



Korane v Director of Public Prosecutions & 3 others (Anti-Corruption and Economic Crime Petition E005 of 2022) [2023] KEHC 784 (KLR) (Anti-Corruption and Economic Crimes) (9 February 2023) (Judgment)

Neutral citation: [2023] KEHC 784 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION E005 OF 2022
EN MAINA, J
FEBRUARY 9, 2023

BETWEEN

ALI BUNOW KORANE PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

THE CHIEF MAGISTRATE ANTI-CORRUPTION COURT . 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The petitioner is a former governor of Garissa county, acting on his own behalf and that of others. By a petition dated March 4, 2022, he invokes the jurisdiction of this court under articles 22(2) and 258 (2) of the *Constitution* of Kenya and rules 3,4(1), 8 and 10 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013* and challenges the decision by the 1st respondent to charge him in Milimani Chief Magistrate's Court, Anti-Corruption Case No 039 of 2020.
2. The 1st respondent, the director of public prosecutions is an independent office established under article 157 of the *Constitution* mandated to *inter alia* to institute and undertake criminal proceedings against any person in respect of any offences.
3. The 2nd respondent, the ethics and anti-corruption commission is a constitutional commission established under article 79 of the *Constitution* with the status and powers of a commission under



chapter 15 of the Constitution for purposes of ensuring compliance with and enforcement of the provisions of chapter 6 of the Constitution.

4. The 3rd respondent, the chief magistrate's anti-corruption court is a subordinate court established pursuant to article 157 of the Constitution and section 5 of the Chief Magistrates Court Act, 2015.
5. The 4th respondent, the Attorney General is a state officer appointed pursuant to article 156 of the Constitution. He is the principal legal adviser to the government of Kenya and represents the national government in civil proceedings, mandated to promote, protect and uphold the Constitution.

Background

6. The petitioner's main contention is that the decision to charge him in Milimani Chief Magistrate's Court, Anti-Corruption Case No 039 of 2020 is unconstitutional as it violates article 157(11) of the Constitution. He further cites articles 2(1), 2(2), 3(1), 10, 19, 20,21,22,23,24,25,28,35,47,50(2), 73(1), 75(1), 159(1), 165(3), 207, 258 (1) and 259(1) of the Constitution of Kenya and various provisions of the Anti-Corruption and Economic Crimes Act, the Public Finance Management Act and Public Finance Management Rules, 2015 as the legal foundation of the petition. He seeks the following reliefs:

- “ 1) A declaration be and is hereby issued that the 1st respondent's decision to charge the petitioner violates article 157(11) of the Constitution.
- 2) An order of *certiorari* to remove into the honourable court and quash the decision by the 1st respondent to charge and prosecute the petitioner in respect to the subject in the Milimani Chief Magistrate's Court, Anti-Corruption Case No 039 of 2020.
- 3) An order of prohibition directed to the respondents, prohibiting further proceedings in the Milimani Chief Magistrate's Court, Anti-Corruption Case No 039 of 2020.
- 4) An order of prohibition directed to the 1st respondent, prohibiting the 1st respondent from instituting any future charges against the petitioner in respect to the subject in the Milimani Chief Magistrate's Court, Anti-Corruption Case No 039 of 2020.
- 5) Costs of this petition.
- 6) Any other or further relief as this honourable court may deem fit to grant.”

7. The gist of the petitioner's case is that he challenges the decision of the 1st respondent to charge him on the basis that it is an abuse of power and in breach of the obligations under articles 157(6) and 157 (11) of the Constitution which guide the decision to charge. The petitioner contends that this court has the jurisdiction to quash criminal charges where it has been shown that the decision to charge lacks *prima facie* basis, the particulars of the offence lack essential elements and the decision was made in error, in bad faith and contrary to the guiding principles.

8. The impugned charges are stated on the charge sheet as follows:

Count I: The petitioner alongside others were charged jointly with the offence of conspiracy to commit an offence of economic crime contrary to section 47 a (3) as read with section 48 of the Anti-Corruption and Economic Crimes Act No 3 of 2003.



