Republic v Office of Director of Public Prosecutions; Necheza (Exparte Applicant); Shah (Interested Party) (Judicial Review Application E013 of 2022) [2025] KEHC 5669 (KLR) (10 March 2025) (Judgment)

Neutral citation: [2025] KEHC 5669 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION E013 OF 2022

OA SEWE, J

MARCH 10, 2025

IN THE MATTER OF AN APPLICATION BY LEONARD SHIMAKA NECHEZA FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS IN THE BILL OF RIGHTS UNDER THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF KWALE CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. E092 OF 2022

BETWEEN

REPUBLIC .... APPLICANT

AND

THE OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS ...... RESPONDENT

AND

LEONARD SHIMAKA NECHEZA .... EXPARTE APPLICANT

AND

RATILAL GHELA SHAH .... INTERESTED PARTY

JUDGMENT

1. The Notice of Motion application dated 10th March 2024 was filed by the ex parte applicant, Leonard Shimaka Necheza. He approached the Court under Sections 8 and 9 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya, Sections 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as Order 51 Rules 1 and 2 and Order 53 of the Civil Procedure Rules, 2010, seeking the following prayers:

    (a) That an Order of Certiorari be issued removing to this Court and quashing the decision to charge him in the Criminal Case at Kwale Chief Magistrates' Court Number CR. E092 of 2022 Republic v Darius Mwiti Kirimi and Shimaka Necheza Leonard.

    (b) That an order of prohibition be issued to prohibit the respondent from prosecuting, trying, hearing, or taking further proceedings whatsoever against the applicant in Kwale Chief Magistrates' Criminal Case No. E092 of 2022: Republic v Darius Mwiti Kirimi & Shimaka Necheza Leonard.

    (c) That the costs of the application be provided for.

2. The application was based on the grounds set out in the Statutory Statement dated 14th April 2022 and the Verifying Affidavit filed therewith, sworn by the applicant on 14th April 2022. The applicant deposed that he is an Advocate of the High Court of Kenya in good standing, practicing in the name and style of Marende Necheza & Co. Advocates in Mombasa, its environs and the entire country.

3. The applicant stated that he was on the verge of being prosecuted by the respondents on the basis of oppressive criminal charges filed in Kwale Chief Magistrate's Court in Criminal Case No. E092 of 2022: Republic v Darius Mwiti Kirimi & Shimaka Necheza Leonard. He added that he was also an aspirant for the Kakamega County gubernatorial seat, which fact was well out in the public domain; and therefore that, his intended arrest and prosecution could be the result of political malice and witch-hunt.

4. The applicant explained that sometime in 2016, he received instructions from a client, Mr. Darius Mwiti Kirimi, to file a suit over a dispute over the land known as Kwale/Diani Complex/25 against Maltra Limited. He proceeded with haste and filed Mombasa ELC No. 237 of 2016: Darius Mwiti Kirimi v Maltra Limited and the Environment and Land Court granted his client interim orders that were extended from time to time.

5. He further deposed that, after serving process, Maltra Limited responded to the suit with a proposal for out of court settlement which proposal was accepted by his client and a consent was filed and adopted as an order of the court. The order was extracted and served upon the Lands Registrar Kwale County. Thereafter, on the 12th April 2022, he was arrested by police officers and arraigned before the Kwale Chief Magistrates' Court alongside his client Darius Mwiti Kirimi on a plethora of charges that they knew nothing about, some of which dated back to 1999 when he was a Form Three student at Amukura High School. He pointed out that he was admitted to the bar in 2012.

6. It was therefore the contention of the applicant that the intended prosecution is malicious, biased and not in the public interest as there is no evidence that he travelled out his remit as an Advocate to facilitate fraud or other crimes in relation to the property herein. It was also of the applicant's posturing that, as matters stand, their client-advocate relationship is in jeopardy, as he has been charged alongside

his client. He therefore pitched a case for the protection of the privileged communication exchanged between him and his client.

