Patel v Director of Public Prosecution & 3 others (Petition E030 of 2022) [2023] KEHC 17865 (KLR) (19 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17865 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION E030 OF 2022

RN NYAKUNDI, J

MAY 19, 2023

BETWEEN

RAJIV RAMESH PATEL ..... PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTION ..... 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

THE CHIEF MAGISTRATE COURT ELDORET ..... 3RD RESPONDENT

THE HON ATTORNEY GENERAL ..... 4TH RESPONDENT

JUDGMENT

1. The Petition before me dated 30th November 2022, raises questions as to the rights of an arrested person as well as accused person's rights. It is the Petitioner's contention that the Petitioner's rights as guaranteed under Articles 29, 47, 49 (1) and 50 of *the Constitution* were violated. The Petitioner sought the following reliefs:

    a. That a declaration be issued that failure of the 2nd respondent to inform the petitioner promptly the reasons for his arrest was a violation of the petitioner's rights as guaranteed under article 49 (1), (a), (i), (f) and (g) of *the constitution* of Kenya.

    b. That a declaration be issued declaring that failure to inform him of the charges preferred against him by the agents of the 2nd respondent and sub-sequent issue of warrant of arrest by the 3rd respondent violated the petitioner's rights to fair hearing as provided for under Article 50 of *the Constitution* of Kenya 2010.

    c. That a declaration do issue that the petitioner's rights to freedom and security of the person, which include not be deprived of freedom arbitrarily and without just cause as provided for under Article 29 (a) of *the Constitution* has been violated.

d. A declaration that issuance of Warrant of arrest against the petitioner by the 3rd respondent contrary to the law was a violation of the Petitioner's right to fair trial and fair administrative action guaranteed under article 47 of *the constitution* of Kenya 2010.

e. An order for general and exemplary damages suffered consequential to the declarations of violation of the Petitioner's fundamental rights and freedom.

f. An order of certiorari be issued against the 1st and 3rd respondents to remove into this court and quash forthwith the decision to prosecute the petitioner as contained in the charge sheet presented to the Chief Magistrate court on 19th September, 2022 in Eldoret Chief Magistrate Court Case No. E1567 of 2022 -Republic -vs- Rajiv R. Patel.

g. An order of Prohibition to issue against the 1st and 3rd Respondents from proceeding to prosecute and entertaining any criminal trial in Eldoret Chief Magistrate Court Case No. E1567 of 2022 -Republic v Rajiv R. Patel and/or proceeding to open any new file relating to the prosecution of similar or related facts.

h. Costs of the petition from the respondents.

i. Any other order the court may deem fit and just to grant.

Background facts

2. The facts are largely not in dispute and may be summarized as follows.

   The 1st respondent on the 19th September, 2022 prepared charges against the petitioner of forgery contrary to section 351 of the penal code which charge sheet was signed by M. Mugun Prosecutor on behalf of the 1st respondent. The said charge sheet was registered on the same day in court and given case number E1567 of 2022 -Republic v Rajiv R. Patel. That on the same day the file was taken before Honourable D. Mikoyan Chief Magistrate for plea taking where it was recorded that the petitioner was absent. The Prosecutor sought for warrants of arrest against the petitioner which the Chief Magistrate granted and gave a mention date of 18th October, 2022 to confirm the arrest. Aggrieved by the actions of the respondents, the petitioner moved this honorable court.

3. I find it plausible to start the exposition by presentation of the parties in brief as deponed in the affidavit.

The petitioner's case.

4. The petitioners case is primarily canvassed by way of a supporting affidavit which set out the averments as a bedrock to the petition. In a brief summary for purposes of this judgment the petitioner deposed as follows:

   1. Thatthe petitioner is a male Adult of sound mind residing and working for gain in the United Kingdom. He brings this petition pursuant to Article 22 of *the Constitution* of Kenya 2010 and Rule 4 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) practice and procedure Rules 2013.

   2. Thatthe 1st Respondent on the 19th September, 2022 prepared charges against the petitioner of Forgery Contrary to section 351 of the penal code which charge sheet was signed by M. Mugun Prosecution on behalf of the 1st Respondent

3. Thatthe particulars of the offence were that on diverse dates between 4th November, 1991 and 25th November, 2002 at unknown place within the Republic of Kenya, jointly with others not before court forged the signature of Rajeni M. Patel while purporting that the same had been signed by Rajeni M. Patel a fact he knew to be false."

4. Thatthe said charge sheet was registered on the same day he 19th September 2022 in court and given Case Number E1567 of 2022 – Republic v Rajiv R Patel.

5. That on the same date the 19th September, 2022 the file was taken before Hon. D. Mikoyan Chief Magistrate for plea taking where it was recorded that the petitioner was absent.

6. That the prosecutor sought for warrants of arrest against the petitioner which the chief magistrate granted the application and gave a mention ate of 18th October 2022 to confirm the arrest

7. That in line with the provision of Article 244, the 2nd Respondent while undertaking its function pursuant to Section 24(e) of the *National Police Service Act* is to conduct investigations in live with provisions of Article 244 which include recording of statements as the initial step of the investigations.

8. That the petitioner was never contacted by the investigating officer P.C Manga on the level claims against him nor was he ever called to record a statement.

9. That pursuant to the provisions of Article 49 (1) (a) (i) every accused person has a right to be informed promptly in a language that he understands for the reasons for his arrest.

10. That the petitioner was never informed that he was being investigated nor was he ever told that there were preferred charges of forgery contrary to section 351 of the penal code against him

11. That upon the accused person being informed of the reason of his arrest pursuant to Article 49 (10 (a) (i) of *the constitution* of Kenya 2010 he is supposed to be brought before a court as soon as possible and at the first court appearance to be charged or informed of the reason for detention continuing or to be release.

12. That the 1st and 2nd Respondents knowingly that the petitioner had not been informed of the charges against him caused to place the charges before the 3rd respondent and strangely the charges were read in his absence and warrants of arrest issued.

13. That the 1st Respondent grossly failed to discharge its duties and functions as stipulated at Article 157 of *the Constitution* of Kenya 2010 and actively participated in the violation of the petitioners Constitution rights.