The particulars are that between February 25, 2019 and September 30, 2019 within Garissa county in the republic of Kenya, conspired to commit an economic crime namely mismanagement of public funds allocated to the county government of Garissa as a conditional grant for the Kenya Urban Support Program (KUSP) amounting to Kshs 233,506,000/-

Count II : The petitioner was charged with willful failure to comply with the law relating to management of funds contrary to section 45 (2) (b) as read with section 48 of the Anticorruption and Economic Crimes Act, 2003.

The particulars of the offence are that between February 5, 2018 and February 3, 2020 at the Garissa county within the republic of Kenya, being the governor and chief executive officer of Garissa county government, willfully failed to comply with the law relating to the management and use of county resources to wit section 30 (2) (a) and section 30 (3) (f) of the County Government Act, 2012 thereby resulting to mismanagement of Kshs. 233,506,000/- allocated to the county government of Garissa as a conditional grant for the Kenya Urban Support Program (KUSP)

9. The petitioner alleges the following violations stated on the face of the petition and in his supporting affidavit:-

- “ 1) Firstly, the decision by the 1st respondent to charge the petitioner in Anti-Corruption Case No 039 of 2020, has the unconstitutional purpose and effect of abuse of the power to charge contrary to article 157 (11) of the Constitution.
2. The decision to charge or not to charge should not be taken lightly. The guidelines on the decision to charge 2019 outline the two-stage test comprising of the evidentiary test followed by the public interest test to be considered before arriving at the decision to charge. The two-stage test should be applied when all outstanding reasonable lines of enquiry have been pursued or prior to an investigation being completed, where the prosecution is satisfied that any further evidence or material is unlikely to affect the application of the two-stage whether in favour or against a prosecution.
3. The evidentiary test means the prosecution must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against suspect on each charge.
4. The public interest test on the other hand means that the test applied by prosecutor to decide whether charging a suspect should be in the interest of the wider administration of justice.
5. The guidelines on the decision to charge 2019, provide that when applying the public interest test, the 1st respondent should consider a broad range of factors including whether and the extent to which the suspect has benefitted from the criminal conduct and whether it is prudent to apply state resources to prosecute the case.
6. When deciding whether to prosecute or not, the 1st respondent should first identify all elements for each offence. This involves a thorough understanding of relevant substantive and procedural law including legal precedents.



7. In the instant case, the 1st respondent charged the petitioner with willful failure to comply with the law relating to management of funds contrary to section 45(2) (b) as read with section 48 of the *Anti-Corruption and Economic Crimes Act* No 3 of 22 of 25, the petitioner contravenes article to ensure that the 2003 while knowing too well or ought to have known that there is no evidence has been adduced that can show *prima facie* the existence of any such criminal offence. In any event, the inter-account borrowing was approved by the relevant accounting officers pursuant to the law, and not the petitioner.
8. The petitioner avers that it is difficult to rationalize how the charges can be properly asserted and sustained without the risk of abuse of power to charge. The decision to charge the petitioner ostensibly because he is the governor without even remotely providing prima facie evidence of criminal culpability on his part, is at the very minimum, arbitrary, illegal, unlawful and a brazen breach of article 157(11) of the *Constitution*.
9. Secondly, the decision by the 1st respondent to charge the petitioner with conspiracy to commit an offence of economic crime while knowing too well that no money was lost and hence no criminal offence has been committed is a brazen abuse of power to charge, a gross violation of the *Constitution*, and not in the best interest of the administration of justice.
10. Thirdly, the launching of the said prosecution is an outright abuse of the legal process and invites the court's supervisory jurisdiction under article 165(3) of the *Constitution* to countervail the 1st respondent's decision to charge and to give directions to protect the petitioner's fundamental rights and freedoms and ensure fair administration of justice.
11. As a consequence, the petitioner prays that this honourable court be pleased to issue the declarations, orders, directions and any other effective remedy that it may deem fit as to protect the petitioner against the threatened violations of his constitutionally ordained rights.
12. The petitioner avers that his grievances are genuine, legitimate and deserving of the honourable court intervention in the manner proposed and prayed herein.
13. This honourable court has the jurisdiction to hear and determine the constitutional issues raised in this petition pursuant to articles 23 (1) and 165(3) (b) of the *Constitution*."

