



REPUBLIC OF KENYA



KENYA LAW

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Langer & 43 others v Director of Public Prosecutions & 2 others; Rodrot & 3 others (Interested Parties) (Petition 10 & 12 of 2020 & 6 of 2019 & 13 of 2015 & Miscellaneous Application 1 of 2021 (Consolidated)) [2024] KEHC 13065 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13065 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

**PETITION 10 & 12 OF 2020 & 6 OF 2019 & 13 OF 2015 &
MISCELLANEOUS APPLICATION 1 OF 2021 (CONSOLIDATED)**

M THANDE, A. ONG'INJO & DKN MAGARE, JJ

OCTOBER 25, 2024

BETWEEN

JAN RAMIN LANGER 1ST PETITIONER
MATHIAS SCHMIDT 2ND PETITIONER
EMMANUEL KARISA NGUNDI 3RD PETITIONER
KAHINDI KATANA KADENGE 4TH PETITIONER
PETER RICHARD KAMBI 5TH PETITIONER
CHARO KARISA SHOMBO 6TH PETITIONER
PATRICK SHIKARI 7TH PETITIONER
KENNEDY KALUME KADENGE 8TH PETITIONER
KENNETH ONYANGO ONIALA 9TH PETITIONER
JULIUS KAHANGA KATANA 10TH PETITIONER
JUSTUS MAIKYMA MASAFU 11TH PETITIONER
MACDONALD MTENGO KALAMA 12TH PETITIONER
KITSAO KATANA GUTA 13TH PETITIONER
NICHOLAS KAZUNGU KATANA 14TH PETITIONER
LENOX KAFEDHA JUMA 15TH PETITIONER
KAHINDI KADOGO MWASUMBU 16TH PETITIONER
ZAINAB ADAM KAZUNGU 17TH PETITIONER
KENNEDY MWAZIRO 18TH PETITIONER



JUSTUS SHELII TINGA	19 TH PETITIONER
KOMBE SHIDA KAINGU	20 TH PETITIONER
ISRAEL SAFARI MLEWA	21 ST PETITIONER
JOHN KALUME KONDE	22 ND PETITIONER
SULEIMAN SHADRACK KOMBE	23 RD PETITIONER
KAHINDI KIBONI RUWA	24 TH PETITIONER
PIUS BARAKA	25 TH PETITIONER
STEPHEN BONAYA	26 TH PETITIONER
JAMES CHANGAWA	27 TH PETITIONER
JUDITH AKINYI	28 TH PETITIONER
PHILA TANUI	29 TH PETITIONER
SARAH GEORGE	30 TH PETITIONER
HIDAYA KADZO	31 ST PETITIONER
NAOMI MUTHONI	32 ND PETITIONER
NEEMA KARISA	33 RD PETITIONER
BEATRICE REHEMA	34 TH PETITIONER
LILIAN CHEROBON	35 TH PETITIONER
FRIDAH MUGINA	36 TH PETITIONER
JOHANA KADETHE	37 TH PETITIONER
PATRICK KAHINDI	38 TH PETITIONER
SIFA DIMITRI DAVID	39 TH PETITIONER
KWICHA KATANA	40 TH PETITIONER
JUSTINE KENGA KADOGO	41 ST PETITIONER
SALAMA BEACH HOTEL LIMITED	42 ND PETITIONER
ISAAC RODROT	43 RD PETITIONER
STEFFANO UCCELLI	44 TH PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS	1 ST RESPONDENT
THE INSPECTOR GENERAL OF POLICE	2 ND RESPONDENT
THE ATTORNEY GENERAL	3 RD RESPONDENT

AND

ISAAC RODROT	INTERESTED PARTY
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STEFFANO UCCELLI INTERESTED PARTY
HANS JURGEN LANGER INTERESTED PARTY
TEMPLE POINT RESORT LIMITED INTERESTED PARTY

JUDGMENT

Introduction

1. The words below aptly summarize the genesis of the Petitions before us for consideration.

This protracted dispute finds its roots in Italy, where a company by the name of Adinos A.G (Adinos) successfully sued another company namely Viaggi Del Ventaglio (Viaggi) and was awarded Euros 825,000 with interest, plus costs of Euros 2,420. However, instead of recovering the sums so awarded, Adinos chose to cede the decree to yet another company, namely Accredo A.G (1st appellant) to whom she owed money. A cession agreement to this effect was drawn up and upon execution, the 1st appellant took over the role of Adinos in so far as the Milan decree was concerned. This meant that the 1st appellant was henceforth at liberty to recover her debt by garnishing the decree issued against Viaggi. However, all was not smooth sailing and as the 1st appellant soon discovered, Viaggi was hurtling towards insolvency, with no attachable assets, save for those held by its Kenyan subsidiary, Salama Beach Hotel Limited (2nd appellant).

2. The above words are contained in the introduction to the judgment of the Court of Appeal in Civil Appeal No. 36 of 2015 Accredo Ag & 3 others v Stefano Uccelli & another [2017] eKLR involving some of the Petitioners herein.
3. To enforce the Milan decree, Accredo AG filed Malindi HCCC 118 of 2009 against Salama Beach Hotel Limited (Salama) seeking the following orders:
 1. An order that the judgment of the court of Milan given on the 14th December, 2001 for Euros 825,000 plus interest and costs of Euros 2470 be enforced against the defendant.
 2. A warrant of attachment before judgment do issue against the defendant's plot no. 9890 Grant no. 11576 pending the hearing and determination of suit.
 3. An injunction do issue restraining the defendant by itself, directors, shareholders, attorneys, servants and/ or agents from selling, disposing off, alienating and/ or wasting plot 9890 Grant no. 11576 Watamu or in any other manner howsoever or whatsoever dealing with the said plot and the developments therein standing in a manner prejudicial or likely to defeat the process of execution of the judgment of the court of Milan given on the 14th December, 2001 pending the leaving and final determination of the suit.
 4. An order that the plaintiff be allowed to take over the ownership, management, running, operation and control of the defendant and the business carried on plot known as Grant No. 11576 plot no. 9890 Watamu for such period and time as shall be sufficient to satisfy the judgment and decree of the court of Milan dated 14th December, 2001.
 5. Costs of the suit and interest thereon at court rates.



4. In the said suit, a consent order between the parties was recorded and adopted by the Court. A decree dated 21.1.10 was issued in the following terms:
- a. That the judgment of the court of Milan given on the 14th December, 2001 for Euros 825,000 plus interest thereof at annual commercial rates of 25% and costs of Euros 2470 plus interests at annual court rates of 12% be and hereby ordered to be enforced against the defendant.
 - b. That a warrant of attachment do issue against the defendant's plot no. 9890 Watamu Grant NO 11576.
 - c. That an injunction do issue restraining the defendant by itself directors shareholders, attorney, servants and/or agents from selling, disposing off, alienating, and/or wasting Grant No. 11576 plot No. 9890 Watamu or in any other manner howsoever and whatsoever from dealing with the said plot and the hotel establishment and developments herein standing in a manner howsoever and whatsoever from dealing with the said plot and the hotel establishment and developments therein standing in a manner prejudicial and/or likely to defeat the execution of the judgment and decree of the court of Milan given on the 14th December, 2001 or prejudicial to the judgment and decree of the court issued herein.
 - d. That the plaintiff company by itself, directors and shareholders namely, Hans-Juergen Langer and Zahra Langer be and are hereby allowed and ordered to take over the shareholding, directorship, ownership, management, running, operation and control of the defendant company and the business carried on Grant No. 11576 plot No 9890 Watamu for such period and time as shall be sufficient to satisfy the judgment and the decree of and time as decree of the court of Milan dated 14th December 2001 and for such a time and period as the plaintiff company shall recover all related and consequential costs and expenses incurred properly while owning and managing the defendant company.
 - e. That the registrar of companies be and is hereby mandated to transfer all the shares held by the defendant shareholders to the directors of the plaintiff company, namely, Hans-Juergen Langer & Zahra Langer an equal number (50% 50%) basis.
 - f. That one Stephano Uccelli the current resident director of the defendant company shall continue to be in the board of directors of the defendant company for the purposes of ensuring that the judgment and decree of this court is fully satisfied and for the interest of the defendant company's previous shareholders and directors without being a shareholder.
 - g. That this suit be and is hereby marked as settled with each party bearing its own costs.
5. Dissatisfied with this consent, Stephano Uccelli (Uccelli), a director of Salama, filed an application dated 20.11.14, seeking the setting aside or review of the decree so that parties could be heard on merit. The Application was allowed by a ruling delivered on 30.4.15 by Chitembwe, J. who set aside the impugned decree. The learned Judge went on to issue the following additional orders:
2. The Registrar of Companies shall remove the names of the 2nd and 3rd respondents, that is to say, Hans Jürgen Langer and Zahra Langer, as directors of Salama Beach Limited and shall ensure that the status of the company in its registry is restored to the position as at 14th December, 2009;
 3. The 2nd and 3rd defendants to hand over all the properties belonging to Salama Beach Hotel Ltd within seven (7) days hereof to the 4th and 5th defendants. Counsel for both parties to participate in the transfer process;



4. The 2nd and 3rd respondents' names to be removed as signatories to all bank accounts of Salama Beach Hotel Limited and to be replaced by the original signatories as at 14th December, 2009;
 5. In view of previous disobedience of court orders by the parties herein, the Officer Commanding Watamu Police Station to ensure that the court order is effected as hereinabove;
 6. Costs of the application to the applicant.
6. This ruling was upheld by the Court of Appeal on 15.12.17 in the decision referred to at the beginning of this judgment. An application for review of the order of 30.4.15 was dismissed by a ruling of this Court dated 21.3.18. An appeal against this latter ruling was dismissed by the Court of Appeal in Civil Appeal No. 43 of 2018, in a ruling dated 21.8.19.
 7. The said decisions were followed by a myriad of activities which gave rise to criminal prosecution of the parties herein, which in turn provoked the filing of Petition No. 10 of 2020, Petition No. 12 of 2020, Petition No. 13 of 2015 and Petition No. 6 of 2019 as well as Miscellaneous Application No. 1 of 2020, now before us for determination.
 8. By a ruling of 1.9.2020, Nyakundi J, certified the matters herein as raising a substantial question of law and referred the same to the Honourable Chief Justice to assign a bench of uneven number of judges to hear the same. The Petitions and Miscellaneous Application were consolidated by an order of the Court dated 19.1.23 with Petition No. 10 of 2020 as the lead file.
 9. The delay in the determination of these matters can be attributed to a number of factors including transfer, promotion of some members of the bench to the Court of Appeal and recusal of some. The current bench was constituted on 15.12.23.
 10. At the hearing on 2.7.24, Miscellaneous Application No. 1 of 2020 was withdrawn, leaving the 4 Petitions pending hearing.
 11. The Petitions before us seek in the main, redress for violation of *the Constitution* and of the Bill of Rights. The Petitions thus call for the interpretation and application of the provisions of *the Constitution*. In this regard, the Court is guided by the principles of constitutional interpretation laid out in Article 259(1) which provides that *the Constitution* shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance. To this end, the Court is enjoined to take a purposive approach in interpreting *the Constitution* which is a transformative charter. In this regard, the Supreme Court in *Speaker of Senate v Attorney General and 4 Others* SCK Advisory Opinion No. 2 of 2013 [2013] eKLR stated:

Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimisation of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on –

"Recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."



12. Similar sentiments were expressed in *Government of Republic of Namibia v Cultura* 2000, 1994(1) SA 407 by Chief Justice Mahomed who cautioned against giving to Constitutional provisions rigid and artificial interpretation thus:

A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation.

(see also *Re The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011* and *State v Acheson* 1991(20 SA 805,813B).

13. In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* (2006) ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883, the Constitutional Court observed as follows:

A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law⁶. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law.

14. Additionally, this Court is required to comply with the edict that *the Constitution* must be interpreted as a whole. This principle was well illuminated in the case of *Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General Nairobi* Petition No 16 of 2011 [2011] eKLR where the Court, citing other decisions, stated:

In interpreting *the Constitution*, the letter and the spirit of the supreme law must be respected. Various provisions of *the Constitution* must be read together to get a proper interpretation.

15. In *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR, Mativo, J. (as he then was) considered the limitation of rights and fundamental freedoms under Article 24 of *the Constitution* and stated:

72. A limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation (“proportionality stricto sensu” or “balancing”) between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.’

16. Article 165(3) of *the Constitution* confers upon this Court, the jurisdiction to enforce the Bill of Rights as well as *the Constitution*. Specifically, under Article 23(1) this Court has the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Similarly, under Article 258 this Court has the jurisdiction to hear and determine applications claiming that *the Constitution* has been contravened, or is threatened with contravention. The Court has been invited to exercise this jurisdiction and we shall proceed to do so, guided by the principles of constitutional interpretation explained hereinabove.



17. The Petitions before us relate to the exercise of the constitutional and statutory powers by the Director of Public Prosecutions and the Inspector General of Police. This brings into focus the provisions of Articles 157 and 245 of *the Constitution* as well as the *Office of the Director of Public Prosecutions Act* and the *National Police Service Act*.