14. That Pursuant to Article 157 (i) of *the Constitution* of Kenya 2010 THE 1ST Respondent while in exercised of the powers conferred by Article 157 AND Section 4 of the office of the Director of Public Prosecution. Needs to have regard to the public interest, the interest of the administration for justice and the need to prevent and avoid abuse of the legal process which responsibility the 1st Respondent abdicated.

15. That In dispensing its mandate the 3rd Respondent had a duty to follow the principles set under Article 159 of *the Constitution* of Kenya 2010 which guidelines the 3rd Respondent did no hid to while issuing the warrants of arrest against the petitioner

16. That the 2nd Respondent once the warrants of arrest were issued on the 19th September, 2022 on the 21st October, 2022 wrote a letter to the officer in charge Interpol- Nairobi office to have the petitioner arrested knowingly that if he needed to reach the petitioner he had ways to do so.

17. That as a result of the Respondents action commission and omission the petitioner's fundamental rights and freedom as provided for under Article 25 (a) (b) and (c) of *the Constitution* have been violated.

18. That the petitioner further avers that petitioner's constitutional Rights provided for under Article 49 and 50 of *the Constitution* have been violated by the Respondents Action.

19. That the petitioner seeks for declaration that failure of the 2nd Respondent to inform the Petitioner promptly by the reason for his arrest was a violation of the petitioners rights as guaranteed under Article 49 (1) (a) (i) (f) and (g) of *the constitution* of Kenya 2010.

20. That a declaration be issued declaring that failure to inform him of the charges preferred against him by the agents of the 2nd respondent and subsequent issue of warrant of arrest by the 3rd Respondent violated the petitioners right to fair hearing as provided for under Article 50 of *the constitution* of Kenya 2010.

5. In a further affidavit, dated 15th May 2023 it was the case for the petitioner

    a. That from the statements prepared by the complainant and his son, one Himesh Patel, it is alleged that they came across the forged documents in an email sent by myself. There is however, no email extract in the police file.

    b. Thatthe alleged forged document related to the acquisition of properties in London and the "funds for the property purchase Mr. Alykhan Lalani at Merukk Kynch, will provide further details.

    c. That Merill Lynch is British Bank and in addition to "providing for further details" with respect to the funds for the acquisition of the property, it was also responsible to "settle the invoices raised by the BVI company (Pennington Investment)

    d. That Wannington Investment is a Trust Incorporated in the British Virgin Island (BVI) where the complainant Rajeni Patel is the sole beneficiary.

    e. That the property which was purchased persuaded the alleged forged documents is in the name of the complainant Mr. Rajeni M. Patel.

    f. That the copies of the alleged forged letters are in the file held by the DCI Eldoret. It is however curious that the investigating officer (I.O) who swore the replying affidavit, Mr. Manga did not find it fit to produce the same before the court. It smacks of Mischief and malice on the part of the investigating officer to conceal the actual complaint from the court. (Annexed and marked RP4 (a) and (b) true copies of the letters dated 25th November, 2002 and 4th November, 1999)

    g. That I swear this affidavit in further support of the Application dated 12th May, 2023 and the petition dated 30th November, 2022 and pray that the charges

together with the proceedings against me in Eldoret CMCR No. E1567 of 2022 be quashed.

7. The Petitioner relying on the above factual matrix seeks declarations premised in *the constitution* as read together with Article 23 of the same Charter.

1st Respondent's case

8. The 1st respondent filed grounds of opposition dated 14th December 2022 opposing the petition in its entirety and sought to have it dismissed. The 1st respondent advanced 13 grounds for dismissal, which among others include that the 1st respondent acted within the confines of *the constitution* particularly article 157 and any other and all laws incidental thereto. That the petitioner has not demonstrated a prima facie arguable case on breach of any constitutional provision or fundamental human right or any other provision of the law by the respondent; or that the respondent exceeded his jurisdiction, breached the rules of natural justice or considered extraneous matters.

9. It is the 1st respondent's case that its decision to charge in Eldoret CMCC No. E1567 of 2022 -Republic -vs- Rajiv R. Patel was based on sufficiency of evidence with a realistic prospect of conviction. The 1st respondent stated that the petitioner's prosecution was instituted with a probable cause and was not actuated by any malice from the 1st respondent who independently reviewed the evidence and decided to charge based on the fact that there was overwhelming incriminating evidence connecting the petitioner to the offence charged in Eldoret CMCC No. E1567 of 2022 -Republic -vs- Rajiv R. Patel.

10. Finally, the 1st respondent stated that some of the complaints and orders sought can be comfortably resolved by the trial court which is properly seized of the matter.

The 2nd, 3rd and 4th Respondents' case

11. In challenging the merit of the petition, the referenced Respondents relied on a joint replying affidavits sworn by P/C Paul Manga and a further affidavit by P/C Boniface Ingosi with the following highlights: On P/C Ingosi's side he deponed as follows:

    1. ThatI am a police constable, of police force Number 249738, attached to the Directorate of Criminal Investigations, Eldoret West, and I am the Investigating officer, and have full authority by the 2nd to 4th Respondents to swear this Affidavit on their behalf, thus competent to swear this Affidavit.

    2. ThatI have read and not understood, had explained to me by the State Counsel in conduct of this matter the contents of the Petition dated 30th November, 2022, by the petitioner, together with the supporting Affidavit sworn by the Petitioner, Rajiv Ramesh Patel on 28th November, 2022.

    3. ThatI have also read and where not understood, had explained to me by the State counsel in conduct of this matter the contents of the Notice of Motion Application dated the same day with the Petition, and supported by a supporting Affidavit deponed by the Petitioner on the 28th November, 2022, and I swear this Affidavit in Response to the averments made in the supporting Affidavits as well as in opposition to the prayers made in the Application and the Petition and now with to state as follows

    4. ThatOn the onset, I wish to state that the offices of the 2nd Respondent is a body under the mandate of the National Police Service, and whose co-functions among others include collecting and providing criminal intelligence, undertaking investigations

on serious crime including homicide, narcotic crime, human trafficking, money laundering terrorism, economic crimes, piracy, organized crime and cybercrime among others.