10. The 1st, 2nd, 3rd and 4th respondents all opposed the petition. The 1st respondent filed a replying affidavit sworn by Njoki Kihara on May 9, 2022, 2nd respondent filed a replying affidavit sworn by Justus Wangia on May 24, 2022 while the 4th respondents filed grounds of opposition dated April 28, 2022. The 2nd respondent also raised a preliminary objection dated March 30, 2022 in which it avers that the petition herein is res judicata and hence an abuse of the court process.

The Petitioner's Case

11. The petition and the preliminary objection were canvassed together by way of written submissions as directed by this court on September 20, 2022.



12. The petitioner contends that count 1 does not disclose an offence and as such, was made in error and in bad faith; that count 2 lacks prima facie evidence; that the charge of failure to comply with the law relating to the management of funds contrary to section 45(2) (b) as read with section 48 of the [Anti-Corruption and Economic Crimes Act](#) is a dead-end charge as the investigating officer has stated in his covering report that no funds were misappropriated and the funds were directed to various county government accounts. He contends that the decision to charge him was made in error and contrary to article 157(11) of the [Constitution](#) and urged the court to invoke its supervisory jurisdiction under article 165(3) of the [Constitution](#) to review and quash the decision to charge the petitioner in both counts 1 and 2.
13. The petitioner framed six issues for determination: whether the instant petition is *res judicata* and/or litigated in installments; whether there is a competent petition before this court; whether the charges against the petitioner lack legal substratum *prima facie*; whether the decision to charge the petitioner is arbitrary, illegal, unlawful and therefore a contravention of article 157(11) of the [Constitution](#); what are general principles should guide the honourable court in guiding in resolving the issues at hand; and what are the appropriate remedies?
14. On the first issue, the petitioner submitted that contrary to the 2nd respondent’s preliminary objection, this petition is not *res judicata* as the same is substantially different from petition No E006 of 2021; that the petitioner was only but an interested party and not a primary party and that the issues and reliefs sought are different from the issues in this petition. That the parties are not litigating under the same title, the issues have not been determined by a court of competent jurisdiction and as such, the petition is not barred by *res judicata*. They cited the case of [Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#) [2017] eKLR.
15. On the decision to charge, the petitioner submitted that it is arbitrary, illegal, unlawful and therefore a contravention of article 157(11) of the [Constitution](#). That while the 1st respondent has the prosecutorial powers to institute criminal proceedings, article 157(11) has ordained an accountability framework to ensure that the prosecutorial powers are not used in a manner that is oppressive and tantamount to an abuse of the court process. Further, that article 157(11) is amplified by the guidelines on the decision to charge 2019 which outline the two-stage test comprising of an evidential test and the public interest test. Where the decision to charge has been exercised arbitrarily and the charges are baseless, this court has the jurisdiction to interfere with the decision and to terminate the proceedings. They relied on the case of [Michael Sistu Mwaura Kamau and 12 others v Ethics and Anti-Corruption Commission & 4 others](#) [2016] eKLR.
16. They submitted further that the charge in count 1 cannot stand, that they are a “writ in water” and even if the petitioner elected to remain silent, a conviction cannot be sustained. That the 1st respondent has not provided a rational basis for the charges.
17. On count 2, they submitted that the forensic report indicated that there was no money lost or directed to personal use and therefore the issue of willful failure to manage public funds did not arise. That the two counts lack legal substratum and the 1st respondent acted in bad faith and flagrant abuse of the legal process contrary to article 157(11) of the [Constitution](#). They relied on the case of [Ethics and Anti-Corruption Commission v Ibrahim Haji Issak](#) [2020] eKLR.
18. Lastly, they urged the court to apply a holistic interpretation of the [Constitution](#) in resolving the questions in issue. They reiterated that that the 1st respondent has not shown a prima facie basis for the decision to charge the petitioner and as a consequence, the court should review and quash the decision



to charge the petitioner in Milimani Chief Magistrate's Court, Anti-Corruption Case No 039 of 2020 and grant the reliefs as prayed in the petition.

