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Omollo t/a Kamoti Omollo & Company Advocates v Director of Public Prosecutions & 2 others; Wanjiku & 2 others (Interested Parties) (Petition E005 of 2024) [2025] KEHC 5238 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEHC 5238 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E005 OF 2024

OA SEWE, J

MARCH 14, 2025

IN THE MATTER OF ARTICLES 1, 2(4), 10, 21, 22, 23, 27, 28, 35, 47, 48, 49, 50, 157, 159, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE 1ST RESPONDENT'S DECISION TO HAVE THE PETITIONER ARRESTED AND CHARGED

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 29, 48 & 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE PENAL CODE, CHAPTER 63 LAWS OF KENYA

AND

IN THE MATTER OF THE NATIONAL POLICE ACT, NO. 6 OF 2012

AND

IN THE MATTER OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT

BETWEEN

VINCENT O OMOLLO T/A KAMOTI OMOLLO & COMPANY ADVOCATES .... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS, KWALE .... 2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT, KWALE .... 3RD RESPONDENT

AND

RUTH WANJIKU .... INTERESTED PARTY

MARY KADZO CHARO .... INTERESTED PARTY

JUSTUS MBECHE .... INTERESTED PARTY

JUDGMENT

1. The petitioner is an Advocate of the High Court of Kenya, and is practicing as such under the name and style of M/s Kamoti Omollo & Company Advocates. He filed this Petition contending that, he was appointed by the 1st and 2nd interested parties to carry out the conveyancing exercise for the sale of a piece of property known as Plot No. Kwale/Ukunda S.S/564 situate within Kwale County on their behalf as the purchaser and the vendor of the suit property.

2. The petitioner averred that the suit property was then charged to Equity Bank Limited and that upon payment of the purchase price, the petitioner forwarded a letter dated 15th January 2020 to the Bank along with a duly executed Discharge of Charge. Thereafter the petitioner lodged the Transfer instrument dated 22nd June 2020 duly signed by the 1st and 2nd interested parties; and the property was consequently transferred to the 2nd interested party.

3. The petitioner further averred that, on the 15th February 2024, the 1st and 2nd respondent, while acting on a complaint allegedly lodged by the 2nd interested party, arrested him without any notice, and caused him to be taken to Kwale Police Station. He was later to learn that the 1st interested party had already been charged in Kwale Chief Magistrate's Court Criminal Case No. E438 of 2023: Republic v Ruth Wanjiku, with the offence of obtaining Kshs. 1,000,000/= from the 2nd interested party by false pretences, by purporting that she had a piece of land to sell, a fact she knew to be false.

4. The petitioner further stated that he immediately contacted the 2nd interested party to ascertain the position and the 2nd interested party denied having lodged any such complaint against the 1st interested party. The petitioner explained that he got to learn from the Police that the 1st interested party had allegedly entered into an agreement with the 3rd interested party whereby the 3rd interested party agreed to clear the 1st interested party's loan with Equity Bank Ltd in consideration for the property. He added that this agreement was neither registered at the Lands Office nor brought to his attention when he handled the sale transaction between the 1st and 2nd interested parties.

5. Thus, it was the contention of the petitioner that, at all material times, he acted professionally upon the instructions given to him by the 1st and 2nd interested parties at a fee chargeable under the relevant laws; and therefore it was improper for the 1st and 2nd respondents to prefer Thus, it was the contention of the petitioner that, at all material times, he acted professionally upon the instructions given to him by the 1st and 2nd interested parties at a fee chargeable under the relevant laws; and therefore it was improper for the 1st and 2nd respondents to prefer any charges against him. He added that he has never received any complaint from the 1st or 2nd interested parties regarding his conduct in the subject transaction. Accordingly, the petitioner invoked Articles 10, 28, 50 157, 244 and 159 of the Constitution contending that the charges levelled against him are ill-conceived, malicious, vexatious and amount to gross abuse of not only the process of this Court, but also of the criminal justice system.

6. Consequently, the petitioner prayed for the following reliefs against the respondents:

(a) A declaration that his arrest and intended prosecution with regard to the sale and transfer of the property known as Plot No. Kwale/Ukunda S.S/564 situate within Kwale between the 1st and 2nd interested parties is an abuse of the criminal justice process and contravenes his constitutional rights to freedom and security of the person, right to a fair hearing and right to equality.