5. That On 16th July, 2022, the office of the 2nd Respondent received a complaint from one Rajeni Patel represented by his appointed counsel to the effect that the petitioner/ Applicant had forged his signature to apply for some money in his companies known as R.M Estates Limited and R.M Patel & Partners Limited. Immediately the 2nd Respondent as by their regulations, recorded the complaint incident in its occurrence book as OB No. 56/16/07/20212. Attached herewith and marked as Exhibit PM-1 is a copy of the Daily Occurrence Book Containing the register of the complainant

6. That As investigations commenced, 2nd Respondent then recorded the statement of the complaint, who recorded that he was a British citizen and a businessman running different companies in Kenya and Uganda. He recorded that he was and is the Director of RM Patel 7 Partmerns Limited, Terra Agri Farms EA Ltd & Terra Agri Solutions Ltd.

7. That He recorded that on his routine of perusing his company documents, he together with his wife came across false set of company accounts running as far back as 2002 and 2011, purportedly executed by himself. Attached and marked PM-2 is a copy of the said statement taken in regard to the complaint received.

8. That The 2nd Respondent also recorded a statement from one Himesh R. Patel who is the son to the complainant and also a Director of RM Estates. He recorded that his nephew, the petitioner/Applicant herein, had sent him some email sometimes back on 22nd September, 2011, previously sent to a finance company with an attached letter of 20th September, 2011. That at the time, he did not question the legitimacy of the said letter as he did not suspect any foul play. But the recent discoveries of financial impropriety in the company uncovered this as a series of suspicion, thus necessitating the report and aiding the investigations. Attached and marked PM-3 is a copy of the said statement taken in regards to the complaint received.

9. That from the above an exhibit memo with the questioned documents were sent to Nairobi to be examined by a Document Examiner for forensic analysis, and indeed a report came back positive that the signatures differed and were appended by two (2) different people. Attached and marked PM-4 and 5 are copies of the forwarding signal dated 22/7/2022, and the Respondent dated 25/08/2022, respectively

10. That from our investigations through statements and documents received at our office, we formed an opinion that there were enough evidence to sustain and charge the petitioner/applicant for the offence of making a false document contrary to section 347(d) (i) of the penal code, to which I compiled a file to be forwarded to the 1st Respondent for further advice on the matter, given that the suspect was in the United Kingdom and this orders for warrant and extradition had to be sought. Attached and marked PM-6 is a copy of the said letter to ODPP dated 16/09/2022.

11. That I am aware that the 1st Respondent concurred with our opinion on the preferred charges and indeed a charge sheet was prepared against the petitioner culminating to Eldoret CM CR NO E 1567 OF 2022. Republic V. Rajiv R. Patel, the case to which

the petitioner now wishes to be stayed and ultimately quash the charge sheet and the decision to prosecute by the 1st Respondent.

12. That I am now being advised by the state counsel in conduct of the matter, which advise I verify believe to be true that, for the Application and the Petition to succeed, the petitioner must demonstrate that the criminal proceedings seeking to be quashed were a violation of the petitioner's constitutional rights and that the 1st and the 2nd Respondents acted ultra vires outside their mandates.

13. That I seek refuge in the advise of the state counsel in conduct of this matter which advise I verily believe to be sound that, it has been settled and understood that the police have a duty to investigate once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene.

14. That so then the question which must be answered by the Petitioner/applicant in making his case against the 2nd to 4th Respondents will be was a complainant made to the 2nd Respondent? If yes was it investigated? If yes was there a reasonable suspicion for the preferring charges?

15. Thatthose questions, I now must answer in the affirmative and rebut any allegation to the contrary and state that the 2nd Respondent received a complainant from the complainant one Rajeni Patel, made inquiries into the complaint through investigations completed investigations into the complaint received against the Applicant, and the from the findings of the investigations, the 2nd Respondent formed a reasonable suspicion to prefer charge against the petitioner as it did and forwarded the recommendation to 1st Respondent for concurrence and further action.

16. ThatNothing in the said acts by the 2nd Respondent depict malfeasance and breach of the petitioner rights as claimed in the petition, as all acts we done out of due regards to existing constitutional and legal principles and the rights available to the petitioner as per our law. It is appreciated, and I must point out the fact that a prosecution is proceeded by and investigation which answers the question whether or not an offence or crime has been committed. *The constitution* and the *National Police Service Act* give the police the mandate to investigate. That is as far as the roles of the 2nd Respondent go in as far as criminal justice goes in Kenya

17. Thatby running to this Honourable court and obtaining orders stopping the respondents from executing their mandates as required by law, the applicant is acting in bad faith and the court should not be used to sanitize the applicants act that the investigations have revealed are criminal nature.

18. Thatby persuading the court to quash the charge sheet preferred against him, the petitioner is asking the court to usurp the role, function and mandate of other constitutional bodies, and in so doing undermines their constitutional space in the false hope that the acts of the petitioner which form a reasonable suspicion of criminality will go unpunished

19. ThatAll the petitioner is depicting is that he is a afraid of being arrested and prosecuted. He has not shown that the allegations against him are false, for if that were the case, nothing would have stopped him from making appearance at the 2nd Respondents offices and recording a statement. Nothing would further have stopped him form appearing before the trial court and pleading to the charges and defending his name and character against the allegations and charges labelled against. Instead he now seeks to use judicial process to frustrate constitutional offices form performing their constitutional roles.

20. Thatinstant case is definite definition of a clear case that has been made by the 2nd Respondent and concurred to by the 1st Respondent against the petitioner. The investigative process has been concluded by the Respondent, and what remains is the prosecutorial process of the Applicant. No harassment has been exhibited by the Applicant, and neither has he evidenced that the Respondents have in any way acted outside the law and the procedure in so far as criminal procedure and prosecution is concerned. In the absence of this therefore, the applicant has not shown or discharged his burden to impute on the court to grant him the orders sought.