18. We now proceed to consider each of the Petitions and reliefs sought.

Petition No. 6 of 2019

19. This Petition is dated 26.8.19 and is filed by Uccelli against the Senior Magistrate Court, Malindi as the 1st Respondent, the Director of Public Prosecutions (the DPP) as the 2nd Respondent, the Divisional Criminal Investigation Officer (DCIO) as the 3rd Respondent and the Hon. Attorney General (the AG) as the 4th Respondent. In the Petition, Uccelli is challenging his prosecution in Malindi Criminal Case No. 609 of 2019 (the Criminal Case) in which he is charged with the offence of perjury contrary to section 108(1)(a) of the Penal Code. He seeks the following reliefs:

1. A declaration that the act of the arresting, charging and prosecuting the Petitioner herein for the offence of Perjury contrary to Section 108 (1) (a) of the Penal Code (Chapter 63 Laws of Kenya) in Criminal Case no. 609 of 2019 in the Senior Resident Magistrate Court (Court 3) in Malindi on 11th July 2019 is unconstitutional, illegal, unlawful, invalid, null and void ab initio,
2. A declaration that the Petitioner's Right to a Fair Hearing enshrined in Article 50 of *the Constitution* of Kenya were violated and/or infringed upon by the 1st and 2nd Respondents in their conduct of Criminal Case No. 609 of 2019 in the Senior Resident Magistrate Court (Court 3) in Malindi aw Courts on 11th July 2019.
3. AN order of CERTIORARI removing into this Honourable Court and quashing the Charge Sheet and the entire proceedings against the Petitioner herein that were conducted in Criminal Case No 609 of 2019 before the Senior Resident Magistrate Court (Court 3) in Malindi Law Courts on 11th July 2019.
4. A declaration that the Petitioner's Right to a Fair Administrative Action, Human Dignity, Right of Equality and Freedom from Discrimination were violated and/or infringed enshrined and contemplated in Article 47, 28 and 27 of *the Constitution* have been violated and/or infringed upon by the 1st to 3rd Respondents.
5. A declaration that as result of breach if the Petitioner's Rights he has suffered loss and damages.
6. AN order for compensation for the apparent breach or violation of Petitioner's rights.
7. Costs of the suit and interest thereof.
8. Any of the order as the Honourable Courts shall deem just and fit.

20. In his supporting affidavit sworn on even date, Uccelli stated that he is a shareholder and a director of Salama. He averred that on 24.4.19, his co-director Isaac Rodrot (Rodrot) was charged in Malindi Criminal Case No. 394 of 2016 with the offence of unauthorized access to computer data contrary to Section 83U of the *Kenya Information and Communications Act*. Uccelli stated that he was listed as a prosecution witness and that he had made a statement, of which he was not aware. Further, that when he became aware of the statement, he made a written complaint of the same to the DPP, but there was no response. He was instead summoned to court in 5.2.19 to testify on the basis of a fake statement. He added that upon taking oath, he informed the court through an Italian interpreter that he was not the author of the statement but that on the prosecution's application he was declared a hostile witness.



21. Uccelli further stated that he was subsequently arrested and was released on a cash bail of Kshs. 50,000/=. Further, that while on cash bail, he obtained an order from the High Court in Miscellaneous Application No. 35 of 2019, restraining the Respondents from arresting, questioning, charging, prosecuting and/or harassing him on any matter concerning or related to his recanted statement that was being used against Rodrot in Criminal Case No. 394 of 2016. He added that in spite of the existence of the High Court order, he was arrested and charged with the offence of perjury.
22. Uccelli added that when he was arraigned in court, he stated that he understood basic English. However, that without providing an interpreter, the court proceeded to read the charge to him and he denied the same. Uccelli's complaint therefore, is that without being provided with an interpreter and being informed of his right to legal representation, he was convicted of the offence and further sentenced without being given an opportunity to mitigate. He asserted that his conviction and sentence breached his right to a fair hearing as the proceedings were conducted in English despite informing the trial court that he did not understand the language.
23. The 1st, 3rd and 4th Respondents opposed the Petition vide grounds of opposition dated 3.10.19. The grounds are:
 1. That the Petitioner's allegation of harassment and intimidation by the aforesaid respondents are too vague, ambiguous and unsubstantiated to constitute an arguable case against the Respondents.
 2. The Petitioner has/had an avenue for appeal if dissatisfied with the proceedings before court.
 3. That the petitioner has obtained orders in Garsen Petition 3 of 2016.
 4. That the Petition is unsubstantiated and without proper basis thus not meeting the threshold as was set out in Anarita Karimi Njeru v Attorney General (1979).
 5. That no law, and/or regulation, or procedure has been demonstrated to have been breached.
 6. That there ought to be no interference of the jurisdiction of the trial court when such is properly invoked.
 7. That the institution of the Petition herein is calculated to exert undue pressure upon the court and the Respondents in carrying out their lawful duties and is therefore an abuse of the court process.
 8. That under Article 157 (6) of *the Constitution* of Kenya 2010, the Director of Public Prosecutions exercises state powers of prosecution and in that capacity, may institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed.
 9. That the applicant has not demonstrated that the DPP abused his powers neither has he demonstrated that he is being discriminated against nor that the action complained of are carried out against him for ulterior motives.
 10. That the 1st Respondent has the jurisdiction and competence to hear and determine the case before it whether civil or criminal in nature. That the said issues raised under the application can be constitutionally and sufficiently canvassed before the trial court.
 11. That there is no allegation of procedural or substantive impropriety on the part of the Respondents nor any indication of such impropriety demonstrated to warrant presentation of evidence in another criminal proceeding.



12. That the petition does not demonstrate that the Respondents have exceeded their lawful authority, contravened *the Constitution* or that by their acts, the rights of the petitioners and interested parties have been or are threatened with violation.
 13. That the criminal proceedings have since commenced and matter is pending further hearing and it is against the greater public interest to pre-empt and delay the ongoing prosecution of the petitioners unless the said process has been demonstrated to be oppressive, frivolous and vexatious which is not the case herein.
 14. That the petitioners have not been discriminated against, however by the petition herein, the petitioners seek to be elevated above the law by the issuance of orders to pre-empt and delay an ongoing prosecution without laying a sound basis for the same. The immunity sought can only lead to impunity.
 15. That provision regarding stay is now well settled in the case of *Giella v Cassman Brown* [1973] EA 358.
 16. That the application and petition is premised on speculation, unfounded fears and concealment of material facts thus falls short of the basic criteria for grant of reliefs sought.
 17. That the application and petition be dismissed with costs.
24. The 1st, 3rd and 4th Respondents filed further grounds of opposition dated 8.10.19. The grounds are:
1. That the 1st Respondent was carrying out the lawful duty as a trial court in Criminal proceedings hence the provision of the Criminal Procedure Code were fully applicable and no actions were carried out contrary to *the Constitution* and/or the fair Administrative Act.
 2. That under Article 50(6) of *the Constitution* the petitioner can only Petition the High Court if he had challenged the decision of the trial court through an appeal which he never did and neither has any reason been given for not appealing or seeking revision within the time prescribed by the law.
 3. That the petitioner's right under *the Constitution* were not violated as it was on the request of the Petitioner that he wished to change his plea and requested for the file to be placed before the trial court where the procedures were duly followed when he pleaded guilty and was dully sentence.
 4. That at the time of changing plea the Petitioner never informed the Court that he needed an interpreter and neither r did he state or give Any indication that he could not understand the English language, the Petitioner is therefore estopped to allege that a ground in this petition when he ought to have raised the same during the change of plea at the trial court.
 5. That further the petitioner has not demonstrated how the trial court attempted or infringed his right by denying him an interpreter since he did not raise this ground or make it known before the trial court for such to be ground of infringement or his rights by the trial court.
 6. That the Court should take judicial notice that the Petitioner's Affidavits have all been drafted and sworn in English without any certificate of translation that the affidavits and application herein were translated to him on the grounds that he does not understand English and on this ground the Petition an application is a clear abuse of the court process.
 7. All in all the Petition and the application for stay does not meet the threshold of the delay and arguability test as was established in *R vs Massey* [2001] EWCA Criminal 20150 [2000] All as



stated on Supreme Court Petition No. 14 of 2016 Wycliffe Oparanya =vs= Director of Public Prosecutions.

8. That the application and petition be dismissed with costs.
25. Hans Juergen Langer, the 2nd Interested Party (Hans) filed an answer to petition dated 1.11.19. He stated that Uccelli, Rodrot and himself have been involved in litigation in various cases for the last 9 years. Further that Rodrot hacked into his emails, as a result of his complaint Rodrot was charged in Malindi Criminal Case No. 394 of 2016. He added that Uccelli recorded his statement but would later recant the same and was charged with the offence of perjury. He further stated that Uccelli pleaded not guilty but later changed his plea to that of guilty and was convicted and fined Kshs. 10,000/=, and in default 3 month's imprisonment. Hans further stated that from the foregoing, Uccelli is attempting to subvert the course of justice. Additionally, that Uccelli has all along testified in English, sworn affidavits in English and that even wrote defamatory letters against Hans in English. He thus stated that Uccelli's claim that he does not understand English is making a mockery of the court process.
26. Parties filed written submissions as directed by the Court. We have considered the Petition, responses and rival written and oral submissions and having done so, we proceed to determine whether the arrest, charging and prosecution of the Petitioner are unconstitutional.
27. The claim before us is for redress for violation of the right to a fair trial. This right is non-derogable and sacrosanct. The nature of this right finds expression in Article 25(c) of the Constitution which provides as follows:

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(c) the right to a fair trial;

28. Article 50 of the Constitution guarantees to every person the right to a fair hearing. Article 50(2) makes specific provisions in relation to accused persons as follows:

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

- (a) to be presumed innocent until the contrary is proved;
- (b) to be informed of the charge, with sufficient detail to answer it;
- (c) to have adequate time and facilities to prepare a defence;
- (d) to a public trial before a court established under this Constitution;
- (e) to have the trial begin and conclude without unreasonable delay;
- (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (i) to remain silent, and not to testify during the proceedings;
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;



- (k) to adduce and challenge evidence;
- (l) to refuse to give self-incriminating evidence; *The Constitution* of Kenya 35
- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
 - (i) an offence in Kenya; or
 - (ii) a crime under international law;
- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

29. In *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015* (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment), the Supreme Court had this to say about the right of an accused person to a fair trial:

37. The rights of an accused person to a fair trial is provided for under article 50 (2) of *the Constitution*. That right is absolute as it is one of the rights which cannot be limited pursuant to article 25(c) of *the Constitution*.

30. And in the context of international law, the Court stated:

38. Kenya is a signatory to the International Covenant on Civil and Political Rights (ICCPR) since May 1972. The ICCPR makes the following provisions under article 14:"

“1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”

31. The Supreme Court went on to state:

40. These constitutional provisions and those of the ICCPR bring to the fore a number of principles. Firstly, the rights and fundamental freedoms belong to each individual. Secondly, the bill of rights applies to all law and binds all persons. Thirdly, all persons have inherent dignity which must be respected and protected. Fourthly, the State must ensure access to justice to all. Fifthly, every person is entitled to a fair hearing and lastly, the right to a fair trial is non-derogable.

32. The Respondents and Hans have opposed the claim by Uccelli that the proceedings were conducted in a language that he did not understand. Indeed, Hans stated that Uccelli has all along testified in English, sworn affidavits in English and that even the defamatory letters by him against Hans are in English.



33. The material before us shows that in Criminal Case No. 394 of 2016 Uccelli testified with the help of an Italian/English interpreter. The trial court record in the criminal case against him shows that he did inform the court that his English was basic. However, the court did not act on this information. Uccelli stated that he did inform the trial the court that he did not understand English. This notwithstanding, the court proceeded with the plea taking, the record of which is reproduced below:

11.7.19

Before Hon. Ivy Wasike – SRM

Prosecutor – Ms. Wamae

Court Assistant – Ken Kayo

Accused – present

Interpretation – English/Kiswahili

Court – Charge read to the accused in English who replies: -

Accused – Not true.

Court

Plea of not guilty entered against accused. To be released on cash bail of Kshs. 30,000/= or bond of Kshs. 60,000/= with one Surety of similar amount. Mention on 30/7/2019 for a hearing date.

HON. I. Wasike

Senior Resident Magistrate

11.7.19

11.7.19

Later at 3.00 pm

Coram as before

Accused – I want to change my plea as it was read to me but I did not understand. My English is basic.

Court – Charge read to the accused in English, who replies; -

Accused – It is true it happened and I was arrested the same day.

Court – Plea of guilty entered against the accused.

34. The record shows that the that the charge was read to Uccelli in English. Quite evidently, the trial court disregarded the fact that his English is basic. Strangely enough, the interpretation was from English to Kiswahili, which languages are not indicated to be those understood by the Petitioner. We also note from the record that in Criminal Case No. 394 of 2016, the Petitioner testified in Italian which was translated to English.

35. Article 50(2)(m) guarantees to every accused person the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. A trial court thus has a duty to ensure that this right is protected. To this end a court must inquire from an accused person the language he understands, before the charge is read to him. The record shows that this was not done in the trial court.



36. From the record, it is quite clear that by proceeding in a language that Uccelli did not understand, the trial court did not accord him the right to a fair trial as guaranteed under Article 50(2)(m).
37. In this regard we associate with Mativo, J. (as he then was) who in *Wilson Kichirchir Koskei V Republic* [2019] eKLR held:

In conclusion it is my finding that the proceedings in the lower court were not conducted in a manner that can be read to be consistent with the fair trial requirements under Article 50(2)(m) of *the Constitution*. The appellant cannot be said to have been accorded a fair trial when it is evident that the entire proceedings except his defence were conducted in a language he did not understand. I find that it would be an affront to the letter and spirit of *the Constitution* to allow the conviction and imprisonment imposed upon the appellant to stand. Accordingly, I quash the conviction and set aside the sentence imposed upon the appellant in CMC Criminal Case Number 153 of 2012 Nakuru, Republic vs Wilson Kipchirchir Koskei.

