 11 the Applicant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 11 are that on the 26th day of May, 2010 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi Province, being the Minister for Industrialization, used his office to improperly confer a benefit on Al Pacific Ltd – a motor vehicle importer - by exempting eight (8) units of motor vehicle imported by the said Al Pacific Ltd from the application of Kenya Standards (KS)1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to do so.

(xii) In count 12 the Applicant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars in count 12 are that on the 13th day of May, 2010 at the Ministry of Industrialization Headquarters, Teleposta Towers, Nairobi within Nairobi Province, being the Minister for Industrialization, used his office to improperly confer a benefit on Bangal Cars – a motor vehicle importer, by exempting seven(7) units of motor vehicle imported by the said Bangal cars from the application of Kenya Standards (KS)1515:2000 Code of Practice for Road vehicles under Legal Notice No. 69 of 2001 as read with the Legal Notice No. 78 of 2005 without the advice of National Standards Council and without satisfying himself that it was in the national interest to do so.

The Prosecution's Case

The Applicant herein, ***Henry Kiprono Kosgey***, (hereinafter referred to as the Applicant and Accused interchangeably) was a Minister for Industrialization thus a public officer under the repealed Constitution and a state officer within the meaning of the Constitution of Kenya, 2010.

Among his responsibilities, the Minister was charged with ***enforcing national standards,*** whose code stipulated that cars more than eight (8) years old should not be imported in the country subject to the exemptions clearly set out.

It was not in dispute that the Minister had power to exempt any motor vehicle from the application of the national standards. It was the prosecution's case that that power had to be exercised within very clear parameters. One of the parameters, the prosecution contended, was that the Minister could exempt any vehicle only if he had first obtained the advice of the National Standards Council in addition to satisfying himself that it was in the best national interest to do so.

It was further contended by the prosecution that the Minister exempted several motor vehicles, which form the basis of the 12 counts of the charges levelled against him, without obtaining the advice of the National Standard Council. That, according to the prosecution, amounts to a criminal offence hence the 12 charges levelled against him.

It was also contended by the prosecution that the vehicles whose particulars forms the basis of the charge aforesaid were exempted even after protest from local motor dealers. That the said exemptions were at any rate done selectively hence conferring benefit on the part of the Minister and the beneficiaries at the expense of the state.

Last but not least, it was also contended by the prosecution that car manufacturers as well as car dealers negotiated guidelines which became known as National Standards referred to as KS1515:2000. The same was crystallized in Legal Notice No. 69 of 2001 which provides:

THE STANDARD ACT
(Cap 496)

"IN EXERCISE of the power conferred by section 9 (2) of the Standards Act, the Minister for Tourism, Trade and Industry on the advice of the National Standards Council, makes the following Order:-

THE STANDARDS (No. 1) order, 2001

1. ***This order may be cited as the Standard (No. 1) Order, 2001.***

2. ***The Kenya Standard having been declared as set out in the first and second column of the schedule, no person shall manufacture or sell the commodity or use the methods and procedure on or after the date of publication of this Order unless the commodity or methods or procedures comply with the requirement of the relevant Kenya Standard.***

SCHEDULE

Number Code of Practice

KS-1515:2000 Kenya standards code of practice for inspection of road vehicles.

Made on the 27th April, 2001"

That it was therefore incumbent upon successive Ministers to enforce the said standards. To that end, Legal Notice No. 78 of 2005 was promulgated. The said Legal Notice provides:-

" (THE STANDARD ACT (Cap 496)

IN EXERCISE of the powers conferred by section 4 and 20 of the Standards Act, the Minister for Trade and Industry, in consultation with the National Standards Council, makes the following Order:-

THE VERIFICATION OF CONFORMITY TO KENYA STANDARDS OF IMPORTS ORDER, 2005.