12. It is their case that nothing has been demonstrated by the petitioner to warrant impeachment of the charge sheet on account of violation of his fundamental rights. Nothing has been exhibited to show how the 2nd 3rd & 4th respondents have acted outside the law or *the constitution*. That by his failure to do so, the petitioner has not discharged the burden vested in him to secure judgement from this court. He is there undeserving of the orders sought, and neither is he deserving of the orders already in place.

13. This petition was essentially canvassed by way of written submissions to season the affidavits and the appropriate annextures.

The Legal Perspectives by the Petitioner

14. The legal team for the petitioner led by Mr. Maathai submitted that the petition is for judicial review orders and constitutional redress in favour of the petitioner stemming from the abuse of the process by the Respondents acting jointly and severally. It was the contention of learned counsel that the decision to investigate and recommend an indictment for prosecution of the petitioner is in breach of Articles 49 (1) (a) (i) (f) and (g), 50, 29, & 47 of *the Constitution*. The learned counsel invited this court to interpret *the constitution* in a manner which protects and guarantees the Bill of Rights which are under threat, violation, or infringement by the respondents.

15. It is in this respect learned counsel contended that orders of prohibition and certiorari do issue to quash the criminal proceedings currently pending before the Chief Magistrate Court in Reference case No. E1567 OF 2022 – Republic v Rajiv R. Patel. In support of the submissions, to urge the court to jealously guard the Bill of Rights in favour of the petitioner learned counsel placed reliance on the following cases: Institute of Social Accountability & Another v National Assembly & 4 others [2015] eKLR, Republic v Danson Mgonya & Another [2010] eKLR Ibrahim J. (as he then was) Anthony Murimi Waige v Attorney General & 4 Others [202] eKLR DRY Associates Ltd v Capital Markets Authority and another [2012] eKLR, John Omila & Another vs Attorney General & 4 Others [2017] eKLR, Kuria & 3 Others v Attorney General [2021] eKLR 69, Republic v Director of Public Prosecution & Another ex-parte Kimani Nairobi Judicial Review application No. 78 OF 2015 , while quoting the case of R v Attorney General ex Kipngeno Arap Ngeny High Court Civil application No. 406 OF 2001, Lalchand Fulchad Shah v Investments & Mortgages Bank Limited & 5 Others [2018] eKLR.

16. Significantly learned counsel vehemently argued that the petitioner cannot received a fair trial and it would be unfair for this court to allow the proceedings to proceed as initiated by the 1st respondent.

17. Learned counsel asserted at the time of making the decision to investigate and subsequently charge the petitioner with a criminal offence the respondents were already in breach of *the constitution* on fair administrative action, rights of an arrested person and the right to a fair hearing. It is with this rash by the respondents which renders any decision made against the petitioner singularly or jointly voidable by the court.

18. According to learned counsel although the impugned decisions are plainly founded in law there was misapprehension on the part of the respondents to act in a way that resulted in an abuse of the process and therefore any action taken was ultra vires. The petitioners counsel went on to submit that this court has come to the finding that the investigative agency and the Director of Public Prosecution decision to recommend and initiate a criminal charge against the petitioner is unconstitutional.

Re-joinder submissions by the 1st respondent

19. It is the 1st respondents submissions that in arresting and commencing a criminal prosecution, there was no violation of the fundamental rights as alleged in the supporting affidavit of the petitioner. Learned counsel Mr. Mugun maintained that the petitioner has failed to demonstrate threats, infringement, or violations under Article 49 and 157 (6) & (10) of *the Constitution* to warrant declarations to enforce the writs of prohibition and certiorari against the prosecution. He further submitted that the prosecution function has vested with the Director of Public Prosecution and expressly ring-fenced to protect it from any interference by any other authority or persons. It was learned counsel contention that the impugned decision to charge under attack by the petitioner was arrived at within the provisions of *the constitution* and the office of the Director of Public Prosecution Act to be precise section 23. Learned counsel further argued that there is nothing in the affidavits of the petitioner which shows that the decision in question was unconstitutional, irregular, unreasonable or improper to subject it to Article 165 (6) & (7) of *the constitution*. In support of this proposition learned counsel relied on the principles in the cases of :Cyrus Shakhalagwa Khwa Jirongo b Soy Limited & 9 Others, R.P Kaput v State of Punjab AIR 1960 SC 866, Midlands Ltd & 2 others v DPP & 7 Others [2015], Robert Waweru Maina & 3 Other v The Director of Public Prosecution & 3 Others [2022]. In connection with the applicable principles in the cited cases learned counsel strongly argued against any grant of the orders sought by the petitioner.

Analysis and determination

20. I have considered the material facts to the somewhat limited extent of the affidavits filed by both parties with corresponding submissions touching on the dominant issues in the petition. The way I see it, the predominant issue for determination is whether the contextual factors that regulate the 1st & 2nd respondents decision making process are amenable to judicial review. Similarly, the 2nd limb of the petition is whether the factors influencing the decisions manifested infringement of the fundamental rights and freedoms enshrined in the Kenya constitution.

21. To start with, a constitutional issue is one which confronts fundamentals on guarantees in the Bill of Rights. The issue is to establish a link between the petitioner's human rights and the provisions of *the Constitution* alleged to have been contravened, or violated by the respondents capable of a remedy under Article 23 of *the Constitution*.

22. It determining this petition, a question relating to the interpretation of *the constitution* with the sense of establishing whether the respondents indeed violated the rights and fundamental freedoms in the

Bill of Rights as alleged in the petition is indispensable. In Article 2(1) of *the constitution* it declares *the constitution* supreme. Therefore, any law, policy, statute, practice or administrative action which contradicts any provisions of *the constitution* to the extent of inconsistence or invalidity should be considered unconstitutional. In construing the Republic Constitution Article 259 provides as follows: That this constitution shall be interpreted in manner that:

a. Promotes its purpose, values and principles

b. Advances the rule of law and the human rights and fundamental freedom in the Bill of Rights

c. Permits the development of the law and

d. Promote to good governance.

2. If there was a conflict between different language version of this constitution the English language version prevails.