38. We have noted another disturbing occurrence during trial. After the facts were read to the Petitioner, the proceedings indicate the following:

Accused

It is true. They asked me about the statement and I denied it.

Court

Accused is found guilty of his own plea and is sentenced to a fine of Kshs. 10,000/= in default 1 month imprisonment.

39. The fact that the Petitioner stated that he was asked about the statement in question and he denied the same, clearly shows that he did not admit to the facts as read to him. As such, the plea was not unequivocal. We are guided by the holding in *Adan v R* case which was cited by the Court of Appeal in *Ombena v Republic* [1981] eKLR:

In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —

“Held:

- i. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
- ii. the accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;
- iii. the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
- iv. if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
- v. if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused’s reply should be recorded.”

40. We now turn to the Petitioner’s claim that he was denied an opportunity to mitigate before sentence. Although not expressly indicated in Article 50(2) of *the Constitution* as one of the rights of an accused persons, mitigation is a key component of a fair trial. As seen from the record, upon convicting



the Petitioner, the trial court immediately proceeded to impose sentence without according him an opportunity to mitigate.

41. On this claim, we can do no better than quote the Supreme Court in the Muaruatetu case (supra) which stated as follows:

46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in *the Constitution* does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to article 50(2) of *the Constitution* are not exhaustive.

47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in article 10 of the Universal declaration of Human Rights, and in the same vein article 25(c) of *the Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse’

42. One other issue. The right to legal representation is critical in ensuring a fair trial, more so in criminal proceedings. Article 50(2)(g) provides that an accused person has the right to choose, and be represented by, an advocate, and to be informed of this right promptly. The record in the trial court shows that the Petitioner was neither represented nor informed of his right to be represented by an advocate of his choice.

43. We now turn to the High Court order dated 10.7.19 issued in Malindi Miscellaneous No. 35 of 19. This order restrained the Respondents from arresting, questioning, charging, prosecuting and/or harassing him on any matter concerning or related to his recanted statement that was being used against Rodrot in Criminal Case No. 394 of 2016. Notwithstanding the existence of this order and the fact that the Petitioner was out on police bond, the Respondents went ahead and arrested and charged him and the court proceeded to convict and sentence him. Notably the judicial officer who presided over the proceedings is the same one who signed the High Court order in question.

44. Article 159(1) of *the Constitution* provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

45. Article 162 sets out the court system in Kenya which consists of superior courts, subordinate courts and tribunals. At the helm of the court system in Kenya is the Supreme Court followed by the Court of Appeal. Thereafter the High Court and Courts of equal status. Subordinate courts fall below these courts. The High Court has supervisory jurisdiction over subordinate courts under Article 165(6) which provides:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

46. In this regard, I am guided by the holding in the case of Kenya Hotel Properties Limited v Attorney General & 5 others [2020] eKLR, where the Court of Appeal stated:

As we stated at the beginning of this judgment this appeal is disturbing. The multiplicity of endless proceedings around the same dispute does not bode well for the administration of justice...Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the Court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is



hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. *The Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts.

Moreover, under Article 164(3) of *the Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong; without jurisdiction it would be embarking on a hopeless adventure to nowhere.

47. This finding of the Court of Appeal was affirmed by the Supreme Court in *Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020)* [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment), which stated:

55. We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves.

48. For the trial court which is subordinate court to the High Court to proceed with the Criminal Case against Uccelli, notwithstanding the existence of an order that was binding on it was to disregard the decision of a court of competent jurisdiction and of a court higher than itself. The trial court thus defied the constitutional hierarchical system of the courts.

49. After considering the material placed before us, and duly guided by the provisions of *the Constitution* and the cited authorities we find that the manner in which the Petitioner was arrested, charged and prosecuted occasioned him great prejudice. The Petitioner's right to a fair trial under Article 50(2) of *the Constitution* was violated. Further and equally fundamentally, the proceedings were in direct violation of a High Court order prohibiting them, thus defying constitutional hierarchy of the courts. The proceedings were not in the public interest or in the interest of administration of justice and were an abuse of the court process. It would therefore be an affront to the letter and spirit of *the Constitution* to allow the conviction and sentence imposed upon the Petitioner to stand.

50. In view of our finding above, we do not find it necessary to delve into the issue of breach of fair administrative action as claimed by the Petitioner.



Petition No. 10 OF 2020

51. This Petition is dated 23.4.2020 and is filed by Jan Ramin Langer & 40 others against the Director of Public Prosecutions (DPP) as the 1st Respondent, the Inspector General of Police (the IG) as the 2nd Respondent and the Hon. Attorney General (the AG) as the 3rd Respondent. The Petitioners challenge their prosecution in Malindi Criminal Case No. 240 of 2020 where they are charged with forcible entry contrary to section 90 of the Penal Code. They seek the following reliefs:
- i. A declaration that the arrest, detention of the Eighty Three (83) employees of Temple Point Resort and prosecution of the Petitioners herein on account of events that occurred at the said Resort on 10/3/2020 is unconstitutional, unlawful and invalid.
 - ii. An order of Certiorari do issue quashing the decision by the Respondents to charge the Petitioners, the Charge Sheet dated 17.3.2020 by which the Petitioners are charge with the offence of forcible entry contrary to Section 90 of the Penal Code and all proceedings in Malindi Chief Magistrate's Criminal Case No, 240 of 2020 in respect of the charge of forcible entry rising from the events that occurred at Temple Point Resort on 10.3.2020.
 - iii. An order of prohibition do issue restraining the 1st and 2nd Respondents by from arresting detaining or charging any employee of Temple Point Resort or the Petitioners herein whatsoever on account of the events that occurred at Temple Point Resort on 10.3.2020.
 - iv. That the Respondents do bear the Petitioner's costs.
52. The Petition is supported by the affidavits of Nicholas Kazungu Katana (Nicholas) sworn on 23.4.2020 and 14.4.2024. It is the Petitioners' case that the charges they face are trumped up. They claim that they were among a group of 83 employees of Temple Point Resort (the Resort) that were arrested by the police on 10.3.2020 for alleged offence of robbery with violence, handling of stolen goods and forcible entry vide a charge sheet dated 16.3.2020.
53. Nicholas went on to state that they were arraigned before the Chief Magistrate's court at Malindi on 11.3.2020, on a charge of robbery with violence as per the charge sheet dated 11.3.2020. Further that on 16.03.2020 when the matter came up, the trial court was not sitting following the directions issued due to Covid 19 pandemic. As a result, the matter was placed before Nyakundi, J. who directed that the matter be mentioned in the afternoon for plea taking. However, that the police refused to take them to court on account of the 1st Respondent declining to approve the charges contained in the charge sheet dated 16.3.2020, which were allegedly drafted by Rodrot.
54. It is the Petitioners' assertion that following a public outcry the charges were abandoned and new charges of forcible entry were brought vide the charge sheet dated 17.3.2020. They further stated that when the 83 employees were arraigned in court on 17.3.2020, the Respondents discharged 42 of them without preferring any charges. The Petitioners' claim is that all the 83 persons arrested were employees of the Resort and had reported to work on 10.3.2020. It is their argument that it is not logically possible that the said employees committed the said offences.
55. Nicholas continued to state that all 83 of them worked for the said Resort until 10.3.2020 when they were arrested by the police and the Resort was handed over to Rodrot. Further that the manner in which the police approached them threw the employees into panic and fear with some managing to escape, one dying and 83 of them arrested. He added that he called their director Jan Langer who arrived in the company of Mathias Schmidt. They tried to talk to the police but were also bundled into the police lorries without any explanation. It was additionally stated that they were all detained at Watamu and Malindi Police stations without access to drinking water and in a deplorable state for 6 days.



56. Nicholas further stated that on 17.03.2020 the Petitioners were charged with the offence of forcible detainer. He averred that between 10.3.2020 and 17.03.2020 when they were charged, the police and the DPP filed 3 different charge sheets which is clear that the charges were being fabricated.
57. The DPP opposed the Petition vide a replying affidavit sworn by Barbara Sombo, prosecuting counsel on 6.7.2020. She stated that on 10.3.2020, a tip off from the Resort management reached the police that more than 100 men and women armed with crude weapons had invaded the Resort. Further that several people at the Resort had been injured and properties of unknown value stolen. She further stated that a joint operation from Watamu and Malindi police stations was conducted at the Resort where 83 suspects were arrested and arraigned before Malindi Chief Magistrate's Court. Further that vide Miscellaneous Application No. 34 of 2020 the court granted the Respondents 14 days to conclude investigations.
58. It was further stated that the 14 days lapsed during the Covid 19 pandemic and the court was not sitting. The matter was therefore mentioned before Nyakundi, J. where the DPP informed the court of its decision not to charge the 83 suspects with the offence of robbery with violence and further that the 41 Petitioners be charged with the offence of forcible entry contrary to section 90 of the Penal Code.
59. The DPP asserted that the Respondents were carrying out their mandate under Article 245 as read with Articles 239, 243 and 157(4) of *the Constitution*. Further that the DPP had powers to direct the IG to investigate any allegations or criminal conduct. It was asserted that the DPP acted independently and without coercion from Rodrot. Further that the decision to charge the Petitioners with forcible entry and not robbery with violence is a decision that need not be explained to any person pursuant to Article 157(8) of *the Constitution*.
60. The DPP further stated that the rights of the Petitioners were adhered to in accordance with Article 49(1) as they are out on cash bail. Additionally, that their rights were not infringed upon and that they have not demonstrated to the Court which rights were infringed. The DPP urged the Court to allow the prosecution to proceed in the trial court and that if the charges are trumped up, the Petitioners will be acquitted. The DPP thus opposed the granting of the orders sought and urged that the Petition be dismissed.
61. Rodrot, the 1st Interested Party opposed the Petition vide replying affidavits sworn on 23.6.2020 and 4.2.21. He stated that the Petition is based on deliberate falsehoods which he set out in Petition No. 12 of 2020 in which he is one of the petitioners. He averred that the Interested Parties were in lawful possession and occupation of the Resort following the compliance by the police with the order of Chitembwe, J. of 30.4.15 and that he had been involved in management of the Resort. Further that on 10.3.2020, they received information that the former occupants of the Resort were planning to attack the Resort at night and take possession thereof by force. He stated that he made a report to the OCS Watamu, who then set an ambush and arrested several invaders including the Petitioners.
62. Rodrot's case is that as at 10.3.2020, none of the Petitioners was lawfully in the Resort when they were arrested. Further that the invasion was violent as they were armed with crude weapons, ready to harm and kill their people. Rodrot stated that there was justification for the police to arrest and charge the Petitioners with the offence in the charge sheet and that there is enough evidence to support the same. He denied the claim that he influenced the police to arrest and charge the Petitioners.
63. This Petition was canvassed by way of written and oral submissions.
64. In their submissions dated 6.7.2020, the Petitioners contend that they have demonstrated that their fundamental rights are likely to be violated if subjected to trial on trumped up charges of forcible entry. Relying on the case of *Gulam & Another v Chief Magistrate's Court & Another* (2006) eKLR, they



- submitted that the Respondents had the duty to ensure criminal prosecutions are only commenced on proper factual foundation.
65. They further argued that they have demonstrated a prima facie case that the charges against them have no foundation and are brought to achieve a cause unconnected to justice and are an abuse of process and that their right to fair trial cannot be guaranteed by the Respondents. Further that it is illegal, against public policy and the interests of administration of justice for the Respondents to use the criminal justice system as a pawn to aid Rodrot in the civil dispute over the ownership of the Resort. Further that the Criminal Case is used by Rodrot to threaten, scare and intimidate the employees of the Resort as part of the wider plan to aid him in his takeover of the same.
 66. It is the Petitioners' contention that the DPP has violated the provisions of Article 157(10) and (11) by accepting directions and being influenced by Rodrot to institute the criminal proceedings against the Petitioners. They further submitted that they will incur unnecessary expenses to defend themselves, lose their reputation and that their lives will be greatly disrupted. They will also suffer great anxiety and trauma, if the criminal proceedings are not stayed. To support this position, they relied on *R v Attorney General ex parte Kipngeno Arap Ngeny HCC Application No. 406 of 2001*. They further submitted that an acquittal after trial cannot redress the gross violations they stand to suffer.
 67. The Petitioners have further submitted that the police and the DPP discharged 42 of the 83 alleged robbers without preferring any charges. It is their submission that the selection of the Petitioners for prosecution was arbitrary and not informed by any evidence on their culpability or a probable cause and is discriminatory and an abuse of the court process. To support this position, they cited *Ronald Leposo Musengi v Director of Public Prosecutions & 3 others* [2015] eKLR.
 68. The 1st and 2nd Respondents filed submissions dated 2.7.24 in which they posited that the Petition does not support the claim that they shall not receive a fair trial and that the Court ought not to interfere with the decision to charge. They asserted that the decision to charge the Petitioners was in compliance with *the Constitution*, the *Office of the Director of Public Prosecutions Act* (ODPP Act) and National Prosecution Policy and Guidelines, 2019. They added that the Petitioners have not contended that the evidence was illegally collected. It was further submitted that that the Petitioners ought to defend themselves in the criminal trial and that the Petition constitutes what should be their defence therein.
 69. The Respondents further submitted that the Petitioners have not demonstrated which of their constitutional rights have been violated by the action to institute criminal charges. They urged the Court to allow the criminal trial to proceed to its logical conclusion. Reliance was placed in the cases of *Maina & 4 others v Director of Public Prosecutions & 4 others (Constitutional Petition E106 & 160 of 2021* (Consolidated)) [2022] KEHC 15 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment), *Kenneth Kanyarati & 2 others v Inspector General of Police, Director of Criminal Investigations Department & 2 others* [2015] eKLR and *Daniel Ndungu v Director of Public Prosecutions & another* [2013] eKLR.
 70. The Interested Parties filed submissions dated 8.4.24 which they express to be in respect of both this Petition and Petition 12 of 2020. After carefully perusing the submissions however, we find that the Interested Parties have not addressed the present Petition but have focused on Petition 12 of 2020.
 71. We have considered the Petition, the rival affidavits, submissions together with the authorities cited. We now proceed to determine whether the arrest, detention and prosecution of the Petitioners is unconstitutional and unlawful. As we consider this issue, it is necessary to elucidate the constitutional and statutory powers of the DPP and the IG.