1. ***This Order may be cited as the verification of Conformity to Kenya Standards of Imports Order, 2005.***

2. ***The Kenya Bureau of Standards shall publish a list of goods which shall be subjected to verification of conformity to Kenya Standards or approved specifications.***

3. ***A person who imports goods must ensure that the goods meet Kenya Standards or approved Specifications.***

4. ***The Kenya Bureau of Standards shall appoint an inspection body or bodies in the country of origin of goods to undertake verification of conformity to Kenya Standards or approved specifications.***

5. ***All goods which are specified by the Kenya Bureau of Standards in accordance with paragraph 2 shall be subjected to verification of conformity to Kenya Standards or approved specifications in the country of origin by an inspection body authorized by the Bureau, and may be re-inspected at the port of entry by the Bureau if it is deemed necessary.***

6. ***(1) The Kenya Bureau of Standards shall issue a certificate of conformity in respect of goods that conform with Kenya Standards or approved specifications and a non conformity report in respect of goods which do not.***

(2) ***No Goods that do not conform to the Kenya Standards or approval specifications shall be permitted***

into Kenya, and shall be re-shipped, returned or destroyed at the expense of the importer.

7 ***(1) Goods specified in accordance with paragraph 2 arriving at the port of entry without a certificate of conformity shall be subjected to destination inspection at a fee of 15% of the cost, Insurance and Freight value of the goods***

(2) ***The importer of such goods shall, in addition to the fee imposed in paragraph (1), execute a security bond equivalent to the said fee.***

(3) ***Where goods subjected to destination inspection under sub paragraph (1)fail to conform to Kenya Standards or approved specifications, they shall be re-shipped, returned or destroyed at the expense of the importer.***

8. The Minister may, on the advice of the National Standards Council, exempt any imports from the provisions of this order where the Minister is satisfied that it is in the national interest to do so.

9. The Quality Inspection of Imports Order, 1998, is revoked.

Made on the 29th June, 2005"

It was the prosecution's case that the said Legal Notice No. 78/2005 was intended to provide a window through which the Minister concerned could lawfully allow vehicles below eight (8) years to be imported in the country. That the wording of clause 8 of the Legal Notice was couched in a way which does not allow equivocation. The expression that the Minister ***may*** allow importation of motor vehicle was discretionary save that the discretion had to be exercised with the criteria of eight (8) years in mind.

Arising from the promulgation of the said Legal Notice, it was incumbent upon the Minister to seek the advice of the National Standards Council(hereinafter referred to as NSC) . That he would not, without the advice of National Standard Council (NSC), authorize importation of vehicles more than 8 years old into the country. That he had to ensure that any authorization of such vehicles was within the national interest subject to the exemptions aforesaid.

It was the prosecution's further case that exemptions which constitute the basis of the 12 counts were granted to several companies and individuals. The said companies and individuals imported vehicles for purposes of trade. That matters could have been different if they imported the same for building Kenyan roads, or for use by the military and ambulances for the hospitals in the national interest.

That when the Permanent Secretary and Kenya Bereau of Standards (KEBS) raised the issue the applicant, in writing, said that he had a right to give the exemption thereby putting a stopper to any challenge to his powers not to exempt importation of vehicles which were not in the national interest.

The Defence Case

It was contended, at the close of the prosecution's case, by the defence, that no ***prima – facie*** case had been established to warrant putting the accused on his defence.

That the charges levelled against the accused's under Section 46 as read together with section 48 of the Anti-Corruption and Economic Crimes Act No 3 of 2003 and the particulars thereof based on the regulations made pursuant to Legal Notice 69 of 2001 as read together with Legal Notice 78 of 2005 were bad in law for duplicity.

That the particulars of the charges are based on a Legal Notice No. 69 of 2001 as read together with Legal Notice No. 78/2005. The said Notices were made pursuant to the Standards Act (Cap 496) Laws of Kenya, while the charges are brought under Anti - Corruption and Economic Crimes Act. If the accused was to make a defence he would be embarrassed. He would not know whether to base his defence on the Regulations or the Anti-Corruption and Economic Crimes Act. This argument is based on

the principle that in criminal law an accused person must be confronted with a specific charge which must be specifically proved. That this is a basic fundamental right which is underpinned in the concept of fair trial.

That the particulars of the charge are based on Legal Notice No. 69 of 2001 as read together with Legal Notice No. 78 of 2005. However, there is no scintilla of evidence tendered by the prosecution to confirm that Legal Notice No. 69/2001 and Legal Notice No. 78/2005, being subsidiary legislation, were ever laid before Parliament for approval to gain force of law.