The constitution}} postulates further that Article 10 binds all organs, state officers, public officers, and all other persons recognized by this supreme law whenever any duty is discharged, or decision making process which may impact the fundamental rights of other persons to incorporate the National values and principles of governance which include:

a. Patriotism, National unity sharing and devolution of power the rule of law democracy and participation of people

b. Human dignity, equity social justice, inclusiveness equality human rights nondiscrimination and protection of the marginalized

c. Good governance, integrity, transparency and accountability, and sustainable development

23. In this context the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in *the Constitution*. But it does not treat the language of constitution as it were found in a will or a deed of charter party. A generous and purposive interpretation is to be given to *the constitution* provisions protecting human rights. (See Reyes v R [2002] UKPC 11[2002] 1 AC 235. , R v Big M Drug Mart Ltd [1985] 1 SCR 295). This summarization, exemplifies the courts task to establish a variety of textual standards and adopt an approach to achieve the purpose in Article 20 (4) (a) & (b) of *the Constitution* which provides that :

a. The values that underlie an open and democratic society based on human dignity equality, equity and freedom

b. The spirit purports and objects of the Bill of Rights

24. From a broad evaluation of the perspective the court in Makwanyane v Republic 1995 (3) SALR at 436 by Justice O Regan observed as follows: That in the courts methodology on the requirements on section 33(1) of the justification of a limitation to a right addressed in our equivalent Article 20 (4) (a) & (b) of our constitution. "In both cases the inquiry concerns proportionality to measure the purpose, effects and importance of the infringing legislation against the infringement caused. In addition, it will need to be shown that the end sought by the legislation cannot be achieved sufficiently and realistically by other means which (sic) would be less destructive of entrenched rights. Where the constitutional standard is necessity. The considerations are similar, but the standard is more stringent" underlined emphasis mine

25. It goes without saying the essentials of the petitioner's case will mirror this baseline stipulated in *the constitution* to make a finding whether the petition had ripened for the courts interference to exercise judicial review jurisdiction and constitutional redress for the alleged violations by the petitioner.

26. It must be noted from the onset that *the constitution* of Kenya espouses the doctrine of separation of powers in its governance structure of the Republic. As a matter of jurisdiction Chap. 8 is about the legislature, Chap 9 the Executive whereas Chap 10 is on the mandate of the judiciary. Subsequently, enabling constitution organs which are subsets of the three arms of government are created to perform functions and duties as declared in *the constitution* and applicable statutes.

27. Basically this means that our criminal justice system is based on multi-agency approach of the three arms of government. Of significance to the instant petition would be the National Police Service whose functions are clearly spelt out in Article 244, 245, (a) & (b) of *the constitution* as read in with Section 24 of the *National Police Service Act* 2011. One of the critical function of the National Police Service in Article 245 is to (a) Investigate of any particular offence or offences (b) the enforcement of the law against any particular person or persons.

28. These provisions does bear a rational connection to the petition under consideration as pleaded by the petitioner. Structurally, the petitioner in his affidavits & submissions is aggrieved with the manner of investigations commenced by the 2nd Respondent. According to the petitioner the impugned decision failed the threshold test as to the nature of the transactions complained of to be tried in Kenya instead of the United Kingdom which is the correct locus in quo. In the 1st instance, the petitioner's categorical that any relationship, contractual or otherwise with the complainant arose within the dominion of the United Kingdom. That therefore brings into focus the jurisdiction of the National Police Service to investigate an alleged crime of forgery which prima facie is a matter for the investigating agencies in the country where the acts of omission or commission may have occurred. In the petitioner's persuasive proposition the Magistrate's court at Eldoret had no jurisdiction to entertain the plea for the offence of forgery as recommended by the 2nd respondent to the 1st respondent to initiate or commence the criminal prosecution. In furtherance, of his complaint the other ground the petitioner urged this court to find the proceedings voidable is for reason of lack of jurisdiction in personam and in rem. That therefore to the petitioner's conception the National Police Service expressly lacked the requisite locus standi to initiate an investigation which culminated in a recommendation to the office of Director of Public Prosecution to commence a prosecution against him before the Kenyan Courts. The respondents in their rejoinder descended to the line of arguments put forth by the petitioner placing heavy reliance on the constitutional imperatives as to their mandate and functions within the scope of our constitutional ideals and the rule of law.

29. With regard to this issue, the courts have spoken very profoundly as to the construction and interpretation of the various legal and policy direction executable by the National Police Service. In Republic vs Commissioner of Police and another ex parte Micheal Monari & Another [2012] eKLR " The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. the police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

30. It is settled law in Kenya that Section 193(a) of the Criminal Procedure Code allows for concurrent litigation of both Criminal and Civil Proceedings whose genesis arise from the same basic

characteristics and interlocking issues. However there is a rider that as much as is the prerogative to take cognizance of detecting crime and investigating is vested with the 2nd respondent, all those duties must be done in good faith and in the public interest. It seems that is the similar view expressed in the cases of David Ndolo Ngiali & 2 Others v Directorate of Criminal Investigation & 4 Others [2015] EKlR and ERICK Kibiwott & 2 Others v DPP & 2 Others Judicial Review Civl Application No. 89 of 2020 where the Honourable Judge observed that " The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. the police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court....as long as the prosecution and those charged with the responsibility of making decisions to change act in a reasonable manner, the High Court would be reluctant to intervene.

31. It cannot be over- emphasized that the National Police Service plays a major role in the administration of the criminal justice system in Kenya. Their responsibilities are multifaceted in detection of crime, investigations, arrest, making recommendations to the Director of Public Prosecutions to commence an indictment of suspects, preservation of law and order, enforcement of all laws and regulations with which it is charged to perform, protection of lives and property of the citizens and other residents in Kenya etc. This is how the petitioner found himself within the rubric of the National Police Service Mandate. It is well established in *the constitution* that the National Police Service being a constitutional organ has discretion vested by the same law in handling matters within their mandate without unnecessary interference from other arms of government. As held in Ex chief Peter Ogada case v IBC Civil Appeal No. 307 of 2012 " There is a margin of discretion conferred by *the constitution* and the law upon those who make the decision and the test of rationality ensures tht any legislation of official act is confined within the purpose set by the law. It is the insistence the decisions must be rational that limits arbitrariness and not distraction by itself ....."