7. In support of his case, the applicant produced copies of the pleadings and correspondence in Mombasa ELC No. 237 of 2016: Darius Mwiti Kirimi v Maltra Limited (Annexure "LNS-1"), a copy of the Charge Sheet filed in Kwale CMCR No. E092 of 2022: Republic v Darius Mwiti Kirimi & Shimaka Necheza Leonard (Annexure "LNS-2") and a copy of the Search from the Business Registration Service dated 15th May 2018 (Annexure "LNS-3").

8. The respondent filed a Replying Affidavit sworn on 1st July 2022 by No. 65761 S/SGTJapheth Ngetich of the Directorate of Criminal Investigations at the Headquarters in Nairobi and the investigating officer of the case herein. He averred that investigations commenced after he received a letter dated 19th November 2019 from the complainant Ratilal Ghela Shah, who requested that investigations be conducted on allegations of fraud in respect of the parcel of land Kwale/Diani Complex/25. The complainant alleged that on an unknown date, one Darius Mwiti Kirimi trespassed onto his property and thereafter obtained a fraudulent title deed.

9. The respondent mentioned that the complainant had made a previous complaint against Darius Mwiti Kirimi in respect of which he was arrested and charged in Kwale Court Criminal Case No. 693 of 2015 with an offence of forcible detainer contrary to Section 91 of the *Penal Code* but that the matter was withdrawn without the complainant's knowledge while he was away in India. He added that, it was after this criminal case was withdrawn that Darius Mwiti Kirimi filed the Environment and Land Case No. 237 of 2016 against Maltra Limited through the firm of Marende Birir Shimaka & Co. Advocates, purporting that he was the owner of the suit property.

10. The respondent further contended that the firm of Shimaka and Co. Advocates then entered into a consent with the purported Advocates of Maltra Limited namely Isoe Omariba and Co. Advocates and thus, the property was transferred to Darius Mwiti Kirimi through a court order dated 16th January 2017 and the Land Registrar Kwale transferred the suit property to Darius Mwiti. It was also discovered that the physical land file at Kwale disappeared and what was available at the registry was a temporary file with a green card showing the entry in favour of Darius Mwiti.

11. According to the respondents, the facts as presented by the complainant, Ratilal Ghela Shah, in his statement to the police were that the subject parcel of land was previously owned by Maltra Limited, vide an allocation by the Government of Kenya in 1992. The complainant stated that he was one of the directors of Maltra Limited, alongside Virchard Mulji Malde (deceased) and Benjamin Edgar Kipkorir; and that after Benjamin Edgar Kipkorir left the Company, Virchard Mulji Malde (deceased) transferred the property to him, which transfer was executed on 8th August 2006 through Presentation Book No. 013/8/2006 after settlement of the requisite fees.

12. It was the respondent's case that around 3rd May 2017, the complainant received information that Darius Mwiti was in possession of a title deed issued on 25th January 2017 by the Kwale Land Registrar and that the change was brought about by an order of the Environment and Land Court in ELC No. 237 of 2017 where Darius had allegedly entered into a consent with Maltra Limited.

13. The respondent averred that during investigations it was established that, in a bid to recover the land, the complainant, Ratilal Ghela Shah, filed Mombasa ELC No. 177 of 2017 against Darius Mwiti; and that the applicant represented Darius Mwiti in that matter. The police further established that the ELC matter was heard and the court entered judgment on 25th November 2021 in which the complainant was declared the rightful owner of the Land Reference No. Kwale/Diani Complex/25. The respondent indicated that the police also obtained certified copies of the documents pertaining to Land Reference No. Kwale/Diani Complex/25 from the Kwale Land Registrar and ascertained from the green card

that the land had been transferred to Ratilal Ghela Shah on 8th August 2006; whereupon he was issued with a title deed.