72. Article 157(1) of *the Constitution* establishes the Office of the Director of Public Prosecution. Article 157(6) and Section 5(1)(a) & (b) of the ODPP Act stipulate the DPP's powers to institute and undertake criminal proceedings, take over and continue any criminal proceedings commenced in any court and discontinue any criminal proceedings at any stage before judgment is delivered.
73. Article 157(10) and Section 6 of the ODPP Act provide that the DPP 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. Article 157(11) however requires the DPP to 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 while exercising the powers conferred by *the Constitution*.
74. The constitutional independence of the Director of Public Prosecution, was considered in the case of *Republic v The Director of Public Prosecution & 7 Others* [2013] eKLR where Odunga, J. (as he then was) stated:
- The law is 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. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for interfering with those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process.
- The learned Judge went on to state:
- It follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety.
75. In *Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated))* [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), the Supreme Court reaffirmed the independence of the office of the DPP as follows:
81. Article 157(6) of *the Constitution* empowers the DPP to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. Being one of the independent Constitutional offices established, article 157(10) of *the Constitution* safeguards this independence by decreeing that the DPP shall not require the consent of any person or authority before commencement of proceedings, neither shall he be under the direction or control of any person. That is not to say that this power is absolute. Article 157(11) requires the DPP in exercise of his duties to have regard for public interest, interests of administration of justice and to prevent or avoid abuse of the legal process.
82. Stemming from these provisions of the law, the courts have consistently held that whenever it seems that the DPP is utilizing criminal proceedings to abuse the court process, to settle scores or to put an accused person to great expense in a case which is clearly not otherwise prosecutable, then the court may intervene. These decisions include *Commissioner of Police & the Director of Criminal Investigation Department & another v. Kenya Commercial Bank Ltd & 4 others*, Civil Appeal No 56 of 2012 (2013) e KLR by the Court of Appeal. It also includes the case of *Cyrus Shakhhalanga Khwa Jirongo v Soy Developers Ltd & 9 others, SC Petition No 38 of 2019*; (2021) eKLR where this court held that although the DPP is not bound by any direction, 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 and make appropriate orders. The court found the following guidelines read alongside article 157(11) of *the Constitution* to be a good gauge in the interrogation of alleged abuse of prosecutorial powers:
- i. Where institution/continuance of criminal proceedings against an accused person 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;
 - ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings, eg. want of sanction;
 - iii. Where the allegations in the First Information Report or the complaint take 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.
76. Flowing from the cited decisions it is clear that the office of the DPP is an independent constitutional office which is not subject to the control, directions and influence of any person. It is only the Court that can under Article 165(3)(d)(ii) of *the Constitution*, interfere with the exercise of power by the DPP, where it satisfied that the said powers have been exercised in a manner that is contrary to the constitutional requirement.
77. We now turn to the powers of the IG. The office of the IG is established under Article 245 of *the Constitution*. Article 245(2)(b) provides that the IG shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation. Article 245(4) emphasizes the independence of the office by barring any person from giving a direction to the IG with respect to the investigation of any particular offence or offences or the enforcement of the law against any particular person or persons. It is only the DPP under Article 157(4) who has the power to direct the IG to investigate any information or allegation of criminal conduct and the IG is required to comply with any such direction.
78. Section 51 of the *National Police Service Act* gives power to the police to inter alia provide assistance to members of the public when they are in need; maintain law and order; protect life and property and to investigate crime and apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists. Under Section 59 of the Act, a police officer has power to arrest any person whether with or without a warrant.
79. It is well settled that constitutional and statutory bodies such as the DPP and the IG must be given the space to discharge their mandate and to exercise their discretion in doing so. A court will only intervene where it is demonstrated that they have acted ultra vires or in breach of *the Constitution* or the law. This was the holding of Ngugi, J. (as she then was) in the case of *Kipoki Oreu Tasur v Inspector General of Police & 5 others* [2014] eKLR. The learned Judge stated:
20. The criminal justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.
80. On its part, the Court of Appeal addressed its mind to this issue in *Tom Dola & 2 others v Chairman, National Land Commission & 5 others* [2020] eKLR and stated:



In *Pevans East Africa Ltd & Another v. Chairman, Betting Control & Licensing Board & 7 Others* [2018] eKLR, this Court emphasised, and we reiterate, that where *the Constitution* has vested specified functions in a state institution or organ, the courts will not readily interfere with the discharge of that mandate unless it is demonstrated that the institution or organ in question has acted ultra vires or in breach of *the Constitution* or the law.

81. Our superior courts have repeatedly stated that the acts of arrest and prosecution do not in and of themselves constitute violation of constitutional rights, unless they have been done maliciously or in excess of jurisdiction. One such case is *Cape Holdings Limited v Attorney General & Another* [2012] eKLR, where Warsame, J. (as he then was) stated:

My understanding of the law is that the responsibility to investigate, determine the credibility of the complaint and prosecution is solely left for the police under the direction and control of the Director of Public Prosecution. The predominant factor being that they must act in accordance with the law and so long as they do not exceed the limits, then a court should not prohibit the prosecution of an individual. The investigation of a criminal offence or complaint cannot be easily prohibited or stopped unless there is credible and reasonable evidence to show the same is mounted for an ulterior purposes or objectives.

The applicant has failed to demonstrate that the Police lack or acted in excess of jurisdiction or have not complied with the rules of natural justice. In my view it is outside the jurisdiction of this court to supervise how the police should conduct its investigations unless there is evidence to show that the investigation is being conducted in a manner to prejudice the rights and the interests of the applicant. The police should be allowed to investigate the complaint lodged by the interested party to its logical conclusion and it is now premature for me to determine whether there is any abuse being committed against the applicant.

82. And in the case of *Kenneth Kanyarati & 2 others case (supra)*, Onguto, J. stated:

It is evident consequently that investigation of crime has a constitutional underpinning with proper statutory structures. It is to ensure that persons are not simply dragged to court and charged with offences only to turn out that there was no basis for the prosecution in the first place. The mere fact therefore of an investigation being undertaken by the 1st Respondent would not itself be unconstitutional and a party must prove much more than the investigation process alone. As was stated by Ngugi J in *Peter Ngaki Njagi Vs. Officer Commanding Station (OCS) Kasarani Police Station, and others NBI HCCC No. 169 of 2012* [2013] eKLR

“(12).....an investigation into alleged commission of an offence does not amount to violation of a constitutional right. Indeed, neither does arrest and prosecution, for those are all part of the criminal justice system which is sanctioned by *the Constitution*.”

83. We have carefully considered the claim before us. The Petitioners' complaint as we understand it, is fourfold. First, that the sole purpose of their arrest was to assist Rodrot take over the Resort. Second that as employees, they were rightfully in the Resort. As such they could not be said to have made a forcible entry therein. They claim that the police disregarded their employment letters issued by their employer, Temple Point Resort Limited and proceeded to arrest them. The Petitioners complain that the arbitrary arrest deprived them of their freedom and therefore violated their right to freedom and security under Article 29 of *the Constitution*. Third, that the charge sheet mutated from robbery with violence on 11.3.2020, to robbery with violence, handling stolen goods and forcible entry on 16.3.2020 and finally to forcible entry on 17.3.2020. Fourth that the DPP without any explanation, discharged 42



- of the 83 accused persons leaving the Petitioners to face the charge of forcible entry. They claim that the discharge of the 42 and the charging of the 41 violated their right under Article 27 of *the Constitution* not to be discriminated against.
84. The Respondents' position is that the Petitioners have failed to demonstrate that any of their rights were violated and that no evidence was tendered to prove that the criminal proceedings are for ulterior motives, other than pursuit of justice and that they acted well within the confines of *the Constitution*. They contend that they acted independent of Rodrot and investigated the claim and preferred the charges.
85. On his part Rodrot denied the Petitioners' allegations and stated that he made a complaint to the police about the impending invasion. He contended that the police acted independently and arrested the Petitioners, following which they were charged.
86. We have already set out the constitutional and statutory powers of the DPP and the IG. From the material before us, it is evident that the police acting on a complaint, arrested the Petitioners and others and conducted investigations in line with their mandate. The DPP on reviewing the evidence collected by the police made a decision to discharge the 42 suspects and to charge the Petitioners.
87. The decision to charge or not to charge and who to charge based on evidence lies entirely with the DPP by dint of Article 157(6). In light of this, the DPP cannot be faulted for making the decision to discharge the 42 suspects and to proceed to charge the Petitioners. The act of discharging the 42 arrested persons and charging the 41 Petitioners, does not in and of itself amount to discrimination or constitute violation of the constitutional rights of the Petitioners. No evidence of malice, gross abuse of discretion, manifest injustice or excess of jurisdiction on the part of the DPP has been demonstrated. It follows therefore that the decision made by the DPP in exercise of his discretion in the circumstances, cannot amount to discrimination.
88. In our finding, we are guided by the Supreme Court which in the *Saisi & 7 others v Director of Public Prosecutions* case (supra), had this to say about the exercise of discretion by a public officer or agency:
81. We are also minded of this court's decision in *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others*, SC Petition No 42 of 2019; (2021) eKLR where the court upheld the High Court's position to the effect that in matters involving 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. Further that the only exception where a court can compel a public agency to implement a recommendation is where "there is gross abuse of discretion, manifest injustice or palpable excess of authority" equivalent to denial of a settled right which the petitioner is entitled, and there is no other plain, speedy and accurate remedy.
89. We have carefully read the case of *Ronald Leposo Musengi* (supra), cited by the Petitioners. We note that in that case, the petitioner on the basis of a promise by the respondents had a legitimate expectation that he would not be prosecuted. He submitted thus:
33. To the Petitioner there is no reason given by the 1st Respondent as to why the decision made on 24th January, 2011 was reversed having made the representation to Gateway and its Directors that there existed an agency agreement and there is no proof that the payment from Malili Ranch was obtained fraudulently. The Petitioner therefore had a legitimate expectation that like other directors of Gateway, he would not be charged with any offence arising from the agreement with Malili Ranch... It was therefore contended that the action of the Respondent violated his right to legitimate expectation and the abrupt and arbitrary review of the decision dated 24th January, 2011 without any reason is in violation of his fundamental



rights empowering the court to intervene and the Petitioner's prosecution would be an abuse of the process court, oppressive and malicious and it is not in the public interest hence ought to be stopped.

90. After considering the matter, Odunga, J. held as follows:

93. With due respect, in the absence of any reasonable explanation coming from the Respondents why they have suddenly woken from the slumber, as it were, three years down the line and have decided to prosecute the Petitioner after giving an assurance that such prosecution was not forthcoming, the decision to prosecute the Petitioner cannot be justified. I associate myself with the decision in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

91. Although the Petitioners have relied on the above decision, the circumstances obtaining herein are clearly different. There was no promise to the Petitioners that may have given rise to a legitimate expectation that they would not be charged. Further unlike in the cited case, there was no delay in preferring charges against the Petitioners.

92. On the claim of take over of the Resort, the Petitioners stated that the arrest and preferring of charges against them, was meant to aid Rodrot in the ongoing civil dispute between him and Hans over ownership of the Resort. No evidence was however placed before us to support this claim.

93. After considering the material placed before us, we find and hold that the Petitioners have failed to show how the criminal case is an abuse of the criminal justice system. In any event the pending civil dispute is not a bar to concurrent criminal and civil proceedings. We are fortified in this finding by Section 193A of the Criminal Procedure Code which provides that notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceeding.

94. In this regard, we associate with the finding in the case of Maina & 4 Others (supra) where Mrima, J. stated:

112. In Petition No E002 of 2021 Christopher White & Others v Inspector General of Police & others (2021) eKLR, this court discussed whether criminal offences may be committed when parties are engaged in pure commercial activities. In the end, this court held that whereas parties are at liberty to engage in private and commercial transactions, that does not preclude the commission of crimes and as such, the police are at liberty to investigate such transactions either when a complaint is lodged or when the police acts on its own motion in a bid to fight crime.

The learned Judge went on to state:

136. This court fails to see how the director of public prosecutions acted contrary to public interest, the interests of the administration of justice or failed to prevent and avoid abuse of the legal process. In fact, it is in the interests of the administration of justice



that the criminal case be initially heard for that will settle some of the contentious issues in the civil cases including whether the suit property was lawfully acquired and whether the various rights under *the Constitution* accrued.