Accordingly, the said regulations have no force of law. At best these regulations remain as proposed draft and indeed Karanja Thiongo (PW 1) stated that they were still draft guidelines at the time of his testimony on 2nd March, 2011. This position was confirmed by Josephat Kalo (PW 4) and Joel Kioko (PW 6).

It has now emerged that these guidelines were officially adopted by the National Standard Council in a meeting in April, 2011.

Yet the Accused/Applicant was charged on 4th January, 2011 and the alleged offences, in count 1 – 12, took place between November, 2009 and June, 2010. This was clearly before the adoption of the regulations referred to above by the National Standard Council and approval by Parliament.

In the premises, the charges as laid cannot lie in law.

The particulars of the charge are based on subsidiary legislation while the main charge is under the statute (read Anti - Corruption & Economic Crimes Act No. 3 of 2003). In the circumstances it would be difficult to ascertain whether he (accused) will defend himself for breaching regulations or breaching sections of the Anti Corruption and Economic Crimes Act No. 3 of 2005.

That under section 48 of Anti Corruption and Economic Crimes Act No.3 of 2003 to constitute an offence there must be improper use of the office by the accused. However, no single prosecution witness testified that the accused used his office to confer a benefit to himself or to various beneficiaries.

Although it was alleged in count 1 that the accused used his office to benefit Mr Hussein Mohammed, yet the said Hussein Mohammed was not called to verify whether he received a benefit from the accused.

Even the nature of the benefit has not been disclosed. The same applies to allegations in count 2 and 3. The persons who the accused are alleged to have benefited were not called to give evidence. The charges in respect of those counts must therefore fail.

In respect of counts 4 and 5 the Director of M/s Yuasa International Ltd testified that he paid all taxes. Hence there is no offence Disclosed in respect of count 4 and 5.

In respect of count 6, 7 , 8 and 9 the Directors of M/s Pakens International Ltd were not called to give evidence as to the nature of the benefit it received from the Minister.

In respect of count 10 and 11 the benefit which is alleged to have been conferred upon the Minister by M/s Al Pacific Ltd was not disclosed since no director of the said company was called to testify.

In respect of the allegation of discrimination it was alleged through PW 14 that the waivers by the accused were done in a discriminatory manner. Yet no witness was called to testify that some traders applied for exemption but the accused denied them the privilege thus amounting to discrimination. In any event discrimination does not constitute a criminal offence in Criminal Law.

It was strongly urged that the evidence of Dr. Karanja Kibicho(PW 2) to the effect that the accused breached the regulations or guidelines does not lie in law. That evidence, the defence urged, was incredible because regulations were adopted by National Standard Council (NSC) after the exemptions had been granted. Accordingly, that document cannot be used to criminalize acts which had taken place

before its existence.

It was also strongly urged that Legal Notice No. 78/2005 conferred a discretion on the accused to seek the advice of National Standards Council. ***The operative word in that Legal Notice is may***. Hence the accused was not under any obligation to seek the advice of the National Standards Council anyway. He could act on his own.

It was further urged that the motor vehicles exempted attracted custom duties and other taxes in which case they generated revenue to the Government. Hence no loss was proved.

Last but not least, it was strongly urged that PW 1 complained to the National Standard Council after the exemptions had been granted. PW 1 then set up a technical committee to advise the accused. That committee came up with the policy guidelines on exemptions. In the premises charging the accused with criminal offence on the basis of acts done before the policy on exemptions was put in place amounts to criminalizing the said acts retrospectively. For a criminal charge to stand, the acts complained of must have happened after the law is in place and ***not before***.

Notwithstanding the arguments advanced by the defence, the learned trial Magistrate put the applicant/accused on his defence thereby provoking this application to halt the criminal proceedings.

The Application

By a Notice of Motion dated 25th November, 2011, pursuant to the Provisions of Order LIII, Rule 3 of the Civil Procedure Rules, 2010, the applicant sought orders that:-

(a) An order for certiorari be issued to bring to this honourable Court the proceedings in Chief Magistrate's Court Criminal ***Case No. ACC 1/2011, Republic - Versus Henry Kiprono Kosgey*** for the purposes of being quashed.

(b)An order of prohibition be issued to prohibit the Respondents by themselves or whosoever from proceeding with and/or further hearing Chief Magistrate's Court Criminal Case number ***ACC 1/2011, Republic - Versus Henry Kiprono Kosgey*** onthe charges laid against the Applicant.