32. The law underpinning discretion exercised by the 2nd respondent is crystal clear from the above principles. However, the position by the petitioner, contrasts with the ratio decidendi of the trending decisions which renders judicial review of the court against that discretion a means of a last resort. . That these allegations demand of this court to interpret *the constitution* to ordain and protect his fundamental rights and freedoms.

33. The facts of this petition are neither complicated nor in dispute. A panoramic view of the material evidence and annextures placed before this court demonstrate existence of a complainant who approached the Kenya National Police Service sometimes back in the year of our Lord 2022. The 2nd respondent booked the report in the occurrence book and proceeded to apply the factors in observance of the standards on investigation's and enforcement of the law to that effect. Apparently, the petitioner was not within the jurisdiction of the trial magistrate's court necessitating a warrant of arrest to processes the outcome of the investigation following a criminal charge commenced before the trial court at Eldoret. The issued warrant was never served upon the petitioner to plead to the offence. In the meantime petition No E030 0F 2022 was filed before this Court to challenge the constitutionality of the criminal proceedings. The petition which was accompanied by notice of motion was dispensed with by grant of interim orders of stay so as not render the petition nugatory. That remained to be the position until things appeared slightly more complicated when a fresh notice of motion was filed on 12th May ,2023 bringing to the attention of the court that the 2nd respondent has executed a warrant of arrest against the petitioner at Jomo Kenyatta International Airport. The truth is from the record the information of the charge has never been pleaded to by the petitioner. The objective of the interim interdict against the respondents was a prohibition from intermeddling with the rights of the petitioner pending the hearing and determination of the petition. This latest arrest by the 2nd respondent became a collateral contested issue by the petitioner against the respondents.

34. In obiter this conduct by the 2nd respondent on ascertained analysis from the record borders on impunity given the fact that Eldoret Police Station together with the DCI as the agents in this criminal process must have been aware of the existence of the interim orders of stay pending the hearing and determination of the petition. If in any event, the respective legal counsels did not bring to their attention the positive order of interdict in favour of the petitioner it is prima facie contempt of court on the face of the record against the servants, employees, or agents of the 2nd respondent who were made aware of the orders of the court. These are proceedings which this court could have made eloquent decision to punish disobedience of court orders or directions but unfortunately it seems the arrest at Jomo Kenyatta International Airport was executed by police officers not privy to the stay orders in the pending petition. As a procedural requirement the 2nd respondent was required to perform a compliance action of conveying a copy of the order to the security agents at Jomo Kenyatta International Airport for the safe passage of the petitioner and concurrently comply with Article 47& 49 of *the constitution*.

35. Going back to the issues in the main petition and giving meaning to the controversies surrounding his investigation and initiation of criminal charge, I am inclined further to look at the common threads employed substantially between the multi-agency actors in our criminal justice system. First is to analyze whether the measure of stopping the investigations and subsequent prosecution would be in line with the proportionality test. The offending acts of omission and commission of the 2nd respondent must be retraced within that threshold. In applying this test advocated in constitutionalism purposes to the effect that due weight be given to the fact that the decision maker may have greater expertise and democratic legitimacy than the court, and the court can only apply the test with varying degree of intensity by scrutinizing more or less closely a decision maker's position necessitating the limitation of the right.

36. The Kenya constitution underpinning abhors abuse of power, arbitrariness, unfairness, prejudice, infringement of fundamental rights and freedoms under the guise of good administration of justice. The canon of public interest should not be used to frustrate the legitimate expectation of the citizens. On this contextual position the approach based on Article 27, 28, 29, 47, 48, 49, & 50 of *the Constitution* is the current approach to promote the Bill of Rights. It cannot be gainsaid that the interpretation of *the constitution* must be interpreted as an integrated and as a whole without any one provision occasioning severance or destruction of the other. (See the principles in Federation of women Lawyers Kenya (DIDA) v Attorney General & another [2018] eKLR, Tinyefunsa v Attorney General of Uganda [1997] UGCC 3"

37. The question then would be whether the 2nd respondent adhered to substantive and procedural fairness in relation to its commitment to its commitment to the National values and principles of governance in Article 10 of *the Constitution*. As the petition is presented there are clear signs of trivial administrative muddles occasioned by the 2nd respondents Acts of omission or commission in the course of the investigations. For example proffering a recommendation to the 1st respondent to prosecute the petitioner while domiciled outside the jurisdiction of the court without any evidence of extradition proceedings. In addition, there is no cogent evidence as whether the petitioner was informed of the pending investigations and the need for him to appear in person or with his legal counsel in consonant with Article 49 (1) (c) of *the constitution*. Last but not least why summons requiring attendance was not applied for by the prosecution before the recourse of a warrant of arrest. That issue is moot.Therefore the consideration of interest is in accordance with the term of the petition.

38. The question which begs for an answer is whether the petitioner has satisfied the criterion to review the decision making process by the 2nd respondent to commence investigation.

39. As seen in the pronouncement from a number of decisions cited above the courts are emphatic on the limited jurisdiction of review against such decisions. This is as recent as the case by the Supreme Court in Philomena Mbete Mwilu v Director of Public Prosecution & 3 Others " In our view, it would be within the mandate of an investigative body to receive complaint and to investigate them. Such bodies or entities cannot be faulted for acting on the complainants as in so doing, they would be acting with their constitutional and statutory duty. It was stated in Josephat Koli Nanok & Another v Ethics and Anti- Corruption Commission [2018] eKLR. that by undertaking investigations an investigating entity does not violate any constitutional rights, and that violation of rights may only occur in the manner in which the investigative mandate is executed. In that event, the petitioner would be under and obligation to demonstrate that his or her rights have been violated by the manner of investigation and attendant processes."

40. In practical terms, these factors are substantially the same as those raised by the petitioner. The decision making process by the 2nd respondent referred to by the petitioner is a balancing Act on both legal and extralegal factors that affect investigation outcomes. Such factors as the strength of the evidence vary in the characteristics of investigation carried out by the 2nd respondent. Although the most important function of the Kenyan criminal justice system is to protect the rights of the accused but the system has a twin pillar to prevent crime. Largely bringing the victim into the purview of *the constitution*. Significantly victim rights protection is part of the key characteristic in our criminal justice system.