(b) A declaration that the initiation, maintenance and prosecution of Kwale Chief Magistrate's Criminal Case No. E438 of 2023 is an abuse of the criminal justice process.

(c) A declaration that the charges in Kwale Chief Magistrate's Criminal Case No. E438 of 2023 have no legal or factual background.

(d) An order prohibiting the continuance of Kwale Chief Magistrate's Criminal Case No. E438 of 2023.

(e) A consequential order to quash the proceedings in Kwale Chief Magistrate's Criminal Case No. E438 of 2023.

(f) The costs of the Petition.

(g) Such orders or directions as the Court may deem fit to meet the ends of justice.

7. The foregoing assertions were reiterated by the petitioner in his Supporting Affidavit sworn on 16th February 2024. He adopted the contents of the Petition and deposed that, vide an Agreement for Sale dated 15th January 2020, the 2nd interested party purchased the property known as Plot No. Kwale/Ukunda S.S/564 situate within Kwale County form the 1st interested party. The petitioner also confirmed that he was appointed by both parties to handle the conveyancing exercise on their behalf. He annexed to his Supporting Affidavit copies of the Sale Agreement, the Discharge of Charge and Transfer as Annexures "VO-1", "VO-2" and "VO-3". The petitioner also exhibited a copy of the Charge Sheet filed in respect of the 1st interested party, Ruth Wanjiku, as Annexure "VO-4" and pointed out that, as of the date of filing of the Petition, the case had been set for hearing.

8. The petitioner averred therefore that his intended prosecution alongside the interested parties is an abuse of the Court process for the following reasons

(a) The 2nd interested party denied having lodged any complaint against the 1st interested party; and therefore the Charge Sheet as drawn was fraudulent;

(b) The 1st and 2nd interested parties contracted willingly vide the Agreement for Sale dated 15th January 2020; and as such, if any party felt aggrieved, they ought to have sought resolution through the civil process.

(c) The respondents were elevating a purely civil dispute to be a criminal case.

9. The petitioner also pointed out that, under Section 134 of the *Evidence Act*, Chapter 16 of the Laws of Kenya, he enjoys Advocate/Client privilege in respect of communication made to him in the course and for the purpose of his employment as an advocate. He averred that it was an unreasonable decision for the 1st and 2nd respondents to arrest and prosecute him for alleged offences committed by his client. In the premises, the petitioner prayed for the dismissal of the Petition.

10. The petitioner also relied on the affidavit sworn by Mary Kadzo Charo, the 2nd interested party herein. She confirmed having engaged the petitioner to handle the Sale Agreement in respect of the suit property and annexed a copy of that Agreement to her affidavit. It was her assertion that the transaction was successfully undertaken and the property transferred and vested in her. The 2nd

interested party further averred that she was surprised that she was named as the complainant in Kwale chief Magistrate's Criminal Case No. E438 of 2023: Republic v Ruth Wanjiku in which the 1st interested party was charged for allegedly having obtained Kshs. 1,000,000/= from her. She was categorical that she had no complaint whatsoever as to the manner in which the petitioner handled the sale transaction on her behalf.

11. Along with his Petition, the petitioner filed an interlocutory application for conservatory orders. Pursuant to that application, the Court granted temporary reprieve to the petitioner on the 26th February 2024 and issued a conservatory order staying his intended prosecution pending the hearing and determination of the Notice of Motion dated 16th February 2024. Thereafter, the respondents, particularly the 1st respondent, expressed willingness to forestall the intended prosecution pending the hearing and determination of the Petition. The parties were consequently granted timelines within which to file their responses as well as written submissions in respect of the Petition.

12. The respondents appear to have filed no response. The Petition was urged by way of submissions. The petitioner relied on his written submissions dated 18th November 2024. He proposed the following issues for determination:

    (a) Whether his arrest and intended prosecution with regard to the sale and transfer of the suit property between the 1st and 2nd interested parties was improper;

    (b) Whether the initiation, maintenance and prosecution of Kwale Chief Magistrate's Criminal Case No. 438 of 2023 is an abuse of the criminal justice process; and,

    (c) Whether the prosecution of the petitioner ought to be stopped.