(c) An order to stay any further proceedings and/or hearing of the Chief Magistrate's Court Criminal Case Number ACC 1/2011, **Republic Versus Henry Kiprono Kosgey** pending the hearing and determination of this suit.

(d)Such other or further relief that this honourable Court may deem just and expedient to grant.

The application is based on the grounds set out in the statutory statement dated 10th August, 2011 and the verifying affidavit of ***Henry Kiprono Kosgey*** sworn on the 10th day of August, 2011.

On the 16th day of May, 2012, before the hearing of the Motion, the parties to the application entered into a consent, which was endorsed by the honourable court, on the 22nd day of May, 2012 as an order of the court.

I have taken the liberty of reproducing the said consent ***verbatim***herein - below because it will be important when the court issues the final orders.

"By consent

1. The applicant hereby abandons in its entirety the grounds in the statutory statement under the heading of "want of authority challenging the authority of the interested party Patrick Kiage to conduct prosecution.

2. The interested party hereby withdraws its Recusal application by way of Notice of Motion dated 9th March, 2012.

3. The parties hereby agree to proceed for hearing of the notice of Motion dated 25th November, 2011 on the remaining grounds set out in the statutory statement.

4. There be no order as to costs"

Subsequently, the parties appeared before me, and as said earlier, I endorsed the said consent as an order of this court.

Accordingly, I shall restrict myself to the arguments relating to the following grounds:-

Abuse of Power

3.6 The Applicant is accused of having abused his office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act. Section 46 of the Act deals with the situation of a person who uses his office to "*Improperly confer a benefit on himself or any one else*…." Whereas Section 48 stipulates the sentence.

3.7 The applicant is alleged to have exercised a discretion as a Minister for Industrialization without "*seeking advise of the National Standards Council "* Failure to seek advice is not ***ipso facto a criminal act.***

3.8 The regulation that was allegedly violated confers a discretion upon the Minister in the following terms:

" 8 *The Minister may, on the advice of the National Standards Council exempt any imports from the provisions of this Order where the Minster is satisfied that it is in the national interest to do so"*

3.9 A breach of regulation does not equal to a commission of a criminal offence and as held in ***Republic Vs Hosea Waweru &*** ***Joram Mwenda Gauntai Vs The Chief Magistrate, Nairobi Civil Appeal No 228/2003;***

"Any perceived criminal charges on the regulations would in most cases be ill-advised"

4.2 The order of certiorari and prohibition are the most efficacious in the circumstances**.**

4.3 No other remedy exists which is determinative of the violation which have occurred with the knowledge, express and/or implied of the Respondent **"**

The Applicant's Case

Based on the aforesaid grounds, it was urged, on behalf of the

Applicant, that the foundation of the criminal charges against him are the regulations made under The Standards Act (Cap 496) Laws of Kenya vide Legal Notice No. 69 of 2001 as read together with Legal Notice No. 78 of 2005.

That the said regulations does confer a discretion upon the Minister, on advice of the National Standards Council, to exempt Imports from the order where the Minister is satisfied that it is in the national interest.

During his tenure as the Minister for Industrialization, and particularly during the material period, there were no regulations made by the National Standards Council which the Council could utilize to give advice to the Minister. In absence thereof, the Council was devoid of any advise it could offer to him in the discharge of his Ministerial duties.

As regards the exemption he made, it was contended on behalf of the Applicant, that he was guided by the fact that it was in the national interest for those exemptions to be made.

That his prosecution, in the light of the foregoing, amounts to an abuse of the process of the Court and the High Court has powers and duty to prevent the abuse of the court process by issuing orders of certiorari and/or prohibition.

Accordingly, the applicant sought for the issuance of the orders aforesaid.

The Respondent's Case

The application was opposed by the 1st and 2nd Respondents. In doing so reliance was placed on the replying affidavit of ***Edwin Okello***, a state counsel, sworn on the 29th day of March, 2012 and filed on the same day. Counsel equally adopted the evidence embodied in the said affidavit.