14. According to the statement of Ratilal Ghela Shah, as the only remaining director of the company Maltra Limited, he was not aware of the existence of ELC 237 of 2016 nor had he hired the firm of Isoe Omariba & Co. Advocates to act on his behalf in the matter. It was also the respondent's case that the partners of the firm of Isoe Omariba & Co. Advocates confirmed vide a letter dated 21st June 2021 that they were neither instructed by Maltra Limited to participate in, nor were they aware of the file ELC 237 of 2016.

15. The respondent further deposed that the police perused the records at Kwale County Government and it was evident that Ratilal Ghela Shah had been paying land rates with effect from 8th August 2006. Further, the respondent indicated that the police perused the file in respect of ELC 237 of 2016 and discovered that Darius Mwiti claimed to have acquired the land from Ratilal Ghela Shah vide a sale agreement prepared by Kenzi & Kenzi Advocates in Mombasa in 1999; and the said agreement was shown to one Benedict Wambua Kenzi who acknowledged that the only firm he was aware of was Munyao Kenzi & Company Advocates, a firm that belonged to his elder brother Munyao Kenzi.Benedict Wambua Kenzi, an advocate practicing in the style of B.W Kenzi & Company Advocates, stated that he shared a postal address with his brother and it was 80401-80100, Mombasa and not 823428, Mombasa as purported in the sale agreement.

16. The respondent added that the stamp and impression and the signature of Munyao Kenzi were subjected to forensic analysis and the sale agreement was found to be a forgery. The police concluded, from their investigations, that the documents used in ELC No. 237 of 2016 had been manufactured by Darius Mwiti. They further concluded that the applicant, as the firm used to file a matter ELC No. 237 of 2016 using forged documents, was equally culpable.

17. It was the respondent's case that after investigations were concluded the file was forwarded to the Director of Public Prosecutions who upon review found that there was sufficient evidence to institute criminal proceedings against the applicant. Therefore, the respondent averred that it would be in the best interest of the public for the prosecution of the subject criminal case against the applicant and his co-accused to proceed to its logical conclusion.

18. The application was canvassed by way of written submissions, pursuant to the directions given on the 30th April 2024. Consequently, the applicant filed written submissions dated 8th June 2024. He proposed the following two issues for determination:

    (a) Whether the decision by the respondents is ultra vires, unreasonable, is in breach of the rules of natural justice, constitute an abuse of power and is in excess of jurisdiction.

    (b) Whether the applicant is entitled to the prayers sought.

19. The applicant submitted on the mandate of the respondent and the principles set out in Section 4 of the *Office of the Director of Public Prosecutions Act*, Chapter 6B of the Laws of Kenya, which require the respondent to take into account the diversity of the people of Kenya, the values of impartiality and gender equity, the rules of natural justice, the need to promote public confidence in the integrity of the respondent's office and officers, and the need to discharge the functions of the respondent on behalf of the people of Kenya. The applicant also pointed out that Section 4 aforementioned requires the respondent to take into consideration the need to serve the cause of justice; prevent abuse of the legal process, protect the sovereignty of the people of Kenya and the need to secure the observance of democratic principles as well as the promotion of constitutionalism.

20. It was the submission of the applicant that, in this instance, the respondent disregarded its objectives and abused the powers of his office by pursuing criminal charges against him without any factual basis. He made reference to the case of Thuita Mwangi & 2 others v Ethics and Anti-Corruption Commission & 3 others and Rosemary Wanja Mwagiru & 2 others v Attorney General & 2 others to buttress his arguments.

21. On the authority of Njunguna S. Ndung'u v Ethics and Anti-Corruption Commission & 3 others [2018] eKLR, and Republic v Director of Public Prosecutions & another, Ex Parte Kamani, Nairobi Judicial Review Application No. 78 of 2015, the applicant submitted that, in addition to sufficiency of evidence, the applicant needed to ascertain whether his prosecution was in the public interest before taking a decision to have him charged and prosecuted. He underscored the fact that he was merely rendering professional services and therefore there is no factual or material facts that places him within any of the accusations made by the respondent. The applicant also relied on Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another(Interested Parties) [2021] eKLR for the proposition that the Court can stop a prosecution where an Advocate is unfairly targeted for rendering professional services in a matter. He prayed that his application be allowed and the orders sought by him granted. No submissions were filed by the respondent.