13. The petitioner submitted that, although the office of the 1st respondent is independent for purposes of Article 157 of the Constitution, the powers of that office are not absolute. It was his contention that, the 1st respondent must have regard to the public interest, the interests of the administration of justice and observation of due process of the law before making the decision to prosecute. The petitioner relied on Republic v Michael Thuo (Criminal Case 9 of 2013) [2014] KEHC 4714 (KLR) (Crim) (13 May 2014) to buttress his argument. The petitioner underscored his submission that he was merely acting in the course of his duty as an Advocate of the High Court of Kenya; and pointed out that no evidence of professional misconduct has been tendered before this Court to justify his intended prosecution.

14. Further to the foregoing, the petitioner submitted that, under Section 134 of the *Evidence Act*, an advocate is expressly prohibited from disclosing communication made to him by his client or divulging information regarding documents that come to his attention in the course of employment as the client's advocate. He however acknowledged that the privilege does not extend to communication in the furtherance of an illegality; and was categorical that his role in connection with the sale of the suit property does not fall within the exempted transactions.

15. The petitioner further contended that, in any event, the *Advocates Act*, Chapter 16 of the Laws of Kenya provides redress for complaining clients through the Advocates Disciplinary Tribunal. He therefore submitted that the decision to arrest and prosecute him in the circumstances set out herein is ultra vires and an abuse of his right to fair administrative action under Article 47(1) of *the Constitution* of Kenya. In this regard, the petitioner relied on Judicial Service Commission v Mbalu Mutava & another [2015] eKLR and Martina Kemunto Onchangu v Office of the Director of Public Prosecution & others [2017] eKLR and urged the Court to find that the 1st and 2nd respondents abused his right to fair administrative action.

16. On whether the initiation, maintenance and prosecution of Kwale Chief Magistrate's Criminal Case No. 438 of 2023 is an abuse of the criminal justice process, the petitioner submitted that, whereas criminal and civil proceedings can run concurrently notwithstanding that the matters in issue are substantially the same, that general rule is not without exceptions. He relied on Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and others [2013 eKLR, among other decisions, to augment his submission that it is not in the public interest to use the criminal justice process as a pawn in civil disputes. Accordingly, the petitioner urged the Court to allow his Petition dated 16th February 2024 and grant the orders sought by him as prayed with costs.

17. The respondents relied on the written submissions dated 4th November 2024. As has been pointed out herein above those submissions were tailored for the Notice of Motion dated 16th February 2024 and therefore, the issue posed by the respondents for determination was whether the petitioner had established a prima facie case. They nevertheless emphasized the point that the 1st respondent has a constitutional mandate under Article 157 to ensure that offences were prosecuted and those culpable attended to as the law requires.

18. The respondents, likewise, acknowledged that the Court has the requisite jurisdiction to intervene in the exercise of the 1st respondent's mandate should there be need for such interference for purposes of Article 165(3)(d) of the Constitution, such as where the decision to prosecute is made in abuse of the court process. The respondents relied on Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR. They contended that there was justification for the decision to arrest and charge the petitioner granted that the 1st interested party knowingly sold the same property to the 2nd interested party after having sold the same to the 3rd interested party who was already in occupation.

19. Accordingly, the respondents relied on Articles 50, 238, 239, 243 and 247 of the Constitution in relation to the mandate of the 2nd respondent and submitted that the process of investigation is a normal statutory process since the police are obligated to investigate any complied filed at the various stations. On the authority of Hon. James Ondicho Gesami v the Attorney General & others, Petition No. 376 of 2011, the respondents submitted that the 1st respondent is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to support such charges. They accordingly prayed for the dismissal of the Petition with costs.

20. I have given due consideration to the Petition and the averments relied on by the Petition and its Supporting Affidavit. I have similarly considered the written submissions filed herein by the parties. It is common ground that the 1st and 2nd interested parties entered into a Sale Agreement in respect of the suit property and that they retained the services of the petitioner for purposes of that conveyancing transaction. There is no dispute as to the terms of the Agreement; one of which was that, upon execution the 2nd interested party would pay a deposit of Kshs. 600,000/= which would be deposited in the 1st interested party's Equity Bank account to offset a pending loan. The balance of Kshs. 400,000/ = would be paid on the date of completion after discharge of Charge by Equity Bank.