By way of submission, the counsel for the 1st and 2nd Respondents argued that the case stalled, by an order of this court, at the stage when the Applicant had been called upon to make a defence to the charges. At that stage three principles enumerated in the celebrated case of NATIONAL EXAMINATION COUNCIL VS REPUBLIC (EX-PARTE): GEOFREY GATHENJI NJOROGE ,NANCY SITATI,JULIET WAMBU, RAHAH NYAMBURA ,GRACE WAMBUI ,ALICE WANJA

BEATRICE WAMBUI, SALOME NJOKI & JULIET BUSIGYE must be met by the applicant, **viz;**

(1)Whether there has been lack of jurisdiction;

(2)Excessive use of jurisdiction;

(3)Whether the rules of national justice has been adhered to.

In this case the statement of facts and verifying affidavit does not disclose the breach of the three principles.

The issue of whether the charges are proper or not should be canvassed in the trial court – subordinate court.

In any event the sufficiency of the evidence or not is a matter to be decided by the trial court – subordinate court.

Last but not least that the case of ***REPUBLIC VS HOSEA WAWERU AND JORAM MWENDA GUANTAI (Supra)*** was in respect of the old regulations. The charge herein is based on the Procurement and Disposal Act of 2005 and the regulations made thereunder in the year 2006.

Analysis of the Facts of the Case Viz – á- Viz the Law and the Evidence

The facts are not disputed. What the Respondents in my view, dispute is the legal effect of the facts and their legal and factual interpretation in the context of this case.

The application before me is for judicial review as opposed to constitutional reference. Judicial Review is in the nature of proceedings by means of which the High Court exercises its jurisdiction of supervising inferior courts, and other tribunals commanding them to do what their duty requires in every case where there is no specific remedy and protecting the liberty of the subject by speedy and summary interposition. The jurisdiction is vested by The Law Reform Act (Cap 26) Laws of Kenya and the Rules of Procedure are to be found in order LIII of the Civil Procedure Rules.

Provided the said Courts, tribunals and other persons, keep within their jurisdiction and obey the rules of natural justice the High Court will not interfere.

The application has two substantive prayers;

(1)An order of certiorari be issued to bring to this honourable court the proceedings of the Chief Magistrate's Court Criminal Case ***No. ACC 1/2011. REPUBLIC VS HENRY KIPRONO KOSGEY*** for the purposes of being quashed.

(2)An order of prohibition be issued to prohibit the respondents by themselves or whosoever from proceeding with and/or further hearing Chief Magistrates Court Criminal Case no***. AC 1/2011. REPUBLIC VS HENRY KIPRONO KOSGEY*** on the charges laid against the Applicant.

For a charge of abuse of office to be sustained the accused must be a public officer within the meaning of the repealed Constitution or a state officer within the meaning of the Constitution of Kenya, 2010.

It is not in dispute that the applicant was the Minister for Industrialization, and hence a public officer or a state officer, as the case may be. Equally it is not in dispute that Legal Notice 69/2001 and Legal Notice 78/2005 were rules and regulations created by the Minister for Industrialization in the year 2001 and 2005 respectively.

What is in dispute is whether the regulations alleged to have been breached by the Applicant had been tabled in Parliament so as to have any force of law before June, 2010, since the alleged offences took place between November, 2009 and June, 2010, to constitute offences in count 1 – 12.

What is further in dispute is whether he (Minister) used his office to improperly confer some benefit to himself or confer some benefit on each and every alleged beneficiary in count 1 – 12 contrary to the regulations obtaining (if at all)

What is also in dispute is whether the exemptions relating to the motor vehicles itemized in count 1 – 12 were done without the advice of the National Standards Council and whether the policy guidelines (read regulations) had been formulated at that point in time to constitute various breaches complained of in count 1 – 12.

Against that backdrop, it is important to bear in mind that what the court is looking for in order to issue a prerogative order of prohibition is ***evidence of abuse of the process of the Court***.

It was contended on behalf of the Respondent that prior to the 29th day of June , 2005 the Minister for Industrialization could exempt importation of motor vehicles above the age of 8 years without advice of anybody. However, from the 29th June 2005, vide Legal Notice No 78 of 2005, the Minister was required to exempt importation of vehicles over 8 years old with the advice of National Standard Council, if satisfied that it was in the national interest to do so.

That three categories of vehicles which were exempted by the said Legal Notice were:-

(i) Vehicles in respect of diplomats returning from overseas postage;

(ii) vehicles to be used in projects of national importance;

(iii) vehicles of returning residents;

(iv) non compliant vehicles imported by traders.