41. Figure out this case where a complainant aggrieved with the conduct of the petitioner filed a complaint at Eldoret police station in connection with the alleged forgeries stated in criminal case No. E1567 of 2022. By dint of section 9 (2) (a) & (b), 9(3) & 10 (a) (b) & (c) of the *victim protection act*, The complainant had a right to be heard either at the pre-trial stage or at any stage of the proceedings on account of the unlawful Act or breach of the provisions under the penal code. It also follows, *the constitution* raised the locus standi of a victim in Article 50(9) in any criminal proceedings subordinate to that of a witness. As a consequence, the right to a fair trial under Article 50 binds the actors in the administration of criminal justice to effectuate fair trial rights to the victim. One of the difficulty associated with this right to a fair trial is the reflection in this petition that the complainant was not represented nor was he notified to join the proceedings before this court.

42. While the fairness of the trial is sensitive to the accused/defendant in a criminal case there is a corresponding duty for the right to a fair hearing to apply mutatis mutandis to the victim. It is necessary that the victim rights should not be somewhat be an artificial exercise. Again the question might be asked what is fairness?. It is simply the idea of doing what is best although it may not be perfect but be within the constitutional imperatives. Though courts consider cases with a human rights perspective with more acute scrutiny in favour of the accused there is an equal duty over the judicial decision making process to appropriately infuse the rights of the victim. While the courts would be happy to rule on the reasonableness, irrationality, and impropriety of the decision of a public body, tribunal or persons against an accused person, it is also bound to adhere to the doctrine of legitimate expectation in the context and nature of the victim rights. Based on this typology the right to a fair trial entails protecting the doctrine of arms which is inherent as an element of due process of law in both civil and criminal proceedings conducted in strict compliance with Art.50(1) of *the constitution*.

43. This principle is clearly illustrated by The Human Rights Committee in its General comment 32 on the right to equality before the courts and tribunal expressed that:

> " The right to equality before courts and tribunal also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are

based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant"

44. The significance or the lack of significance of a victim on judicial review jurisdiction is often a delicate question as to how far courts are to incorporate it to interfere with the discretionary power of the 1st and 2nd respondent in this petition.

45. The facts of the petition are informed that the set guidelines such as reasonable cause or probable cause to arrest a suspect by the police being a continuum probability was unfounded to warrant the reliefs sort against the respondent. That the petitioner had engaged in a criminal activity of forgery remains unsubstantiated. That the 1st respondent was insufficiently acquainted with the transactions between the parties to connote a designed criminal offence. The probable cause requirements found their way to this petition I see this petition ranking along this continuum though on various degrees to justify the kind of intrusion upon his fundamental rights and freedoms.

46. Given the nature of a criminal justice system, it suffices to say that the overall purpose of a criminal justice system is to prevent crime and to create a peaceful and law-abiding society. Put differently, it is a system aimed at maintaining law and order and to also maintain the social solidarity on the rule of law.

47. Therefore, it is trite law that a party who alleges that his fundamental rights and freedoms have been violated, denied or infringed has the evidential burden of proving that the rights have been violated: see Anarita Karimi Njeru v Republic (supra) as well as the *Evidence Act* (Cap 80) at sections 105-112 generally. See also Matiba v Attorney General [1990] KLR 666 and Githunguri Dairy Farmers Cooperative Society/Limited v Attorney General & Others [2016] eKLR. It is thus for the Petitioner to avail sufficient evidence to establish that his rights or freedoms have been violated. The proof is on a balance of probabilities. That burden of proof as rested with petitioner has not been discharged as against the 2nd respondent. The decision of Associated Pictures Houses Limited v Wednesday Corporation [1948] 1KB 223.Acquits the second respondent of any transgressions it may have committed while investigating the petitioner for the alleged offence. It is not a question of whether the 2nd respondent arrived at a fair result, for in such cases it will involve the court an examination into the merits of the decision. To the 2nd respondent before I sign of the legal architecture of our Bill of rights in *the constitution* 2010 was promulgated by a negotiated and ratified process as the supreme law to govern the citizens of this great Republic. It is a fundamental aspect of due process clauses as they relate to the rights of an arrested persons in this case Art 49 of *the constitution* that justice be found within our institutions to carry out investigations which guarantee the principle of equality of arms. The objection to the criminal proceedings by the petitioner is on the basic essentials of the procedural activities aimed at appearing in the court of first instance for trial. Its only the management of it that failed the test of judicial review as to the illegality, unjustness and irregularity of the process. For this one I find no evidence to hold the 1st respondent culpable.

48. The 2nd limb of this petition, is under the powers of the Director of Public Prosecution under Article 157 (6) (7) (8) & 10 of *the Constitution*. The petitioner faults the Director of Public Prosecution in taking steps to prosecute some allegations on forgery which are in contravention of Article 157 (11) of *the constitution*. The said actions argues the petitioner are in contravention Art. 2, 10, 22, 25,27,29,47, 49, 50, 157, 159, 165, and 244 of *the Constitution* of Kenya 2010. It is the law in Kenya that in exercising of his powers the Director of Public Prosecution shall have regard to public interest on administration of justice and the need to prevent abuse of the legal process. One key cornerstone for the Director of Public Prosecution is that of exercising the functions conferred by *the constitution* without being subjected to the direction or control of any person or authority. It is Implicit that even the courts are precluded from directing the Director of Public Prosecution in executing the constitutional mandate.

49. The petitioner deponed in his two affidavits and submissions by legal counsel Mr. Mathai to the effect that in preferring the said charges and in making a decision to prosecute he failed the test of public interest and fair administration of justice. Counsel for the 1st respondent submitted that the background information investigated by the 2nd respondent and the compounded file gave rise to the decision to charge the petitioner. Further counsel for the 1st respondent opined that the evidence being challenged can only be tested in another constitutional forum under Article 50(1) which jurisdiction cannot be seized by this court.