137. Whereas the petitioners have the right not to be subjected to an illegal and/or unwarranted criminal process, the Director of Public Prosecutions is also under a public duty to ensure that offences are prosecuted and those culpable attended to as law requires. That is the balance created by the law and which this court is called upon to serious undertake. In fact, that is the essence of the rule of law.
95. We now turn to the Petitioners' claim that their arrest was arbitrary and violated their right to freedom and security under Article 29 of *the Constitution*. The Respondents' case is that they complied with *the Constitution* and the law in arresting the Petitioners.
96. The evidence on record shows that the police laid an ambush at the Resort and made the arrests, following the complaint by Rodrot that there was an impending invasion of the Resort. Under Section 51 of the *National Police Service Act*, the police are mandated to provide assistance to members of the public when they are in need, maintain law and order and protect life and property.
97. Article 29 of *the Constitution* provides that every person has the right to freedom and security of the person, which includes inter alia the right not to be deprived of freedom arbitrarily or without just cause. It is not in dispute that there was commotion in the Resort on the material day when the Petitioners and others were arrested. The Petitioners have however not demonstrated that their arrest was arbitrary and without just cause. They have also not shown that their arrest was actuated by malice or ulterior motive. We are satisfied that in the circumstances, there was probable cause to arrest the Petitioners.
98. In this regard, we are guided by the holding in Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR, where the Court of Appeal stated:

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.

99. On the issue of whether the Petitioners were employees of the Resort and were lawfully in the premises and could not be said to have made a forcible entry therein. Our view is that this can only be ascertained



at the hearing of the criminal proceedings against the Petitioners, which is the best forum to deal with the quality and sufficiency of the evidence in this regard. In so finding, we are guided by the decision in *Uwe Meixner & Another v Attorney General* [2005] eKLR, where the Court of Appeal stated:

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the *Evidence Act*. There are also constitutional safeguards stipulated in section 77 of *the Constitution* to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.

100. We now consider the complaint by the Petitioners regarding the variation of charges in the charge sheets. It bears repeating, that the decision to charge, prosecute, continue or discontinue criminal prosecution is the prerogative of the DPP by dint of Article 157(6) of *the Constitution*. As such, the DPP must be given the latitude to discharge this mandate without interference, unless there is credible and reasonable evidence to show the same is mounted for ulterior purposes or objectives, which is not the case herein.

101. For a petition of this nature to succeed, a petitioner is required to discharge the burden of proof placed on him. The burden of proof on a petitioner in a constitutional petition was addressed by the Supreme Court in the case of *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR. The Court stated as follows:

Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

102. The Petitioners have invoked the provisions of Article 22(1) to institute the proceedings herein, claiming that their rights and fundamental freedoms in the Bill of Rights has been denied, violated or infringed, or threatened by the Respondents. Although the Petitioners have listed numerous articles of *the Constitution*, alleging violation of their rights, they have not demonstrated to the satisfaction of the Court, the manner in which the Respondents have violated the said rights, as required in the principle set out in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR, where the Court stated:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

103. As earlier stated herein, the arrest and prosecution do not in and of themselves constitute violation of constitutional rights, unless they have been done maliciously or in excess of jurisdiction. The Petitioners have not discharged the burden of proof placed upon them to demonstrate that in



preferring and varying the charges in question, the DPP acted maliciously and did not 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.

104. After considering this Petition, the law, submissions and authorities cited, we find that the claim by the Petitioners that their constitutional rights were violated by the Respondents has no merit and is accordingly rejected.

Petition No. 12 of 2020

105. This Petition is dated 8.6.2020 and is filed by Salama Beach Hotel Limited (Salama) Isaac Rodrot (Rodrot) and Stefano Uccelli (Uccelli) against Director of Public Prosecutions (DPP) as the 1st Respondent, Inspector General of Police (the IG) as the 2nd Respondent and the Honourable Attorney General (the AG) (as the 3rd Respondent. Hans Langer (Hans) is the 1st Interested Party and Temple Point Resort Limited (Temple Point) is the 2nd Interested Party.

106. The Petitioners challenge their prosecution in Mombasa SRMCC Criminal Case No. 854 of 2020 in which they are charged with 8 counts which they say relate to filing of returns in relation to shares in Salama. They seek the following reliefs:

- a. A Judicial Review order in the form of orders of certiorari quashing all the criminal proceedings in SRMCC Criminal Case No, 854 of 2020 Mombasa, Republic =vs= Steffano Uccelli & Isaac Rodrot Alias Mwaura.
- b. A declaration that the rights of the Petitioners to property as guaranteed under Article 40 of *the Constitution*, The right to a fair trial contrary to Article 50 of *the Constitution*, The right to a fair trial under Article 50 of *the Constitution*, The right to highest attainable standard of health under Article 43 (1) (a) of *the Constitution* have been breached.
- c. A declaration that the fair trial contemplated under Article 50 of *the Constitution* includes charges arising from an impartial investigation by officers operating under the Provisions of Chapter Six of *the Constitution*.
- d. A declaration that the arrest, transportation and arraigned in court contrary to the Covid-19 guidelines by Committee of National Council of Administration of Justice compromised the right to good health as guaranteed under Article 43 (a) of *the Constitution*.
- e. A declaration that where there is a cessation of movement imposed in a County /Counties/ Parts of a County any criminal suspect arrested within the affected County should be arraigned in court within that County unless under special circumstances approved by Committee of National Council of Administration of Justice.
- f. A declaration that the act of forceful take over of the suit property by the agents of the Respondents and handing it over to the complainant on 28/5/2020 was a clear manifestation that the investigating officers were acting as agents of the complainant to settle commercial and civil disputes between the complainant and their Petitioners through a criminal trial contrary to the principles set out in Article 73 and 75 of *the Constitution*.
- g. A declaration that the act of forceful takeover of the suit property by the agents of the Respondents from the 2nd and 3rd Petitioners and giving it to the complainant on 28/5/2020 was a clear manifestation that the investigating officers were acting as agents of the complainant to settle commercial and civil disputes between the complainant and their Petitioners through a criminal trial contrary to the principles set out in Article 73 and 75 of *the Constitution* and



eroded all the gains to the Petitioners derived from decisions of the High Court in the order of 30/4/2015 and judgment dated 15/12/2017 in Court of Appeal Civil Appeal No, 36 of 2015 – Malindi have been rendered nugatory against the rules of natural justice, Article 50 and Chapter Ten of *the Constitution*.

- h. A declaration that the role exercising civil jurisdiction under Chapter Ten of *the Constitution* to conclusively determine issues between parties and the resultant rights so conferred cannot be set aside, varied and/or amended through a criminal trial after such determinations have been made conclusively by courts of competent jurisdiction exercising civil jurisdiction.
 - i. A declaration that this petition raises issues of great public and national importance which go to the core of the justice system and should be handled by a bench of more than 3 judges appointed by the Chief Justice under Article 165 (3) (b) and (3) (d) of *the Constitution*.
 - j. A declaration be issued that the investigations by the DCI and the DPP's institution of criminal proceedings against the 2nd and 3rd Petitioners in SRMMCC Criminal Case No. 854 of 2020B-Mombasa, Republic =vs= Stefano Uccelli & ISAAC Rodrot Alias Mwaura are in violation of the constitutional rights of the 2nd and 3rd Petitioners.
 - k. A mandatory order directing the Respondents to restore the control, management and occupational of all that property known as Salama Beach Hotel Limited/ Temple Point Resort standing on plot grant no, 11567 and plot no. 9890 Watamu to the Petitioners in compliance with the order dated 30/4/2015 in HCCC No, 18 of 2009 – Malindi.
 - l. A mandatory order staying further interrogations and questioning of the 2nd and 3rd Petitioners relating to SRMCC Criminal Case No. 854 of 2020 Mombasa, Republic =vs= Stefano Uccelli & Isaac Rodrot Alias Mwaura and/or any further interference by the agents of the Respondents relating to the management, ownership and control of the assets and business of Salama Beach Hotel Limited / Temple Point Resort.
 - m. Damages for malicious / unconstitutional prosecution.
 - n. Any other relief this Honourable Court would be pleased to issue.
 - o. Costs of the Petition.
107. The Petitioners contend that the police exposed Rodrot and Uccelli to Covid-19 infection. They stated that they were arrested on 28.5.2020 and bundled into a vehicle and driven to Mombasa. They added that the backseat of the vehicle had a seating capacity of 3 people but they were stacked together with 4 other people including 3 police officers who wore no face masks. Further that they were bundled in a police station with suspects whose Covid status was unknown.
108. They further complained that the Respondents chose to charge them in Mombasa instead of Malindi where they were resident, in spite of a cessation of movement order restricting movement from Kilifi to Mombasa, due to the Covid-19 pandemic. They claim that as a result of this, their friends and family residing in Malindi could not travel to Mombasa to stand surety for them. Their plea to the Officer Commanding Port Police Station to be released on bond to reduce exposure to infection was disallowed. They also assert that the Court denied them bail and they remained in custody for 4 more days in unsanitary conditions without any water. They thus claim that their rights under Article 43(a) of *the Constitution* were violated, in light of the health challenges caused by the Covid-19 pandemic.
109. The Petitioners further link the criminal case to the HCCC No. 118 of 2009 which has been referred to herein. It is their case that the rulings of this Court of 30.4.15, 21.3.18 and 24.2.2020 and the Court



- of Appeal decisions of 15.12.17 and 21.8.19 conferred inalienable property rights to the Petitioners over all the assets of Salama. They contend that Hans, the complainant in the criminal case, is using the criminal process to undermine the integrity of the judicial process as conclusively determined by the said judicial decisions. They added that the criminal case is an illegality as it will amount to a re-trial of the issues of ownership, management and control of the assets of Salama.
110. The Petitioners contend that they are charged in the criminal case with 8 counts relating to filing of returns in relation to the shares in Salama, yet Salama is not the complainant. The Petitioners claimed that the Resort had been in the hands of Hans since August 2010, while the Petitioners were in possession from 21.2.2020 to 28.5.2020 when they were arrested. They stated that that they were taken away from Malindi to facilitate the take over of the Resort by Hans on the same date. They thus claim that their right to property under Article 40 of *the Constitution* was violated by the Respondents.
 111. Additionally, the Petitioners claimed that investigations into the charges they face commenced in August 2010 and were completed in 2015. Further that the process of their arrest, arraignment and resultant confinement was illegal and unconstitutional, malicious, oppressive, unfair and a total abuse of the criminal process to settle civil and commercial disputes. The same cannot amount to a fair trial as contemplated in Article 50 of *the Constitution*. They thus claim that the Respondents violated their right to a fair trial under Article 50 of *the Constitution*.
 112. The 1st and 2nd Respondents opposed the Petition vide grounds of opposition dated 1.7.2020. The grounds are that the Petition offends the provisions of Section 193A of the Criminal Procedure Code in that it seeks to stay criminal proceedings on the grounds that criminal proceedings are directly in issue in civil proceedings; that this Court lacks jurisdiction to examine the sufficiency of evidence in the pending criminal case; that Article 157 of *the Constitution* and the ODPP Act enjoin the DPP to take into consideration the public interest, the interest of administration of justice and the need to prevent abuse of legal process; that the Petitioners have failed to demonstrate in what way their constitutional rights have been violated, infringed and/or threatened by the Respondents; that the Petitioners intention is to delay the trial in the lower court.
 113. Boniface Muli an officer attached to the Directorate of Criminal Investigations (DCI) Headquarters, Nairobi, swore affidavits on 22.6.2020 and 30.5.24. He averred that the Resort has been treated as a crime scene. He stated that in the course of investigations, he had not seen any judgment or order appointing Rodrot as a director or allotted him any shares in Salama, as alleged. He averred that what he has collected as evidence is a court order directing the Registrar of Companies to restore Salama to its status as at 14.12.09. Further that a report from the Business Registration Service does not support the Rodrot's and Uccelli's claims of directorship and shareholding in Salama before 14.12.09.
 114. It was further averred that if the Petitioners can adduce documents other than those found to be forgeries and fraudulent, then the trial court is the best placed and equipped forum to inquire into these allegations and determine the accusations against Rodrot and Uccelli. He added that Rodrot swore an affidavit in Petition No. 13 of 2015, that he is a director of Salama with Mario Scotti Camuzzi as per the CR 12 exhibited, which was found to be false.
 115. The 1st and 2nd Respondents' further contention is that the Petitioners should not be afraid of interrogation as they enjoy the right to remain silent and not to self incriminate. Additionally, that to the extent that there is sufficient, credible and admissible evidence of fraudulent or criminal activities arising from the commercial undertakings to sustain reasonable prospects of conviction, then the law would not exempt Rodrot and Uccelli.
 116. It was asserted that the evidence to be relied upon in the criminal case including Uccelli's statement points towards a false narrative advanced by the Petitioners that they are bona fide shareholders and