It was the Minister (read Applicant) who was obliged to ask for advise of the National Standards Council. Then policy guidelines (read regulations) were to be formulated later on. This was not done

until 16th December, 2010 when the draft policy was proposed. It has now emerged, on the available evidence, that these guidelines were officially adopted by the National Standards Council in a meeting in April 2011. Hence during the Applicant's tenure as the Minister for Industrialization; and particularly when the offences were alleged to have been committed; there were no guidelines made and approved by the National Standard Council which the Council could use to give advise to the Minister. In the absence thereof, the Council was devoid of any advise it could offer to the Applicant. In effect the edifice upon which the charges rest collapses.

Findings

I have carefully considered the evidence adduced by the prosecution. Having done so, I find as a matter of law, that breach of regulations could only have occurred after 16th December, 2010 when the technical waiver committee of NSC was established and draft policy guidelines on waivers was proposed. At best those guidelines still remain a draft. In deed Karanja Thiongo (PW 1) confirmed in his testimony that as at 2nd March, 2011 they were still guidelines. This position was confirmed by Josephat Kalo (PW4) and Joel Kioko (PW 6).

A critical examination of the charges discloses that all the 12 counts relate to a period before November, 2009 and June, 2010. Hence no offence could have been committed by the Applicant prior to the proposal and adoption of the said draft policy guidelines on waivers. More so in the light of the fact that these guidelines were not officially adopted by the NSC until April, 2011. More importantly, that the said guidelines have not been tabled in Parliament for approval to date.

The Applicant is charged with failing to seek the advise of National Standards Council. True, the National Standard Council was in place during the Applicant's tenure as the Minister for Industrialization but the policy guidelines (read regulations) were not in place until April, 2011 when the same were adopted. Even if he (Minister) sought advise of National Standard Council, the said body could not have given legal advise in absence of policy guidelines/regulations being in place.

All said and done, legal notice No. 69 of 2001 and 78 of 2005 embody no penal consequences. It is the Minister who was supposed to comply with the provisions of the Legal Notice. He did not comply with the same because policy guidelines (read regulations) were not put in place. Not to mention the fact that the same were not laid before Parliament for approval to date. Hence has no force of law.

Against that backdrop of evidence, in my considered view, no offence is disclosed in all the 12 counts because the policy guidelines were not in place at the time the said offences are alleged to have taken place. It is a cardinal principle of law ***that criminal law does not know retrospective punishment***. Put in another way exemptions done before the policy guidelines were adopted does not constitute an offence under the said regulations.

It is axiomatic that Parliament controls subsidiary legislation and that the aforesaid Legal Notices are subsidiary legislations.

Section 30 of the Repealed Constitution of Kenya, which was in force at the material time and the time the Applicant(Minister)was charged, provides as follows:-

" The legislative power of the Republic shall vest in Parliament of Kenya which shall consist of the President and the National Assembly"

That LN 69/2001 and LN 78/2005 were Rules and Regulations created by the Minister for Industrialization.

It would be unlawful considering the provisions of Section 30 herein above, which vested legislative authority in the Parliament of Kenya, for any other person or organ to purport to make legislation or regulations capable of creating a criminal offence.

This become even more apparent when one considers the provisions of Section 34 of the Interpretation and General Provisions Act [Cap 2] Laws of Kenya which provides as follows:

"(1) ***All rules and regulations made under an Act shall, unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay, and, if a resolution is passed by the Assembly within twenty days on which it next sits, after the rule or regulation is laid before it that the rule or regulation be annulled, it shall henceforth be void, but without prejudice to the validity of anything previously, done thereunder, or to the making of any new rule or regulation.***

(2) Subsection (1) shall not apply to rules or regulations a draft of which is laid before the National Assembly and is approved by resolution before the making thereof, nor to rules of court.

(3) In this section 'rules' and 'regulations' mean respectively those form of subsidiary legislation which may be cited or regulations, as the case may be."

Flowing from the foregoing it is mandatory to lay all subsidiary legislation before the National Assembly for approval and this should

be done without unreasonable delay. The rationale for this is that the legislative power is vested by the Constitution in the National Assembly.