21. It is not in contention that the full purchase price was paid or that the Charge by Equity Bank was discharged as anticipated by the 1st and 2nd interested parties. Thereafter, a Transfer was lodged and the property was ultimately registered in the name of the 2nd interested party. Subsequent thereto, the 1st interested party was arrested and arraigned before the Chief Magistrate's Court at Kwale, charged with the offence of obtaining money by false pretences after a complaint was filed by the 3rd interested party to the police.

22. Investigations by the police implicated the petitioner. He was also arrested with a view of being prosecuted jointly with the 1st interested party. He promptly filed this Petition before he could be

charged or arraigned before court and obtained conservatory orders restraining the respondents from charging or prosecuting him, pending the hearing and determination of the interlocutory application filed alongside the Petition.

23. In the premises, the issues for consideration are:

    (a) Whether the petitioner has demonstrated the violations complained of herein;

    (b) Whether petitioner is entitled to the reliefs sought;

A. On whether the petitioner has demonstrated the alleged violations or threatened violations to the requisite standard:

24. The petitioner alleged violation of his rights as enshrined under Articles 10, 28 and 50 of the Constitution. *The Constitution* itself prescribes how it is to be interpreted. In this respect Sub-Articles (1), (2) and (3) of Article 259 states:

    (1) This Constitution shall be interpreted in a manner that—

        (a) promotes its purposes, values and principles;

        (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

        (c) permits the development of the law; and

        (d) contributes to good governance.

    (2) If there is a conflict between different language versions of this Constitution, the English language version prevails.

    (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking…"

25. Therefore, in ascertaining whether indeed the rights of the petitioner were violated as alleged, the Court must adopt a holistic approach and consider the alleged violations within the context of the entire Constitution. What amounts to a holistic interpretation was discussed by the Supreme Court in the Matter of Kenya National Human Rights Commission, Supreme Court Advisory Opinion Ref. No.1 of 2012, thus:

> But what is meant by a holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result."

26. Similarly, in the Ugandan case of Tinyefuza v Attorney General Constitutional Appeal No. 1 of 1997 [UGCC] 3, the court held as follows:

> The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."

27. And, in the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR, the Supreme Court held as follows: -

(54) Certain provisions of *the Constitution* of Kenya have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."

28. In terms of the burden of proof, the Supreme Court pronounced itself in Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR, as follows:

(47) It is a timeless rule of the common law tradition, Kenya's juristic heritage, and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the Respondent bore responsibility, in whole or in part.

29. The position was reiterated by the Supreme Court in Wamwere & 5 Others v Attorney General (Petition 26, 34 & 35 of 2019) Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) thus:

A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned or erected or lived in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof."

30. Article 10 of the Constitution provides for the national values and principles of governance in the following terms:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

31. There is no gainsaying that the 1st respondent is vested with the prosecutorial function under Article 157 of the Constitution. In particular, Sub Articles (10) and (11) of Article 157 provides that:

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

32. Therefore, in the discharge of its prosecutorial mandate, the 1st respondent is under obligation to pay due regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process. Moreover, Section 4 of the *Office of the Director of Public Prosecutions Act* No. 2 of 2013, is explicit that the Office of the Director of Public Prosecutions shall be guided by *the Constitution* as well as the guiding principles set out therein in fulfillment of their mandate. It is noteworthy that Section 4 (f) of the aforementioned Act reiterates the need to serve the cause of justice, prevent abuse of the legal process and public interest.

33. It is therefore plain that, a constitutional court has the mandate to question the exercise of the 1st respondent's prosecutorial discretion if it is shown that the decision to prosecute was made in disregard of public interest or the cause of justice. The Supreme Court emphasized this point in Jirongo v Soy Developers Ltd & 9 others (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) (Judgment), as follows:

81. Under article 157(6) of *the Constitution*, the DPP is mandated to institute and undertake criminal proceedings against any person before any court. Article 157(6) provides as follows:

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed."

Article 157(4) 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."

However, Article 157(11) stipulates 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."

82. Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.

34. The Court of Appeal also delivered itself in a similar instance in Diamond Hasham Lalji & another v Attorney General & 4 others (supra) and held:

> Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the Courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases."