- directors of Salama. Further that Alice Mwendwa, Senior Registrar of Companies distanced herself from 2 replying affidavits that were to support the positions of the Petitioners in various civil cases. Additionally, that Faith Chirchir of the Registrar of Companies distanced herself from authorship of a CR 12 dated 12.4.12. Further that CPA Nitin Pandya's statement provided the history of Salama and stated that Rodrot was a mere employee. It was averred that all this was corroborated by the statements of fellow employees, Moses Mwatemo, Joseph Ngumbao Kiponda and Charo Karisa Shombo.
117. The deponent concluded by stating that both civil and criminal processes can run concurrently to their logical conclusion and that public interest militates against allowing the Petition.
 118. In his replying affidavit sworn on 15.3.24, Hans supported the Respondents' case and denied that Rodrot is a director of Salama or that the ruling of 30.4.15 made Rodrot and Uccelli, the shareholders thereof.
 119. Elma Wagner (Wagner), a director of Temple Point swore an affidavit on 1.7.2020 in opposition to the Petition. He averred that the Petition does not disclose the constitutional rights alleged to have been violated. Further that the Petition is fatally defective as Rodrot does not have locus standi to instigate any suit on behalf of Salama as he is neither a director nor shareholder thereof. Additionally, that no resolution of Salama was attached approving institution of the suit.
 120. Wagner further averred that Temple Point leased the Resort from Salama for a period of 15 years at a consideration of Kshs. 1.4 million to Kshs. 5.4 million and that they had invested over Kshs. 698,935,670 up to 2017. He added that the wrangles over ownership of the Resort between Rodrot and Uccelli on the one hand and Hans on the other, caught up with them. Further that there were constant threats of eviction which led Temple Point to instigate Nairobi Insolvency Petition No. 16 of 2018 in which an order was issued restraining the Petitioners and the police from evicting them. However, that on 20.2.2020, Rodrot and Uccelli, in blatant disregard of the court orders, evicted Temple Point from the Resort.
 121. Wagner agreed with the Petitioners that the issue of management and control of the Resort was adjudicated in HCCC No. 118 of 2009 but added that any contempt of the orders issued therein ought to be addressed in that suit.
 122. In response to the Petitioners' claim of violation of their rights under Article 40 of *the Constitution*, it was averred that paragraph 36 the Petition affirmed that the DPP informed the Court that the Resort was handed over to the OCS Watamu as it deemed it a crime scene. As such, if the Petitioners have any substantive evidence to the contrary the same should be brought to the attention of the trial court and that the Petitioners may make the requisite application in the trial court seeking for the said "exhibit" to be released to them upon conclusion of the investigations.
 123. On the allegation that their right to a fair trial under Article 50 was violated for being denied police bail, Wagner contended that the right to police bail is not automatic, and they were indeed granted bail in court upon arraignment within the requisite 24 hours. Further that the Petitioners have deposed that they were allowed to have their counsel present in tandem with their constitutional rights.
 124. On violation of their right to health under Article 43 in the manner in which they were arrested, Wagner argued that no evidence was presented or damages from the alleged breach demonstrated.
 125. Wagner went on to make averments to the effect that the Respondents acted within their constitutional mandate.
 126. Wagner concluded by stating that no reasonable cause has been given by the Petitioners to warrant the quashing of the charges and that in any event, evidence to be tendered in support of the charges should



be tested in the trial court. Further, that the Petitioners have come to Court with unclean hands by deliberately failing to disclose material facts and they do not deserve the equitable remedies they seek to subvert the course of justice. Wagner thus asserted that the Petitioners have failed to demonstrate how their rights under Article 40, 43 and 50 of *the Constitution* were violated.

127. The parties relied on the submissions filed in Petition 10 of 2020 which we have already set out herein.

128. We have looked at the exhibited charge sheet. It contains the following counts:

Count I: Conspiracy to defraud contrary to Section 317 of the Penal Code. The particulars are that on diverse dates between 2.2.10 and 14.7.10 at unknown place within the Republic of Kenya, jointly with others not before Court, conspired with intent to defraud HANS – JURGEN LANGER by means of obtaining false registration of Salama Beach Hotel Limited CR 12 on Certificate of Incorporation No. 34417 dated 2.2.10 by falsely pretending that they were genuine Directors of Salama Beach Hotel Limited and able to act as a Directors of the Company a fact you knew to be false.

Count II: Obtaining Registration of directors by false pretense contrary to Section 328(a) of the Penal Code.

The particulars are that on or before 2.2.10 at unknown place within the Republic of Kenya jointly with others not before court, with intent to defraud, and without colour of right being employees of Salama Beach Hotel limited as an Area Director and Assistant Accountant respectively by false pretense obtained Registration of Salama Beach Hotel Limited as per CR.12 issued and signed by Registrar of Companies Nairobi.

Count III: Obtaining Registration of directors by false pretense contrary to Section 328(a) of the Penal Code.

The particulars are that on or before 23.2.10 at unknown place within the Republic of Kenya jointly with others not before court, with intent to defraud and without colour of right being employees of Salama Beach Hotel Limited as an Area Director and Assistant Accountant respectively by false pretense obtained Registration of Salama Beach Hotel Limited as per CR. 12 C34417 dated 23.2.10 purporting it to be genuine and valid CR. 12 issued and signed by Registrar of Companies Nairobi.

Count IV: Obtaining Registration of directors by false pretense contrary to Section 328(a) of the Penal Code.

The particulars are that on or before 4/6/2010 at unknown place within the Republic of Kenya jointly with others not before court, with intent to defraud and without colour of right being employees of Salama Beach Hotel Limited as an Area Director and Assistant Accountant respectively by false pretense obtained Registration of Salama Beach Hotel Limited as per CR. 12 C34417 dated 4/6/2010 purporting it to be genuine and valid CR. 12 issued and signed by Registrar of Companies Nairobi.

Count V: Obtaining registration of directors by false pretense contrary to Section 328(a) of the Penal Code.

The particulars are that on or before 21.7.10 at unknown place within the Republic of Kenya jointly with others not before court, with intent to defraud and without colour of right being employees of Salama Beach Hotel Limited as an Area Director and Assistant Accountant respectively by false pretense obtained Registration of Salama Beach Hotel limited as per CR. 12 C34417 dated 21.7.10 purporting it to be genuine and valid CR. 12 issued and signed by Registrar of Companies Nairobi.



Count VI: Obtaining registration of directors by false pretense contrary to Section 328(a) of the Penal Code.

The particulars are that on or before 6.8.10 at unknown place within the Republic of Kenya jointly with others not before court, with intent to defraud and without colour of right being employees of Salama Beach Hotel Limited as an Area Director and Assistant Accountant respectively by false pretense obtained Registration of Salama Beach Limited as per CR. 12 C34417 dated 6.8.10 purporting it to be genuine and valid CR. 12 issued and signed by Registrar of Companies Nairobi.

Count VII: Obtaining registration of directors by false pretense contrary to Section 328(a) of the Penal Code.

The particulars are that on or before 12.4.12 at the Registrar of Companies Nairobi within Nairobi County jointly with others not before court, with intent to defraud and without colour of right being employees of Salama Beach Hotel limited as an Area Director and Assistant Account respectively by false pretence obtained Registration of Salama Beach Hotel limited as per CR.12 C34417 dated 12.4.12 issued and signed by State Counsel FAITH CHIRCHIR for Registrar of Companies Nairobi.

Count VIII stealing by servant contrary to section 281 of the Penal Code

The particulars are that on diverse dates between 16.3.10 and 14.7.10 at Kilifi Barclays Bank Branch in Kilifi Town within Kilifi County being servants to Salama Beach Hotel Limited as an Area Director and Resident Manager respectively jointly with others not before Court, stole EUROS 840,000 the property of Accredo AG which came into their possession by virtue of their employment.

129. The claim before us is for redress for violation of the rights under Articles 40, 43(a) and 50 of *the Constitution*.
130. We shall begin with Article 40 which guarantees to every person the right to acquire and own property. It is the Petitioners' claim that they had been in possession of the Resort from 21.2.2020 to 28.5.2020 when they were arrested. They contend that they were taken away from Malindi to facilitate the takeover of the Resort by Hans on the same date. They thus claim that their right to property under Article 40 of *the Constitution* was violated by the Respondents.
131. Associated with the claim of violation of the right to property, the Petitioners seek prayers in relation to what they refer to as forceful takeover of the Resort by agents of the Respondents and handing it over to Hans on 28.5.2020. They also seek orders relating to the management, occupation, ownership and control of the assets and business of the Resort.
132. We note that the issue of ownership, shareholding and directorship of Salama and by extension the management, occupation and control of the Resort is the subject of Civil Case No. 118 of 2009, which is pending before court. In light of this, we decline to delve into the issues raised, for to do so would preempt the civil suit which is active before the court. In any event, the said issues being civil in nature, are not for the constitutional court but for the civil court. It is only upon determination of the suit that the issue of violation of the right to property can be gone into.
133. We now consider the claim that the right of Rodrot and Uccelli to the highest attainable standard of health as guaranteed under Article 43(1)(a) of *the Constitution* was violated by the police in the manner in which they were arrested, driven to Mombasa and held in custody.



134. The material before us shows Rodrot and Uccelli were arrested on 28.5.2020, at the height of the Covid-19 pandemic. They were bundled into a vehicle which had 5 other people some of whom wore no face masks and driven to Mombasa, where they were charged. We note that this was not controverted by the Respondents. The Court takes judicial notice of the protocols put in place during that period, to prevent the spread of Covid-19. These included wearing of face masks and social distancing, which involved keeping a distance of 1.5 meters between people. There was also restriction of movement of persons through Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) orders, in respect of various counties including Kilifi and Mombasa. These protocols were to be observed by every person.
135. Article 43(1)(a) of *the Constitution*, guarantees to every person the right to the highest attainable standard of health. The action of the police to bundle and stack Rodrot and Uccelli in the backseat of a vehicle with 4 other people who wore no face masks was clearly reckless. We also note that their plea to the Officer Commanding Port Police Station to release them on bond to reduce exposure to Covid-19 infection was disallowed. Given the then prevailing circumstances of the pandemic, it is quite evident that the police put the health of Rodrot and Uccelli in great jeopardy by exposing them to Covid-19 infection, more so because the drive from Malindi to Mombasa takes no less than 2 hours. They were subjected to further exposure by being denied police bond. In light of the foregoing, we agree with the Petitioners and find that failure by the police to comply with the Covid-19 protocols violated the right of Rodrot and Uccelli to the highest attainable standard of health under Article 43(1)(a) of *the Constitution*.
136. We now turn to the claim that the police violated the Petitioners' right to a fair trial as guaranteed under Article 50 of *the Constitution*. The Petitioners posited that their arrest and detention were unconstitutional, unlawful and invalid. This was contested by the 1st and 2nd Respondents, who maintained that they acted in accordance with Article 157 of *the Constitution* and the law to investigate and prosecute crime.
137. We have already stated herein that the right to a fair trial is non-derogable. It is among the rights listed in Article 25 of *the Constitution*, that may not be limited. We have also set out the constitutional and statutory mandate and powers of the Respondents. We have further restated that constitutional and statutory bodies such as the Respondents herein, must be given the space to discharge their mandate and to exercise their discretion in doing so and we have cited various authorities. We need not regurgitate them.
138. While the Respondents must be allowed to discharge their mandate unhindered, such discharge must be within the confines of *the Constitution* and the law. In this regard, the High Court has often been called upon to examine the lawfulness of the discharge by the Respondents, of their mandate and make pronouncements thereon. The common thread running through a long line of decisions is that where a person has been arrested and charged following investigations, there must be justification, to avoid arbitrariness. On the other hand where the arrest and prosecution of a person is warranted, it cannot be said that such person's rights and fundamental freedoms have been violated.
139. The uncontroverted evidence before us is that the investigations into the offences with which Rodrot and Uccelli are charged were concluded in 2015. However, they were charged 5 years later and 10 years after the complaint was made. This notwithstanding, they were held for 4 days allegedly to conclude investigations. Further, in spite of Rodrot and Uccelli being residents of Malindi, the place of their arrest, they were without any rational explanation, whisked away to Mombasa and charged there. Given the restriction of movement orders in place due to Covid-19, they could not have access to lawyers and family, and even if they were granted bail, they would still have been confined in Mombasa. The



arrest, incarceration and transportation of the Petitioners for alleged offences that were said to have been committed 10 years earlier was clearly not in good faith.

140. The law is that the Court will intervene where the actions of the Respondents are oppressive, vexatious and amount to an abuse of the court process. In *Stanley Munga Githunguri v Republic* [1985] eKLR a 3 Judge bench of this Court restated the inherent power of the Court to stop a prosecution that amounts to an abuse of the court process, that is oppressive and vexatious. Simpson, Sachdeva and Mbaya, JJ stated:

Mr. Chunga conceded that the High Court has inherent jurisdiction and that a person charged before a subordinate court and considering himself to be the victim of oppression may seek a remedy in the High Court by way of an application for a prerogative order. We have no doubt that he is correct and that Judges of the High Court have a similar discretion in respect of offences triable before them. (*Connelly v DPP* [1964] 2 All ER 401 cited by both counsel). It is a power to be exercised very sparingly however.

In *DPP v Humphreys* [1976] 2 All ER 497 Lord Salmon said (at page 527-3):

“I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of 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 if 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. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is in my view, of great Constitutional importance and should be jealously preserved.”

May LJ in *R v Grays Justice* [1982] 3 All ER 653 had this to say regarding prohibition of the further prosecution of proceedings (page 658) :

“Certainly there must be some abuse of the process of the court, some at least improper and it may be mala fide use of its procedure, before an order of judicial review in the nature of prohibition will be made.

In our opinion, although delay of itself, with nothing more, if sufficiently prolonged, could in some cases be such as to render criminal proceedings brought long after the events said to constitute the offence both vexatious and an abuse, we do not think delay of the order that there has been in and in the circumstances of this case can be so described.”