The respondent adduced no evidence before the subordinate court to demonstrate that the impugned regulations were so laid. Hence Legal Notice 69/2001 and Legal Notice 78/2005 are ***void*** – has no force of law. Accordingly the edifice upon which the 12 counts rest collapses. The charges as laid against the Applicant cannot lie in law.

I have analyzed and carefully considered the evidence embodied in the various affidavits and the statutory statements both counsel submissions together with the evidence adduced in the subordinate court. I have regrettably come to the conclusion that this was a case of bad blood between the Applicant (read Minister for Industrialization) and his Permanent Secretary. This is clearly evident in the proceedings. It was a case of settling scores. The Minister and his Permanent Secretary were not working in harmony. That is evidence of ***malafide***. Those charges should have been dismissed by the subordinate court . The trial, in those circumstances, should not have proceeded. It was an error, therefore, in law, to put the accused on his own defence on the basis of flawed charges.

Having said that, the question which I must now answer is whether I should interfere with the prosecution of the applicant by issuing orders of certiorari and/or prohibition or both, in the light of the facts and evidence on record.

Several authorities on Judicial Review orders of Certiorari and prohibition were quoted before me. I also took into consideration some of the celebrated authorities known to me on this point. I shall endeavor to consider the most outstanding and relevant ones, in the light of the facts and evidence on record.

In the case of ***COUNCIL OF CIVIL SERVICE UNION & OTHERS VS MINISTER OF CIVIL SERVICE {1984} 3 All ER 935*** [quoted with approval in ***MIRUGI KARIUKI -VS- THE HON THE ATTORNEY GENERAL C . A NO. 70 /1991] at page 948 letters e and j Lord Scarman said;***

"I believe that the law relating to Judicial Review has now reached a stage where it can be said in confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say it is a matter on which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power….."

On the facts, and on the evidence, I am inclined to find, as I hereby do, and hold that, this is a matter on which this court can adjudicate**.**

In D P P Vs HUMPHREYS [1976] 2 All ER 497, [quoted with ***approval in GITHUNGURI - VS - REPUBLIC [1985] KLR 96], Lord Salmon said at page 527 – 8.***

"I respectfully agree with my noble and learned friend, VISCOUNT DILHORNE, that a judge has and should not appear to have any responsibility for the institution of the prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. *It is only when the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene….."*

In R -Vs- GRAYS JUSTICE (1982) 3 All E.R 653, at page 658 May LJ said;

"Certainly there must be some abuse of the process of the court, some at least improper and it may be malafide use of its procedure, before an order of judicial Review in the nature of prohibition will be made"

The Court of Appeal in NATIONAL EXAMINATION COUNCIL VS REPUBLIC (EXPARTE) GEOFREY GITHINJI & OTHERS (SUPRA) said;

"…….If Githunguri had allowed the Chief Magistrate to try him, and a conviction had been recorded, an order of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. Prohibition looks to the future in order to prevent the making of a flawed decision"

Flowing from the Githunguri case, I take the view that the Applicant is right in bringing this application before his defence and probably conviction.

The Applicant was charged with abuse of office in all the 12 counts. However, he cannot be guilty of the offences charged under the regulations pursuant to Legal Notice No. 69 of 2001 as read together with Legal Notice No. 78 of 2005 because the said Legal Notices issued by the Minister were not tabled in Parliament as required by Section 30 of the Repealed Constitution. Hence the said regulations lack any force of law. In this regard, I call in aid the authority of ***METCALFE & OTHERS VS COX AND OTHERS [1895] AC 328.***

Moreover, the charges as laid are under section 46 as read together with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Yet the particulars are under the regulations made pursuant to Legal Notice 69 of 2001 as read together with Legal Notice 78 of 2005. This, in my considered view, goes against the grain. In deed one of the cardinal principles of Criminal law is that it is unacceptable to mix one Code (read regulations) with another Code (read Anti-Corruption and Economic Crimes Act No. 3 of 2003) to constitute a Criminal offence under the same roof. ***That, in law, amounts to duplicity.*** In other words, on the one hand, regulations (if tabled in Parliament and approved is one Code, while the Anti –Corruption and Economic Crimes Act No. 3 of 2003, on the other hand, is yet another Code. Both the regulations and the Anti-corruption and Economic Crimes Act, No. 3 of 2003 create different offences which attract different punishments prescribed in the different Codes.