35. In the same vein, the Police have the constitutional mandate to investigate crime. This is manifest at Articles 238, 239, 243 and 247 of *the Constitution*. In Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR, it was held:

> 42. …the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

36. The same position was articulated in Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another (supra), as follows:

> The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

37. With the foregoing in mind I have given consideration to the allegations by the petitioner. There is no proof availed by him to demonstrate violation of Articles 10 or 28 of *the Constitution*. By way of particulars, the petitioner contended that his intended prosecution alongside the interested parties amounts to an abuse of the Court process for the following reasons

(a) The 2nd interested party assure him that she had not lodged any complaint against the 1st interested party; and therefore the Charge Sheet as drawn was fraudulent;

(b) The 1st and 2nd interested parties contracted willingly vide the Agreement for Sale dated 15th January 2020; and as such, if any party felt aggrieved, they ought to have sought resolution through the civil process.

(c) The respondents were elevating a purely civil dispute to be a criminal case.

38. He is in effect challenging the factual basis of his intended prosecution; yet in response thereto, the respondents disputed those assertions and contended that a complaint was made against the 1st and 2nd interested parties; and that upon investigations being conducted, sufficient evidence was unearthed that warranted the joinder of the petitioner.

39. The second limb of the petitioner's case was that, under Section 134 of the *Evidence Act*, Chapter 16 of the Laws of Kenya, he enjoys Advocate/Client privilege in respect of communication made to him in the course and for the purpose of his employment as an advocate. He averred that it was an unreasonable decision for the 1st and 2nd respondents to arrest and prosecute him for alleged offences committed by his client. Again these are factual detail are best handled by the trial court.

40. It is significant that the decision of the respondents to charge and prosecute was not a final decision and cannot, of itself, amount to a violation of *the Constitution*. In Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74 the opinion is expressed, which I find apt, to the effect that:

> The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."

41. In this regard, Article 50(1) of the Constitution provides that:

(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."

42. Needless to mention that the essence of Article 50(1) of *the Constitution* is the concept of a fair hearing; and that it envisages a public hearing before "...a court or, if appropriate, another independent and impartial tribunal or body..." in which the accused is afforded all the safeguards set out in Article 50(2) of the Constitution. It is for the foregoing reasons that it is always preferable that disputes about facts,

such as those raised herein by the petitioner, be ventilated before the trial court, which is itself a creature of *the Constitution* pursuant to Article 162 and 169 of the Constitution.

43. In Michael Sistu Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others [2016] eKLR, wherein a three-judge bench held that:

> The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ..."

44. Indeed, the best forum for testing the validity of a charge including the sufficiency of evidence is the trial court itself. In Erick Kibiwott & 2 Others v Director of Public Prosecution & 2 Others [2014] eKLR it was held that:

> ...In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. In dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of *the Constitution*. There mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings..."

45. The Supreme Court reiterated the foregoing in the Saisi case as follows:

> 88. It is our considered opinion that these are not issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. In Hussein Khalid and 16 others v Attorney General & 2 others, SC Petition No 21 of 2017; [2019] eKLR this court held that it was not for the High Court as a constitutional court to go through the merits and demerits of the case as that is the duty of the trial court. Similarly, and as we have held hereinabove, it not for the judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.
>
> 89. We are emphatic that the High Court, whether sitting as a constitutional court or a judicial review, may only interfere where it is shown that under article 157(11) of *the Constitution*, criminal proceedings have been instituted for reasons other than enforcement of criminal law or otherwise abuse of the court process. We reproduce the words of this court in Hussein Khalid and 16 others v Attorney General & 2 others [supra] as follows;
>
> > "[105] It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it

> will not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence (s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount." [Emphasis added]

46. The Supreme Court added: The right to a fair hearing was broad and included the concept of the right to a fair trial as it dealt with any dispute whether it arose in a judicial or an administrative context. By refusing to submit to the jurisdiction of the trial court where their innocence may be upheld or their guilt established, the appellants removed themselves from the protections of article 50(1) of the Constitution. Whatever the case, the criminal justice system was required to protect against the abuses claimed by the appellants, which the trial court was competent to resolve when challenged by an accused person, properly, during the trial..."

47. For the foregoing reasons, it is my considered finding that the Petition is premature and is accordingly struck out on that account and the interim orders discharged. Each Party to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF MARCH 2025

OLGA SEWE

JUDGE