22. The facts of this application are not in dispute. The applicant is an advocate of this court. It is common ground that, in that capacity, he represented one Darius Mwiti in several matters including ELC No. 237 of 2016 wherein a consent was entered. Pursuant to that consent, land reference no. Kwale/Diani Complex/25 was ostensibly transferred from Maltra Limited to his client Darius Mwiti.

23. From the version given by the respondents, the land was at all material times registered in the name of Ratilal Ghela Shah, the complainant in the criminal case against the applicant and Darius Mwiti which is pending plea before the Chief Magistrates court at Kwale. Hence, while the applicant contends that the decision to prosecute him was based on extraneous considerations, the respondent was of the posturing that there exist sufficient grounds to warrant the prosecution; including public interest.

24. Accordingly, the issues for consideration are:

    (a) Whether the decision of the respondent is illegal, irrational or procedurally improper; and,

    (b) Whether the applicant is entitled to the reliefs sought.

25. The decision of the respondent was premised on the investigations conducted by the National Police Service. The National Police Service is a constitutional body established under Article 243 of *the Constitution*. Its mandate and functions are outlined under Article 244. In particular, Article 245 (4) (a) and (b) of *the Constitution* provide:

    The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—

    (a) the investigation of any particular offence or offences;

    (b) the enforcement of the law against any particular person or persons

26. With regard to the Directorate of Criminal Investigations, Section 35 of the *National Police Service Act* lists their specific functions to include:

    (a) collect and provide criminal intelligence;

(b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;

(c) maintain law and order;

(d) detect and prevent crime;

(e) apprehend offenders;

(f) maintain criminal records;

(g) conduct forensic analysis;

(h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157(4) of *the Constitution*;

(i) coordinate country Interpol Affairs;

(j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and

(k) perform any other function conferred on it by any other written law.

27. Additionally, Section 51 of the *National Police Service Act* provides that:

(1) A police officer shall—

(a) obey and execute all lawful orders in respect of the execution of the duties of office which he may from time to time receive from his superiors in the Service;

(b) obey and execute all orders and warrants lawfully issued;

(c) provide assistance to members of the public when they are in need;

(d) maintain law and order;

(e) protect life and property;

(f) preserve and maintain public peace and safety;

(g) collect and communicate intelligence affecting law and order;

(h) take all steps necessary to prevent the commission of offences and public nuisance;

(i) detect offenders and bring them to justice;

(j) investigate crime; and

(k) apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists.

28. Accordingly, upon receiving a complaint from an aggrieved victim, one Ratilal Ghela Shah, on a claim of fraud and forgery, the Police acted within their constitutional mandate to conduct, and did conduct investigations into the complainant's allegations. There is equally no dispute that at the conclusion of their investigations, the Police referred the matter to the Director of Public Prosecutions, the respondent herein; whereupon a decision to prosecute was taken.

29. The mandate of the respondent to make decisions on whether or not to prosecute and to conduct the prosecutorial function is also provided for in *the Constitution* at Article 157. Sub-Article (10) thereof states 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.

30. It is important to appreciate that the Respondent's mandate is not unquestionable. Article 157(11) provides that in exercising the powers conferred on him, the respondent shall have regard to the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This is a constitutional imperative that the respondent must always have in mind whenever exercising his constitutional mandate. Consequently, whereas *the Constitution* confers on the National Police Service the mandate to investigate and the Respondent to prosecute, they must act in good faith and in the public interest.