Even if there were breach of regulations, the same cannot constitute criminal offences retrospectively. More so in the light of the fact that it has now emerged that those regulations were officially adopted by the National Standard Council in a meeting in April, 2011. Yet the Accused/Applicant was charged with offences relating to the period November, 2009 and June, 2010.

As was observed by the Court of Appeal in ***Republic Vs Hosea Waweru & Mwenda Guantai (Supra)***

…. "the abuse of office charges though having been in the Penal Code for decades, only started being filed in the courts after 2002. These charges create a new crop of hitherto uncommon offences and there are very few past decided cases on them hence a dearth of authority. The purpose of the *regulations* is to promote economy and efficiency in the public procurements and ensure that public procurement procedures are concluded in fair transparent and non-discriminatory manner thereby

contributing towards the creation of sound business climate in Kenya"

Conclusion

The High Court has inherent jurisdiction and that a person charged before subordinate court and considering himself to be a victim of oppression may seek a remedy in the High Court by way of an application for a prerogative order. The applicant applied for orders of certiorari and prohibition.

Prohibition can issue, as was observed by Khamoni J, ***in JARED BENSON KANGWANA VS THE HON. THE ATTORNEY GENERAL (Misc Application No. 446/95):*** in the following instances:-

One, notwithstanding the fact that the applicant has alternative remedies such as defending himself, appeal after conviction, bail pending appeal or review by the High Court.

Two, it is not correct, in law, to say that prohibition can issue only if the subordinate court acts in excess or lack of jurisdiction. This is only one of the instances.

Three, when malafides has been proved.

Four, after applicant has appeared in the trial and the proceedings are going on, as no accused person acquiesces in his own prosecution on a criminal charge.

Five, prohibition can issue when that issuing is not to curtail or interfere with the power of the D P P under the Constitution of Kenya, 2010.

Six, prohibition can issue when as a consequence of what has transpired and also being led to believe that there would be no prosecution, the applicant may well have destroyed or lost the evidence in his favour.

Seven, prohibition can issue when in the absence of any fresh evidence, the right to challenge the decision to prosecute has been lost – the applicant having been told publicly that he would not be prosecuted and property restored to him.

Eight, prohibition can issue when it is not in the public interest or against public policy to do so or to allow the prosecution launched against the applicant to continue.

In the instant case, to charge the Applicant, therefore, with a criminal offence for breach of regulations, not in place, when the alleged offences were committed would amount to criminalizing the acts of the Applicant retrospectively. That would also amount to evidence of malafide.

As Lord Blackburn said in the ***METROPOLITAN BANK LTD VS POOLEY (1985) 10 APP CASES 210 at 220 and 221:***

"But from early times the court had inherently in its power the right to see that its process was not abused by proceedings without reasonable grounds, so as to be vexatious and harassing - the court had the right to protect itself against such an abuse"

Having critically examined the charges and the particulars thereof, as contained in section 46 as read together with section 48 of the Anti Corruption and Economic Crimes Act No, 3 of 2003 together with the particulars contained in the regulations, which has never come in to force, I am of the considered view that criminal charges underpinned on the alleged breach of the regulations would not succeed given the disclosed facts and evidence tendered before me, between acts done in abuse of office and acts done in excess of it.

In point of law, the criminal charges based on those regulations are in any event, misconceived by reason of the matters aforesaid

In the result, I hold the view that, in the particular circumstances of this case, the prosecution of the applicant herein, HENRY KIPRONO KOSGEY, would amount to an abuse of the process of the court and that the said criminal charges have been wrongly brought.

Accordingly ***an order of prohibition [Prayer 2 of the Notice of Motion dated 25th November, 2011]*** shall issue against the Chief Magistrate - Nairobi or any other Magistrate in Kenya, prohibiting him/her or them from hearing or further proceeding with the trial of the Applicant on charges brought against him in Chief Magistrates court Criminal Case No. ACC 1/2011, between the REPUBLIC Vs HENRY KIPRONO KOSGEY.

There shall be no orders as to costs

Dated and delivered at Nairobi this **28th** day of **June,** 2012.

N R O OMBIJA

JUDGE