The Respondents' Case

19. The 1st respondent opposed the petition and relied on the affidavit of Njoki Kihara sworn on 9th May and their written submissions. They framed four issues for determination: whether this court can entertain a petition that raises issues that were directly and substantially in issue in a petition that has since been determined; whether there is a basis for this honourable court to intervene against the 1st respondent's exercise of its constitutional mandate in the subject trial; whether the petitioner's fundamental rights under the *Constitution* have been violated and whether the decision to charge the petitioner was based on insufficient evidence.
20. They submitted that the petition is barred by the doctrine of res judicata under section 7 of the *Civil Procedure Act* by virtue of this court's determination in *Abdi Shalle Bule & 2 others v EACC & 3 others; Ali Bunow Korane (Interested Party)* [2022] eKLR.
21. On whether the court should interfere with the decision of the 1st respondent to charge the petitioner, they submitted in the negative; that this court ought not to usurp the constitutional mandate of the director of public prosecutions to investigate and undertake prosecutions; that the fact that the ongoing prosecution is likely to fail is not a ground for the court's interference as the defense is open to the petitioner in those proceedings and that the court should exercise judicial deference and only interfere with the 1st respondent's discretion sparingly and in the rarest of circumstances. They cited the case of Civil Appeal No 217 of 2014 *Diamond Hasham Lalji & another v Attorney General & 4 others* 2015 eKLR, where the Court of Appeal stated the law as follows:

“From the foregoing, there cannot be any doubt that the prosecutorial discretion of DPP is not absolute. It is limited by article 157(11) which specifies the mandatory considerations that underlie the exercise of discretion; by the constitutional principles to which we have referred and by statute.”
22. They contended that the 1st respondent is independent of any form of interference and relied further on *Tukamubebwa v Attorney General* Uganda Constitutional Petition No 59 of 2011 [2014] UGSC and *Charles Okello Mwanda v Ethics and Anti-Corruption Commission* [2014] eKLR.
23. On whether the petitioner's rights have been violated, they submitted that the petitioner has failed to demonstrate the manner in which the constitutional rights have been infringed. That the preferring of charges is not a violation of the petitioner's rights as this allows for the proper functioning of the rule of law and that there is absolutely no right that has been violated.
24. Lastly, the 1st respondent submitted that they considered the evidence gathered by the 2nd respondent and the public interest before arriving at the decision to charge the petitioner. That should this court consider whether the decision to charge was based on insufficient evidence as argued by the petitioner, it would be tantamount to descending into the arena of investigation and an interference of the constitutional mandate of the 1st respondent. That the petition is frivolous, vexatious, and an abuse of the court process and should be dismissed on this basis.
25. The 2nd respondent opposed the petition on the same grounds as the 1st respondent. They reiterated that the petition was *res judicata* by virtue of this court's determination on ACEC Petition No E006 of 2021 *Abdi Shale Bulee & 2 others v EACC & 3 others; Ali Bunow Korane (interested party)* [2022] eKLR.