31. Therefore, it is now trite that where prosecution has been preferred by the Director of Public Prosecution without factual foundation, the Court will have no hesitation in quashing such a decision if called upon do to so. In the case of Republic v Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others [2016] eKLR, held:

" 118. On the other hand the courts have also been consistent that a prosecution which lacks a foundational basis must not be allowed to stand. The DPP is not supposed to simply lay charges but must determine on sound legal principles whether the evidence can sustain a charge prior to instituting the prosecution..."

32. Thus, the general position was aptly stated in Kites Technical Limited v Police & 2 others; Kenya Power & Lighting Company Limited (Interested Party) (Constitutional Petition E041 of 2021) [2021] KEHC 204 (KLR) (10 November 2021) (Ruling), as follows:

" The police have a statutory and constitutional duty to investigate crime. Failure to investigate is a gross dereliction of duty which can have the most far-reaching consequences for the complainant, the suspect and the criminal justice system. A wrong decision not to investigate or failure to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to investigate crime or not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved..."

33. What then are the applicable considerations in such matters. In Jirongo v Soy Developers Ltd & 9 others (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) (Judgment), the Supreme Court provided the following guidance:

" ...the Supreme Court of India in RP Kapur v State of Punjab AIR 1960 SC 866 laid down guidelines to be considered ... They are as follows:

(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or

(II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or

(III) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or

(IV) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge…"

34. The burden of proof in such instances is on the person alleging the wrongful exercise of prosecutorial power. In the case of Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR, the Court of Appeal reiterated its stance that:

"(42) The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision…"

35. In this case, the applicant is aggrieved that he has been implicated in claims of forgery and fraud on matters that he received instruction on from his client in the absence of proof that he travelled outside his remit as an Advocate. He was also of the view that the criminal charges herein will jeopardize the advocate-client privilege as to information shared between him and his client, the co-accused.

36. Regarding Advocate-Client privilege, Section 134 of the *Evidence Act* provides:

(1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(a) any communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

37. The Court of Appeal in the case of King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd & another v M/s Kaplan & Straton Advocates [1993] eKLR, had occasion to pronounce itself on the above provision in a somewhat similar matter and held:

"The fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without that client's consent. That fiduciary relationship exists even after conclusion of the matter for which the retainer was created…"

38. Needless to mention that the privilege is not absolute. In Mohammed Salim Balala & another v Tor Allan Safaris Limited [2015] eKLR, the Court of Appeal pointed out that:

"Of particular importance is that the advocate client privilege is only there for the sake of the client not the advocate. It is for the client to choose whether or not to lift the privilege. All that the advocate can do is plead privilege if sued. (see. Halsbury's Laws of England 4th edition vol 44 at page 52). This does not mean that an Advocate cannot be sued on the basis of his relationship with his client.

It only means that he cannot be compelled to disclose information thus obtained unless his client chooses to lift or pierce the privilege…"

39. In the instant matter, the applicant is not being compelled to disclose information obtained from his client in his capacity as an Advocate. His apprehension stems from the fact that he stands to be prosecuted in respect of allegations of fraud in respect of services rendered by him in his capacity as an Advocate and on the basis of instructions given to him by his client. The proviso to Section 134 is explicit that privilege cannot be pleaded to protect an Advocate from disclosure in instances when the communication made is in furtherance of an illegal purpose or any fact observed by an advocate in the course of his employment showing that a crime or fraud has been committed. Accordingly, in my considered view the plea of Advocate-Client privilege is untenable in the circumstances.

40. That said, the only issue for determination is whether the applicant has met the threshold for the issuance of the orders of Certiorari and Prohibition. The efficacy of the order of Certiorari was the subject of discussion by the Court of Appeal in Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, in which the Court held:

"…Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons…"

41. The Court of Appeal then proceeded to discuss the scope of the Order of Prohibition as follows:

"What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury's Law of England, 4th Edition, Vol.1 at pg.37 paragraph 128."