The delay in that case was only two years. The delay in the present case from the dates of commission of the alleged offences is 9 years in the case of two of the counts and 6 in the case of the other two. As may be seen from the National Assembly Official Report for June 30, 1981, the Attorney-General “never went beyond what is called an inquiry” which resulted in 20 proposed charges. The inquiry never went to court. The file was brought to the office of the Attorney-General and he was satisfied that there was no evidence against Mr. Githunguri. Mr. Chunga has conceded that the present 4 charges were amongst those proposed 20 charges.



141. The grounds upon which a prosecution may be prohibited were considered in *Director of Public Prosecutions v Martin Maina & 4 Others* [2017] eKLR, where the Court of Appeal stated:

40. The learned Judge was alive to the fact that the judicial power of quashing criminal proceedings has to be exercised very sparingly, as held by the Supreme Court of India in *State of Maharashtra & Others v ARun Gulab Gawali & Others* (supra). In the same matter the Court outlined grounds upon which orders prohibiting criminal prosecution may be granted. 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;
- (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;
- (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; and
- (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.”

The court went on to state:

The power of quashing criminal proceedings has to be exercised very sparingly with circumspection and that too in the rarest of rare cases.”

142. Article 157(11) of *the Constitution* is explicit that the DPP shall in exercise of the powers conferred upon him, 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. The provision protects against oppressive and vexatious prosecution that goes against public policy and interest and an abuse of the court process. This protection arises from the dark history of this country.

143. In the case of *Republic v Mohammed & another (Petition 39 of 2018)* [2019] KESC 48 (KLR) (15 March 2019) (Judgment) (with dissent - MK Ibrahim & SC Wanjala, SCJJ) the Supreme Court acknowledged the chequered past of the country while addressing the amendment to section 25A of the *Evidence Act* and stated as follows:

The mischief for its enactment was to protect and safeguard the rights of suspects, coming from a chequered history of violations of rights of accused where confessions were extracted through torture by the police. This history was well captured by the High Court, Ouko J (as he then was), in *Republic v. Maalim Komora Godana & another* [2006] eKLR, thus: “The matter at hand calls for the interpretation of section 25A of the *Evidence Act*. I have not been able to find any decision on the matter. Given its novelty, therefore, it is imperative that the position of the law in the period preceding the amendment of the *Evidence Act* by the Criminal (Amendment) *Act (No 5 of 2003)* be revisited. *Act No 5 of 2003* introduced section 25A and repealed sections 28, 30 and 31. Section 28 provided that a confession could be obtained from an accused person



while in police custody only in the presence of a magistrate or a police officer of the rank of inspector and above. Sight must not be lost of the mischief intended by the amendment.

The powers of the court to quash proceedings to meet the ends of justice cannot be gainsaid. In the case of *Maina & 4 others v Director of Public Prosecutions & 4 others (Constitutional Petition E106 & 160 of 2021)* (Consolidated) [2022] KEHC 15 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment), the Court stated as doth:

A court could stop the prosecution of an accused when the institution/continuance of criminal proceedings against an accused could amount to the abuse of the process of the court; when the quashing of the impugned proceedings would secure the ends of justice; where it manifestly appeared that there was a legal bar against the institution or continuance of the proceedings, e.g., want of sanction; where the allegations in the First Information Report or the complaints taken at their face value and accepted in their entirety, did not constitute the offence alleged; where the allegations constituted an offence alleged but there was either no legal evidence adduced or evidence adduced clearly or manifestly failed to prove the charge; where the prosecution was not in public interest; where the prosecution was not in the interests of the administration of justice; where the prosecution was oppressive, vexatious and an abuse of the court process; where the prosecution amounted to a breach of rights and fundamental freedoms; where the investigation and prosecution amounted to abuse of power and discretion and was aimed at achieving an ulterior or improper motive; where the investigation and the prosecution were tainted with illegality, irrationality and procedural impropriety; and where the investigation and prosecution were in gross contravention of *the Constitution* and the law.

144. In the case of *Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others* [2013] eKLR, the Court of Appeal addressed its mind to abuse of mandate by the IG and the DPP and stated:

By the same token and in terms of Article 157 (11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See *Githunguri V. Republic* [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua V. R.* [2002] 1EA 205. See also *Kuria & 3 Others V. Attorney General* [2002] 2KLR 69.

145. The right to fair administrative action cannot be gainsaid. Article 47 of *the Constitution* provides that every person is entitled to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This is restated in Section 4 of the *Fair Administrative Action Act* (FAAA).



146. In the case of *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, the Court of Appeal had this to say about the right to fair administrative action:

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

147. Any administrative action taken by any administrator must conform to the provisions of Article 47 and Section 4 of the FAAA. The decision by the Respondents to arrest and charge Rodrot and Uccelli falls within the meaning of “administrative action” under Section 2 of the Act. The Respondents were obligated to act in a manner that was expeditious, efficient, lawful, reasonable and procedurally fair.

148. The decision to charge them many years after the offences were allegedly committed, the decision and manner in which they were transported to Mombasa under the then prevailing circumstances denied the Petitioners their constitutional right to procedural fairness.

149. After considering the foregoing factors taken together, we find that the Respondents did not accord Rodrot and Uccelli fair administrative action as envisaged in *the Constitution* and statute. Pursuant to Section 7(2) of the FAAA, the Respondents’ actions are subject to judicial review on account of procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

150. We now turn to the charges which Rodrot and Uccelli face in the Criminal Case. We have looked at the particulars of the offences. They include inter alia, falsely pretending to be genuine directors of Salama and obtaining false registration of Salama and directors and Forms CR12 of Salama purporting them to be genuine. They are also charged with the offence of theft by servant.

151. It is common ground that the issues of shareholding and directorship of Salama, which include the status of Rodrot and Uccelli therein, as well as the control and management of the Resort are live in civil suits before this Court. We are alive that Section 193A of the Criminal Procedure Code provides that notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceeding. However, the offences with which Rodrot and Uccelli are charged appear to have been provoked by the enforcement of the ruling of the High Court of 30.4.15. Further that the issues of shareholding and directorship of Salama, are still live before the High Court. It is for this reason that we find that it is the High Court, that is best placed to make a final determination on the said issues.

152. In the end, we are satisfied that the prosecution of Rodrot and Uccelli on the said issues that are before the civil court is oppressive and not in the public interest. It was also not in the interests of the administration of justice or motivated by the need to prevent and avoid abuse of the legal process. The same cannot therefore stand.

153. The Petitioners also seek prayers in relation to what they refer to as forceful takeover of the Resort by agents of the Respondents and handing it over to the complainant on 28.5.2020. They also seek orders relating to the management, occupation, ownership and control of the assets and business of



the Resort. We have repeatedly stated that the issue of ownership, shareholding and directorship of Salama and by extension the management occupation and control of the Resort is the subject of Civil Case No. 118 of 2009 which is pending before court. This Court is concerned with questions as to whether there has been breach of the Petitioners' rights and fundamental freedoms under the Bill of Rights or of *the Constitution* itself. In light of this, we decline to delve into the said issues which would preempt the hearing of the civil suit. In any event, the said issues being civil in nature, are not for the constitutional court but for the civil court.

Petition No. 13 OF 2015

154. This is the oldest of the 4 petitions before this bench. The Petition is dated 25.9.15 and is filed by Isaac Rodrot (Rodrot) against Director of Public Prosecutions (DPP) as the 1st Respondent, Director of Criminal Investigations (DCI) as the 2nd Respondent, Inspector General of Police (the IG) as the 3rd Respondent and the Honourable Attorney General (the AG) as the 4th Respondent. The Petitioner challenged his prosecution in Malindi Criminal Case No. 394 of 2016 (formerly Milimani Criminal Case No. 775 of 2015) (the Criminal Case).

155. Rodrot stated that in the Criminal Case, he was charged with the following offences:

1. Unauthorized access to computer data contrary to Section 83U(1) of the Kenya Information and Communication Act, particulars are that on diverse dates in 2014 at an unknown place within the republic of Kenya knowingly and without lawful excuse accessed the email account md@templepointresort.com belonging to Hans Langer.
2. Unauthorized disclosure of password contrary to section 83Z(o) of the Kenya Information and Communication Act, particulars being that on unknown date in 2024 at unknown place within the republic of Kenya knowingly and without lawful excuse disclosed email address md@templepointresort.com and password "mkw31771" of Hans Langer to Stephano Uccelli with intent to gain access to the data held therein.

156. Rodrot seeks the following reliefs:

1. A declaratory order do issue that the Petitioner's rights have been violated as particularized above.
2. A declaration order that 1st and 2nd Respondent in light of the allegations touching on his competence, integrity and suitability as well as conflict of interest for that office is in breach of *the Constitution* in particular Article 10 (1) and (2) and Article 73 (1) and (2) of *the Constitution*.
3. A declaration order that the 2nd Respondent as a public officer herein abused his powers contrary to article 157(11) of the constitutional by unfairly prosecuting the petitioner and constantly harassing the petitioner at the behest of the foreign interests thus stifling the administration of justice and should forthwith stop the prosecution of all matters relating to the aforementioned criminal cases.
4. A declaration order that the 2nd Respondent in light of allegations of corruption, incompetence and conflict of interest in the manner he has handled matters relating to the prosecution of the petitioner his acts of omission or commission by himself and/ or assigns be declared inconsistent with *the Constitution* and in particular Articles 73(1) & (2) of *the Constitution* as read with Sections 12 and 22 of the Public Officers Ethics Act.



5. A declaration order that the actions, inactions, commission and omissions of the 1st and 2nd Respondents in prosecuting the Petitioner in relation to Salama Beach Hotel Limited violates the Petitioner's rights to fair administrative action as guaranteed under article 47 of *the constitution*.
 6. A declaration order that the actions, inactions, omissions and commissions of the 1st and 2nd Respondents in failing to investigate complaint by the Petitioner herein over illegal and fraudulent acquisition of Salama Beach Hotel which formed subject in complaint by the complainant against the Petitioner and instead giving preferential treatment to Hans Juergen Langer's complaint. The failure by the 1st and 2nd Respondent to prosecute Hans Juergen Langer despite there being a recommendation of the same from the officers of the 1st Respondents without giving any sufficient reason was in breach of their constitutional duty.
 7. A declaration order that the fundamental rights and freedoms of the Petitioner as guaranteed under Article 50(1) of *the Constitution* has been violated.
 8. A declaratory order do issue that the allegations against the Petitioner have no basis in law and any intended prosecution and ongoing prosecution against the Petitioner is bad in law and should be declared illegal.
 9. A declaratory order do issue that any action of the Respondents that is inconsistent with *the Constitution* be voided to that extent.
 10. A declaratory order that the DECREE issued by Hon. Justice Mohammed Ibrahim on 21st January 2010 is unconstitutional to that extent.
 11. An order of Mandamus directed against the 1st and 2nd Respondents to stop prosecuting any criminal case against the Petitioner in relation to Salama Beach Hotel Limited as the court has ruled that Hans Jüergen Langer the complainant herein acquired the hotel fraudulently, illegally and the hotel be handed over to the Petitioner herein.
 12. Alternatively, a declaration that the Petitioner is entitled to the protection of the law as guaranteed under Article 27(1) of *the constitution* of Kenya; and the abuse of power and subsequent office in the manner of investigation harassment and malicious prosecution of the Petitioner by the 2nd Respondent is a flagrant disregard of right to a fair hearing as encapsulated in article 50(1) of *the Constitution*.
157. The Petition is premised on the grounds set out therein and the supporting affidavit of the Petitioner sworn on even date and a supplementary affidavit dated 12.4.2024. Rodrot deponed that he is a shareholder of Salama Beach Hotel Limited (Salama) with 40,000 shares. He further stated that prior to 2009, he was the chief executive officer of Salama. He added that he acted as the sole agent of Ventaglio International S.A Luxemburg which holds 41,000 shares in Salama.
158. The Petitioner's case is that he has a long and convoluted ownership tussle with Hans over Salama trading as Temple Point Resort, which matter he says was decided in his favour in HCCC No. 118 of 2009 on 30.4.15. He added that the decision vindicated him of all the accusations by Hans in the criminal cases. Further that he had hitherto been dispossessed of his shares in Salama vide the decree of 21.1.10, which decree was set aside by the ruling of 30.4.15, restoring the ownership. He stated that the decision was upheld by the Court of Appeal in Civil Appeal No. 36 of 2015 and effected by the Registrar of Companies as evidenced by Form CR 12 dated 25.6.15.