26. On whether the petitioner's constitutional rights have been violated, they submitted that the petitioner has failed to demonstrate any illegality, bias unfairness, unreasonableness on the part of the respondents and as such the petition is aimed to circumvent the criminal justice system. That the 2nd respondent acted on a complaint and commenced investigations in the execution of its constitutional mandate. That there was no malice or impropriety on the part of the respondents and as such the allegations by the petitioner are unsubstantiated. They submitted that the trial court is the proper forum to consider the facts and evidence of the case and this court should refrain from usurping the mandate of the subordinate court. They cited the case of *Raymond Kipchirichir Cheruiyot & another v Republic* [2021] eKLR and *Republic v Attorney General ex parte Kipng'eno Arap Ngeny* [2001] eKLR.
27. Lastly, that the issue on whether this court should halt the ongoing criminal trial was addressed at length by this court in ACEC Petition No E006 of 2021 *Abdi Shale Bulle and 3 others v Ethics and Anti-Corruption Commission and 3 others*.
28. The 2nd respondent in sum urged the court to dismiss the petition with costs.
29. The 3rd and 4th respondents similarly opposed the petition *vide* grounds of opposition dated April 28, 2022. In the joint written submissions dated September 29, 2022, they restricted their submissions to prayer No (c) of the petition: An order of prohibition directed to the respondents, prohibiting further proceedings in the Milimani Chief Magistrate's Court, Anti-Corruption Case No 039 of 2020.
30. They submitted that the 3rd respondent is an independent institution whose autonomy is guaranteed under article 160 of the *Constitution*. That the concept of judicial independence secures the judge from interference from those entrusted with administrative responsibilities, including other judges. They relied on the Canadian case of *Her Majesty The Queen v Marc Beauguard* [1986] 2 SCR 56 and the decision of the Supreme Court in *Raila Odinga & 3 others v IEBC* 2013 eKLR.
31. They submitted further that the petitioner has not pleaded with precision the violations and breaches under the *Constitution* as set in the *locus classicus* case of *Anarita Karimi Njeru* [1979] KLR. He has not demonstrated any breaches on the principles of justice under article 159 of the *Constitution* to warrant this court's interference. They relied further on the case of *Communication Commission of Kenya and 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. Lastly, that the petition is underserving of the reliefs sought and should be dismissed.

Issues For Determination

32. The following issues arise for determination:
 1. Whether this petition is *res judicata* by virtue of ACEC petition No E006 of 2021 *Abdi Shale Bulee & 2 others v EACC & 3 others; Ali Bunow Korane (Interested Party)* [2022] eKLR.
 2. Whether the decision to charge the petitioner in Milimani Chief Magistrate's Court, Anti-Corruption case No039 of 2020 was in breach of his constitutional rights.
 3. What are the appropriate reliefs?
Whether this petition is *res judicata* by virtue of ACEC petition No E006 of 2021 *Abdi Shale Bulee & 2 others v EACC & 3 others; Ali Bunow Korane (interested party)* [2022] eKLR



33. The 2nd respondent raised a preliminary objection dated March 30, 2022 on the grounds that the petition is *res judicata*. They submitted that the petitioner was an interested party in the case of ACEC petition No E006 of 2021 *Abdi Shale Bulee & 2 others v EACC & 3 others; Ali Bunow Korane (interested party)* [2022] eKLR hence the parties in both suits are the same, the issues are identical in both suits; the former suit was dismissed by this court for lack of merit and the decision was final. They cited the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR.
34. The law on *res judicata* is provided at section 7 of the *Civil Procedure Act*:
- “7. *res judicata*
- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
35. The test in determining whether a suit is *res judicata* as espoused in the case of *Uburu Highway Development Ltd Central v Central Bank of Kenya* [1999] eKLR is whether the issues in dispute are similar in both suits, whether the parties are the same, the similarity in the claim, whether the suit has been determined by a court of competent jurisdiction and the finality of the court’s decision in the previous suit. The rationale for the doctrine is based on the public interest principle that there should be an end to litigation, as it ensures the prudent use of the court’s time and resources.
36. It is not in dispute that this court heard and determined ACEC petition No E006 of 2021 *Abdi Shale Bulee & 2 others v EACC & 3 others; Ali Bunow Korane (interested party)* [2022] eKLR and dismissed the petition *vide* a judgement delivered on January 27, 2022. The ACEC petition No. E006 of 2021 was similar to the current petition as the petitioners and the interested party, the petitioner herein, challenged, on similar grounds, the decision of the Director of Public Prosecutions to charge them in Chief Magistrates Court ACEC No E039 of 2020 *Republic v Ali Bunow Korane and 4 others*.
37. The petitioners in ACEC petition No E006 of 2021 have been charged alongside the petitioner with economic crimes at the trial court. With respect to the petitioner, he faces count 1 which is a charge for the offense of conspiracy to commit an offense of economic crimes contrary to section 47 as read with section 48 of ACECA in relation to a sum of Kshs 233,506,000/- belonging to the county government of Garissa,. The petitioner is charged further in count 2 with the offence of willful failure to comply with procurement laws contrary to section 45(2) (b) as read with section 48 of the ACECA. counts 3 to 8 relate to the petitioners in ACEC petition No E006 of 2021 who are not parties to this petition.
38. The petitioner contends that the parties in the two petitions are not the same. This is not a correct presentation of the facts. The petitioners in ACEC petition No E006 of 2021 were Abdi Shale Bulee, Ibrahim Shariff and Ahmed Aden, the respondents were the same respondents in this petition and the petitioner was an interested party. He actively participated in those proceedings by filing a response and written submissions, which were heard and considered by this court and a judgment rendered on January 27, 2022. The issues for determination in ACEC petition No E006 of 2021 were whether the petitioners have made out a good case to warrant this court to halt the criminal proceedings being Chief Magistrates Court ACEC No E039 of 2020 instituted against them by the 2nd respondent (ODPP) and whether the criminal proceedings are a violation on their constitutional right. The subject matter of the petitions and issues in the two petitions are directly and substantially similar.