42. Therefore, to qualify for the said orders the applicant needed to prove three key elements, namely, illegality, irrationality or procedural impropriety. These elements were explained in the Ugandan case of Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300, as follows:

"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis BahikirweMuntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality…Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute

or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

43. Needless to say that judicial review trains its eye, not on the merit of the application but on the decision-making process itself, the same being supervisory by nature. Nevertheless, some measure of merit analysis may be done in the interests of justice, so long as such merit analysis is based on uncontroverted facts. In Saisi & 7 others v Director of Public Prosecutions & others, (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), the Supreme Court held:

> "75. In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in Judicial Service Commission & another v Lucy Muthoni Njora, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of *the Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.
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> 76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019;

[2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised…"

44. In the instant matter, the respondent justified the impugned decision contending that sufficient evidence had been gathered by the DCI to support the charge of conspiracy to defraud contrary to Section 317 of the *Penal Code* against one Darius Mwiti and the applicant. In particular, the respondent demonstrated that the investigations and analysis of the evidence established that:

(a) The complainant, Ratilal Ghela, is the registered owner of the subject property, land parcel No. Kwale/ Diani Complex/25 as affirmed by the ELC case 177 of 2017 Ratilal Ghela v Darius Mwiti;

(b) The complainant, Ratilal Ghela, had filed various complaints against Darius Mwiti for trespass on his property No. Kwale/ Diani Complex/25, an example being Kwale Criminal Case No. 693 of 2015.

(c) Mombasa ELC No. 237 of 2016: Darius Mwiti v Maltra Limited was filed on behalf of Darius Mwiti by the firm of Marende Birir Shimaka & Co. Advocates; the applicant being the Advocate acting in the matter for Darius Mwiti.

(d) An alleged consent order was entered on the 16th January 2017 in ELC 237 of 2016 by Marende Birir Shimaka & Co. Advocates on behalf of Darius Mwiti and Isoe Omariba and Co. Advocates on behalf of Maltra Limited.

(e) Isoe Omariba and Co. Advocates wrote a letter and denied receiving instructions from Maltra Limited and stated that they did not represent them in any matter before court.

(f) The authenticity of the sale agreement signed in 1999 was also questioned and the advocates detailed to have drafted it denied that they took part in the making of that agreement.

45. There is therefore no proof that the Police acted outside their mandate in this instance. Similarly, there is no proof that the decision to prosecute was made for some ulterior or collateral purpose. In Republic v Commissioner of Police & Another, *Ex Parte* Michael Monari & Another (supra), it was held:

> "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."

46. Consequently, it cannot be said that the respondent acted illegally, irrationally or unprocedurally in taking the decision to prosecute and causing the applicant to be charged before the Magistrate's Court at Kwale, as he did.

47. 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…"

48. Additionally, and more importantly, 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."

49. The essence of Article 50(1) of *the Constitution* is the concept of fair hearing. It envisages the context of the fair hearing to be a public hearing before "…a court or, if appropriate, another independent and impartial tribunal or body…" in which the accused person 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 applicant, be ventilated before the subordinate court before which the impugned charges have been preferred, which is itself a creature of *the Constitution* pursuant to Article 162 and 169 of the Constitution.

50. 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]

51. In the premises, I agree entirely with the position taken in Michael Sistu Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others [2016] eKLR, 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 ... "

52. Indeed, in Republic v Attorney General it was held: & others, Ex Parte Diamond Hasham Lalji & another (supra) it was held

    1. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.

       It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

53. In Saisi (supra) the Supreme Court stated:

> 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…"

54. Hence, it is my finding that the Ex parte Applicant has not shown that the respondent's decision to prosecute him was *ultra vires*.

55. There being no proof that the criminal proceedings were instituted to perpetuate ulterior motives, I therefore find it apt to reiterate the expressions of Lord Hailsham of St Marylebone in Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155 that:

> The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court."

56. For the foregoing reasons, it is my considered view that the Notice of Motion dated 10th March 2024 lacks merit. The same is hereby dismissed. Each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF MARCH 2025.

OLGA SEWE

JUDGE