159. Rodrot further stated that on numerous occasions he informed the Respondents that Hans had illegally acquired the Resort but that they failed to take any action. Additionally, that the Respondents ignored the decisions of this Court and of the Court of appeal and proceeded to prosecute him endlessly on unfounded claims and charges. Rodrot averred that he was under investigations in DCI inquiry file No. 1919 of 2010, and asserted that his harassment by the Respondents was instigated by Hans over alleged theft by servant at the Resort. He accused Hans of illegally running the Resort through many frivolous and vexatious criminal cases, with the aid of the Respondents. He added that the said criminal cases relate to and arise from ownership of Salama and are intended to scuttle the pending proceedings in HCCC No. 118 of 2009.
160. To support his allegations of harassment, he deponed that despite being a resident of Malindi, officers from DCI arrested and charged him in Nairobi, Milimani over alleged hacking or having information from email md@templepoint.com. Rodrot, thus contented that the charges in the Criminal Case are trumped up. He stated that there was exculpatory evidence in possession of the Respondents exonerating him. It was his case that the criminal case was actuated by malice and ulterior motives. Further that the criminal justice system is being used to settle civil scores and/or dispute between him and Hans over ownership of Salama.
161. The DPP and the DCI filed a replying affidavit sworn on 16.9.16 by Victor Mule (Mule), prosecution counsel. He averred that the orders sought for declaration of the decree dated 21.1.10 issued by Malindi High court is unconstitutional as the Respondents were not party to the case where the decree was issued.
162. He stated that Rodrot has failed to demonstrate how the DCI was using the criminal process to stop him from pursuing his rights in the cases in the High Court. It was their case that all actions and decisions by the DPP, DCI and IG were undertaken pursuant to their respective constitutional mandate, and that they diligently discharged their mandate with utmost competence and integrity and in the interests of the general administration of justice. It was posited that Rodrot had not stated succinctly how his constitutional rights had been violated.
163. Mule further stated that investigations in respect of the Criminal Case commenced following a complaint by one James Maganga that on 10.10.14 he discovered that unknown persons had hacked his email address and several messages were sent to his friends. The complainant reported that the said messages did not originate from him. The messages contained previous conversations he had with his clients but had been manipulated and the contents were different from the original conversation. Mule averred that the prosecution of Rodrot in the Criminal Case cannot be said to be an act of harassment and that the charges were preferred after the evidence gathered disclosed that an offence had been committed.
164. On the claim by Rodrot that the DPP and DCI are in breach of their Constitutional duty for failure to prosecute Hans in respect of his complaint over illegal and fraudulent acquisition of Salama, Mule asserted that under Article 157(10) of *the Constitution*, the DPP does not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his powers or functions, is not under the direction or control of any person or authority. He further denied the allegations of bias and stated that all complaints brought to the DPP had been referred to appropriate investigatory agencies who would act in accordance with the law. Further that appropriate responses had been made to Rodrot's counsel on his fear of bias.
165. He further stated that the Respondents have ensured the protection of Rodrot's rights and that he has not demonstrated how the Respondents have not accorded him protection of the law.



166. Mule further stated that the allegations against the Petitioner are still under investigation. Further that this is a matter within the domain of the trial court to determine the sufficiency or otherwise of the evidence adduced during the trial and this Court cannot usurp the role of the trial court.
167. Additionally, Mule stated that the 1st Respondent was an independent office under Article 248(1) and 157(10) of *the Constitution* and the Petitioners failed to place material before the court to justify any breach of Chapter Six of *the Constitution* on the part of the 1st Respondent. He also deposed that the investigations herein had both local and international aspects hence the delay, and that there was no limited time under the law within which to complete investigations.
168. It was the Respondents further contention that the Petition was not framed with precision as per the principle in *Anarita Karimi Njeru versus Republic* (1980) 1 KLR 1272. With regard to the decree of 21.1.10, Mule averred that the same had been dealt with in Nairobi Constitutional Petition No. 410 of 2012 filed by Rodrot.
169. Parties filed detailed submissions in support of their respective cases which were highlighted before us by their respective counsel.
170. The Petitioner submitted that on 29.4.15, he was charged in the Criminal Case in which the prosecution had lined up several witnesses. Further that one of the witnesses was Uccelli, a director of Salama, using a fake statement containing his forged signature. It was Rodrot's case that Uccelli swore an affidavit on 9.7.19 to the fact that the signature in the purported witness statement was a forgery. Further that Uccelli annexed a document examiner's report dated 4.3.19 which indicated that the signature on the statement in question was by a different author. Rodrot contended that in spite of the 1st to 3rd Respondents being aware of the forgery, they nevertheless, ignored the same and chose instead to charge him.
171. Rodrot then submitted that the charges in the Criminal Case are trumped up and that 1st to 3rd Respondents disregarded exculpatory evidence exonerating him which was in their possession. He contended that his prosecution was actuated by ulterior motives and was meant to achieve collateral purposes and not the overriding objective of the criminal justice system. Further that the 1st to 3rd Respondents were using the criminal justice system to settle civil scores and/or dispute, involving the ownership of Salama between him and Hans. It was his case Mule's replying affidavit did not controvert his claim. He relied on the case of *Stanley Munga Githunguri v Republic* (supra) to support his position.
172. Rodrot submitted that Hans was not a director of Salama pursuant to the order of 30.4.15. As such the complaint against Rodrot is a nullity ab initio. Additionally, that the decision to charge was capricious and arbitrary with the sole intention of assisting Hans in a civil matter. Rodrot asserted that the DPP acted in breach of Article 157(11) of *the Constitution* and the fundamental guiding principles stipulated in section 4 of the ODPP Act. Reliance was placed on *Republic v Chief Licensing Officer, Central Firearms Bureau & 3 Others Ex-Parte Bryan Yongo Otumba* [2015] eKLR.
173. The 1st and 2nd Respondents relied on their submissions dated 2.7.24 which they said were in opposition to all the Petitions herein. We have already set out the said submissions, in Petition 10 of 2020 which we need not regurgitate, save to say that they contended that the Petition was a nonstarter and that the Petitioner had not demonstrated that his constitutional rights had been violated. They maintained that the decision to charge Rodrot was in compliance with *the Constitution* and the law, the National Prosecution Policy and Guidelines on the Decision to Charge, 2019.



174. We have considered the Petition, responses, submissions, cited authorities and oral arguments before us. We now proceed to determine whether the arrest, charging and prosecution of the Petitioner is unconstitutional.
175. We have already stated that 1st and 2nd Respondents being creatures of *the Constitution* and statute, must be given the space to discharge their mandate and to exercise their discretion in doing so. A court will only intervene where it is demonstrated that they have acted ultra vires or in breach of *the Constitution* or the law. We have also cited herein the constitutional and statutory provisions that govern the mandate and powers of the DPP and IG, together with the relevant case law. It will be superfluous to repeat the same.
176. We note from the evidence before us that on 28.4.15, just 2 days before the ruling of 30.4.15 in HCCC No. 118 of 2009 that set aside the consent judgment of 21.1.10, the Petitioner was charged with the offences in question. In the said ruling, the Court directed the Registrar of Companies to remove Hans and Zahra as directors of Salama restore the status of the company in its registry, to the position as at 14.12.09. The Court further directed Hans and Zahra to hand over all the properties belonging to Salama within 7 days of the ruling, to Rodrot and Uccelli. Additionally, Hans and Zahra were removed as signatories to all bank accounts of Salama and were to be replaced by the original signatories as at 14.12.09. That decision was upheld by the Court of Appeal.
177. The charges in the Criminal Case relate to an email address md@templepointresort.com. We note that the email address contains the domain name templepointresort.com. From the available evidence, it is difficult to isolate the case of ownership and management of Salama and the Resort from a dispute over an email address with the Resort's domain name. Going by the ruling of 30.4.15, it would seem logical that the said email address is one of the properties that were to be handed over to Rodrot and Uccelli.
178. It bears repeating that the dispute in the HCCC No. 118 of 2009 revolves around the ownership of Salama and the Resort. Rodrot has stated, and it was not controverted, that as at 2009, he was the chief executive officer of the Resort. It is worth noting that Hans is the complainant in the Criminal Case against Rodrot yet Mule's averments are that the Criminal Case commenced following a complaint by one James Maganga that unknown persons had hacked his email address. The question that begs is, was the complainant in the Criminal Case, Hans or Maganga?
179. In light of the foregoing, to proceed with the prosecution of Rodrot with the glaring contradiction as to who the complainant is and in the face of the ruling of 30.4.15 and the decision of the Court of Appeal, is in our view, an attempt to relitigate the matter in the subordinate court. This defies the constitutional hierarchy of the court system in Kenya.
180. We therefore find that the institution and continuance of the Criminal Case against Rodrot is not in the public interest or the interests of the administration of justice. It also amounts to an abuse of the process of court and will not secure the ends of justice.
181. As regards the allegations touching on the Respondents competence, integrity and suitability as well as conflict of interest and breach of Article 10(1) and (2) and Article 73(1) and (2) of *the Constitution*, we find that no material was placed before us to support the same.
182. The Petitioner seeks a declaratory order that the decree issued by Hon. Justice Mohammed Ibrahim on 21.1.10 is unconstitutional. The question that begs is, does this Court have the jurisdiction to make such orders?
183. The law, is that this Court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. In the case of *Macharia & another v Kenya Commercial Bank Limited*



& 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling) where the Supreme Court stated:

(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

184. The Supreme Court went to state:

Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*.

185. This Court derives its jurisdiction principally from Article 165 of *the Constitution*. Article 165(6) confers upon the Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. The provision is however explicit that the Court has no jurisdiction over a superior court.

186. The decree of 21.1.10 was issued by the High Court. Flowing from the foregoing provision, this Court lacks the jurisdiction to declare the decision of a court of concurrent jurisdiction unconstitutional. In any event, the issue of the said decree was dealt with in Nairobi Petition No. 410 of 2012. Further the decree was set aside by the ruling of 30.4.15. In the premises, the prayer sought by Rodrot relating to the decree of 21.1.10 is declined for want of jurisdiction.

187. The Petitioners in all 4 petitions have moved this Court under Article 22 of *the Constitution* claiming that their rights have been violated. Article 23 provides that the Court may grant appropriate relief, including–

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.

188. An appropriate relief that a court may grant could be a declaration of rights, an injunction, a conservatory order, a declaration that a law is invalid, an order for compensation and an order for judicial review.

189. In the case of Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR, Mrima, J. while considering a petition seeking the quashing of criminal proceedings posited:

129. On a wholesome consideration of this matter, there is no doubt that the conduct of the 1st and 2nd Respondents is questionable. It cannot be the case that they acted in public interest or in the interest of administration of justice. They jointly acted for an otherwise cause.

130. Whereas the investigations undertaken by the 2nd Respondent are highly suspect, the decision to charge the Petitioner made by the 1st Respondent is equally questionable. A decision to



prefer charges against a party must be made within the confines of public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. That was not the case in this matter.

190. As we have stated herein, the manner in which the Petitioners in Petitions 6 of 2019, 12 of 2020 and 13 of 2015 were arrested, charged and prosecuted failed to accord them the right to a fair trial. Accordingly, we find that the proceedings occasioned great prejudice to the Petitioners. The prosecution of the Petitioners in the respective cases is not in the public interest or in the interest of administration of justice and therefore an abuse of the court process.
191. Beyond the declaratory orders sought by the Petitioners for violation of their rights, they also seek compensation for the violation of their rights.
192. A case of constitutional violation, such as the ones before us do not call for an award of compensatory damages in the traditional sense. The award of damages is a secondary remedy, as was stated by the Constitutional Court of South Africa in the case of *Dendy v University of Witwatersrand, Johannesburg & Others* - [2006] 1 LRC 291 as follows:

[T]he primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

193. We also derive guidance in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR in which the Court of Appeal spoke to the issue of award of damages for infringement of constitutional rights and stated:

The relevant principles applicable to award of damages for constitutional violations under *the Constitution* was explained exhaustively by the Privy Council in the famous case of *Siewchand Ramanoop v The AG of T&T*, PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

194. The Court of Appeal went on to state:

Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only



will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration.

195. Duly guided by the holding in the cited cases and having regard to the circumstances herein, we find that the justice of these cases does not favour the grant of an award of damages. Our view is that a declaration of violation of rights would be the appropriate remedy.
196. In the end, having considered all the Petitions before us and analyzed the law and cited authorities, we find that the following orders commend themselves:
 1. Petition No. 10 of 2020 is hereby dismissed.
 2. A declaration is hereby issued that the arrest, charging and prosecuting Stefano Uccelli for the offence of perjury in Malindi Criminal Case No. 609 of 2019 Republic v Stefano Uccelli is unconstitutional, illegal, unlawful, invalid, null and void ab initio,
 3. A declaration is hereby issued that Stefano Uccelli's right to a fair hearing enshrined in Article 50 of *the Constitution* of Kenya was violated and/or infringed upon by the Respondents in their conduct in Malindi Criminal Case No. 609 of 2019 Republic v Stefano Uccelli.
 4. The proceedings against Stefano Uccelli in Malindi Criminal Case No 609 of 2019 Republic v Stefano Uccelli are hereby quashed.
 5. We direct that any fine paid by Stefano Uccelli in Malindi Criminal Case No. 609 of 2019 Republic v Stefano Uccelli, be refunded to him forthwith.
 6. A declaration does hereby issue that the rights of Isaac Rodrot and Stefano Uccelli to a fair trial under Article 50 of *the Constitution*, fair administrative action under Article 47 and right to highest attainable standard of health under Article 43(1) (a) of *the Constitution* were breached by the Respondents in relation to Mombasa Criminal Case No. 854 of 2020 Republic v Steffano Uccelli & Isaac Rodrot alias Mwaura.
 7. The proceedings in Mombasa Criminal Case No. 854 of 2020 Republic v Steffano Uccelli & Isaac Rodrot alias Mwaura, are hereby quashed.
 8. A declaration does hereby issue that the rights of Isaac Rodrot to a fair trial under Article 50 of *the Constitution* and fair administrative action under Article 47 were breached by the Respondents in relation to Criminal Case No. 394 of 2016 Republic v Isaac Rodrot.
 9. The proceedings in Malindi Criminal Case No. 394 of 2016 Republic v Isaac Rodrot are hereby quashed.
 10. No order as to costs.

DATED SIGNED AND DELIVERED VIA MS TEAMS THIS 25TH DAY OF OCTOBER 2024

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M. THANDE
JUDGE

.....

ANNE ONG'INJO
JUDGE



.....
KIZITO MAGARE
JUDGE