39. The issue of similarity of parties was discussed by the court in the case of constitutional petition No 59 of 2015 *Okiya Omtatah v Communications Authority of Kenya and 14 others* where the learned judge held:-

“In my view, he sued the officials of the 1st respondent and ADN to disguise the proper parties who were in the first petition and that attempt cannot affect my conclusion above and help him evade the doctrine of res judicata on the main issue of digital migration which is the common thread running through all the petitions as can be seen above. I shall repeat for emphasis that the said issue cannot be re-opened merely by introducing the rights of viewers to migrate and re-packaging it differently as a violation of the provisions of the *Constitution* and that of the bill of rights to prevaricate the principle of res judicata.”

40. It is my finding that the petitioner herein having fully participated in the case of ACEC petition No E006 of 2021 *Abdi Shale Bulee & 2 others v EACC & 3 others; Ali Bunow Korane (interested party)* [2022] eKLR as an Interested Party and having presented his case for determination by the court, cannot re-litigate the same issues against the same parties. For this reason, I find that this court is barred from hearing the petition under the principle of *res judicata*. I would uphold the 2nd respondent’s preliminary objection and strike out the petition with costs.

41. Nonetheless, I have considered the remaining issues briefly below:

Whether the decision to charge the petitioner in Milimani Chief Magistrate’s Court, Anti-Corruption Case No 039 of 2020 was in breach of his constitutional rights.

42. It is trite that the prosecutorial power of the 1st respondent is not absolute. Article 157(11) of the *Constitution* grants this court the jurisdiction to interfere with the powers of the Director of Public Prosecutions if they are exercised without regard to the public interest, or against the interest of the administration of justice, or where the power is exercised in violation or abuse of the court process. The article provides: -

“157(11) In exercising the powers conferred by this article, the director of public prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

43. In the case of Civil Appeal No 217 of 2014 *Diamond Hasham Lalji & Another v Attorney General & 4 others* 2015 eKLR, the Court of Appeal restated the position in law as follows:-

“From the foregoing, there cannot be any doubt that the prosecutorial discretion of DPP is not absolute. It is limited by article 157(11) which specifies the mandatory considerations that underlie the exercise of discretion; by the constitutional principles to which we have referred and by statute.”

44. Similarly in the case of *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (interested party); International Commission of Jurists Kenya Chapter (amicus curiae)* [2019] eKLR it was held:-

“243. We agree that there is a real danger of courts overreaching if they were to routinely question the merit of the DPP’s decisions. However, there are circumstances where the type of scrutiny set out in the majority decision of *Njuguna S Ndungu* (supra) is called for. Should there be credible evidence that



the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, then a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled.

244. To be underscored is that judicial review of the foundational basis of a charge should only be undertaken when an applicant has first established that there are reasonable grounds that the challenged proceedings are a vehicle for a purpose other than a true pursuit of criminal justice. To allow a willy-nilly and casual review of the foundational basis of criminal charges would be to turn judicial review proceedings into criminal mini-trials, a prospect that anyone keen to stop a criminal trial would relish. The question is whether the present case fits into the latter scenario.”

45. In this petition it was alleged that the 1st respondent’s decision to charge is arbitrary, illegal, unlawful, and therefore a violation of the *Constitution*. That the charges were not based on evidence and are likely to fail and as such, the prosecution is an infringement on the petitioner’s rights. It is clear from the pleadings in this case that what the petitioner is asking this court to do is to determine the merits of the allegations made against him by the director of public prosecutions.
46. In the case of *Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others* (supra) the court gave reasons for looking into the merits of the allegations of the Director of Public Prosecutions at paragraphs 252, 253 and 254. In this case nothing has been placed before this court to warrant it to delve into the merits of the allegations. There is nothing to demonstrate an ulterior motive or motive other than the public interest as was the case of *Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others* (supra).
47. This court considered this issue in depth in ACEC petition No E006/2021 and determined it as follows:-

“The gist of the petitioners’ and the interested party’s case is that their conduct in borrowing the funds from the Kenya Urban Support Programme which they later refunded in full does not constitute an offence. On the other hand, the respondents contend that the funds in the Kenya Urban Support Programme account were not fungible and hence not open to borrowing and that as such the conduct of the petitioners and the interested party which violated the agreement dated September 14, 2017 amounted to embezzlement of the funds and hence a criminal offence. While I appreciate that in determining this petition I have jurisdiction to scrutinize the charges, the documents availed and the law to determine whether indeed the DPP has a prima facie case it is my finding that in the instant case, the real issue in controversy between the parties being whether or not the funds in the Kenya Urban Support Programme account were fungible is best left to the trial court. I am of the view that the trial court would be the proper tribunal to determine that issue upon hearing and evaluating the evidence from both sides. It is instructive that in this petition other than asserting that the charges do not disclose an offence the petitioners have not proved that the charges against them are actuated by an ulterior motive or by a motive other than that of the public interest. Unlike in the case of *Diamond Hasham Lalji & another v The Attorney General and another* [supra] they have not placed any evidence before this court that would lead it to conclude that there was improper motive in charging them or that they



were victimized or discriminated against whether in the process of the investigations or the prosecution. In other words, I find no evidence of mala fides in bringing the charges against them that would warrant me interfering with the 2nd respondent's decision to charge. For the same reasons I am also not persuaded that their prosecution is an abuse of the court process. The petitioners shall have an opportunity to adduce the evidence/facts and issues of law which they raised in this court at the trial court and should they be convicted and they feel aggrieved they have recourse to this court on appeal.”

48. The upshot is that this petition having arisen from the same subject matter and having been between the same parties as ACEC No E006 of 2022, this court reaffirms its findings and reiterates that the petitioner has not proved any violation of his rights. The mere fact that he has been charged in Milimani Chief Magistrate's Court, Anti-Corruption Case No 039 of 2020 does not in any way amount to a violation of the constitution. It is not for this court to stop the Director of Public Prosecutions in his tracks simply because the petitioner has asked it to do so. The exercise of the power vested in this court must at all times be justified. The court's discretion must therefore be exercised judicially.
49. The constitutional discretion given to the Director of Public Prosecutions under article 157 of the Constitution ought not to be lightly interfered with especially if the evidence in his possession if true may well sustain a prosecution. Trial courts are better placed to consider the veracity of the evidence and to determine whether or not an offence was committed and whether or not to place an accused on their defense and even after placing the accused on his defense, the trial court may well proceed to acquit the petitioner. The petitioner has not demonstrated that the action or decision of the director of public prosecutions was arrived at arbitrarily. Further, the criminal process apart from having safeguards to afford accused persons a fair trial as dictated in article 50(2) of the Constitution also provides for a process of appeal where the accused is aggrieved by the decision. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. See the case of Attorney General v Attorney General for and on Behalf of Inspector General of Police & 3 others ex-parte Thomas Ng'ang'a Munene [2014] eKLR.
50. From the foregoing, the upshot is that the petition dated March 4, 2022 is unmerited and it is dismissed with costs to the 1st and 2nd respondents.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY 2023.

E N MAINA

JUDGE