50. The Petitioner has alleged that there was no reasonable cause for his prosecution. He stated that under article 50 (2) (f) of *the constitution*, an accused person ought to be present when tried, unless the conduct of the accused person makes it impossible for the trial to proceed. He stated that he was neither informed of any charges nor was he presented in court to answer to the elements of the offence. That conduct by the 1st respondent was a violation of Article 50 of *the constitution* on the rights to a fair trial.

51. First and foremost, the petition seems to focus on the conduct of the 1st respondent to commence a prosecution which has a consequence of impairing and violating the fundamental rights and freedoms in the Bill of Rights.

52. The petitioner therefore has the burden to show that such an infringement having taken effect is a violation of Articles 20, 21 & 22 of *the constitution* and there was no justification for that limitation. The question then would be whether the 1st respondent has laid evidence which passes the limitation test. In constitutional matters, this is a complex dichotomy and more complicated is the balancing scale of constitutional justice. However, the court in Ferreira v Levin NO 1996 (1) SA 984 (CC) Par 44. Shed some light on this issue as follows: "The task of determining whether the provisions of an Act are invalid because they are inconsistent with the guaranteed rights here under discussion involve two stages first an inquiry as to whether there has been an infringement of the guaranteed right if so a further inquiry as to whether such infringement is justified under the limitation clause. The task of interpreting the fundamental rights rest of course with the courts but it is for the applicants to prove the facts upon which they rely for the claim of infringement of particular rights in question. Concerning the second stage its for the legislature or the party rely on the legislation to establish this jurisdiction (in terms of the limitation clause) and not for the party challenging it to show that it was not justified)

53. In principle any petitioner seeking reliefs under Article 23 of *the constitution* has the onus at the substantive stage of the proceedings to demonstrate that the Bill of Rights in chapter 4 and the referenced Articles that the challenged conduct of the public body is in contravention of those premised rights.

54. The issue is whether the petitioner has raised the bar on justiciable issues to satisfy the criterion for review. This dictum from comparative jurisprudence on the rule of law in an Article by Prof. Robert Stein University of Minnesota Law School title "Rule of Law. In which he proposes the ideal characteristics of society governed by the rules of law as follows:

    a. The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.

    b. The law is known, stable and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined and government discretion sufficiently limited to ensure the law is applied non arbitrarily

    c. Members of society have a right to participate in the creation and refinement of law that regulate their behaviors.

d. The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently rebuts and accessible to ensure enforcement of these protections by an independent legal profession

e. Judicial power is exercised independently of either the executive or legislative power and individual judges base their decisions solely on facts and law oaf individual case

55. This extract is a pointer that every path we come round to the same conclusion that *the constitution* 2010 sovereignty has favored the rule of law and calls forth the courts exertion that leads to a purposeful interpretation of the Bill of Rights to guarantee for the protection. The application of these principles will form the bedrock of the findings of this court in accordance with the principle of precedence in constitutional interpretation. It follows therefore to question whether the petition as canvassed made the integration and applicable measures. in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance and Others [2013] eKLR, the court of Appeal re-affirmed the test in Anarita Karimi Njeru when it stated: " We cannot but emphasise the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. I essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formulaic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleading, hearing submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...cases cannot be dealt with justly unless the parties and the court know the issue in controversy. Pleadings assist in that regard and are a tenant of substantive justice as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule tht requires reasonable precision in framing of issues in constitutional petitions in an extension of this principles."

56. This passage is of general application and can be used as a basis for understanding locus standi and justiciability of constitutionality of an act or conduct of public body, tribunal, or person on decision making with powers conferred by statute. When a constitutional challenge fails all that is being said is that the conduct, decision or provision of a statute are compatible with *the constitution*. The citation in my view explains the differentia minimal between an ordinary civil claim and a constitutional petition categorizing the allegation of infringement or violations.

57. If I am permitted what then postulates the combination of factors to impute abuse of discretion by a public body, person, or authority would be in consonant with the position In Broad v Han [1939]5 Bing (N.C) 722, 725, Tindal C. J. states as follows:

58. There must be reasonable cause such as would operate on the mind of a discreet man. There must also be probable cause such as would operate on the mind of a reasonable man, at all events such as would operate on the mind of the party making the change."

59. The reasonable and probable cause is a question of law and fact followed by appropriate inference. It must exist in the mind of the person investigating the prosecution. In this case, the prosecution pursuant to the constitutional mandate was commenced by the 1st Respondent. The investigations were however prompted by the complainant and undertaken by the 2nd respondent. The question to ponder in this petition is whether the DPP decision to prosecute the petitioner is ultra vires *the constitution*. In respect as of necessity the courts have construed and interpreted Article 157 of *the constitution* which establishes the mandate and functions of the Director and Public Prosecution. In the case of Mwenda Kathege v Director of Public Prosecution & 2 others [2014] the court while discussing he mandate of the respondent under Article 157 of *the constitution* observed that :

i. He has acted without due regard to public interest

ii. He has acted against the interests of the administration of justice

iii. He had not taken account of the need to prevent and avoid abuse of court process

iv. These consideration are not new and have over time been taken as to only bar to the exercise of dissertation on the part of the 1st}} Respondent.

60. Also in the case of Diamond Hasham Lalji & another v Attorney General & 4 Others [2018] eKLR opined as follows "Thus the exercise of prosecutorial discretion enjoys some measures of judicial defernee and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of case.

61. The 1st}} Respondent, like the 2nd Respondent is under a duty to investigate crime and prosecute those deemed culpable. The 1st Respondent must however not act whimsically. He can and must only act where there is a foundational basis for any prosecution. Where the 1st Respondent has all the facts fairly laid before him and gives his decision to charge , it cannot be inferred that there was no reasonable and proper cause to act.

62. What would be the indicators to look for in a petition of this nature to warrant manifestation of unconstitutionality of the decision to prosecute by the 1st respondent. (i) Whether the proceedings as filed are vexatious or oppressive and would therefore amount to a violation of a right to a fair hearing in Article 50 of *the constitution* (ii) Whether the criminal proceedings as initiated and sanctioned by the DPP under Article 157 (6) & (7) of *the constitution* against the petitioner was for a collateral purpose. (iii) Whether at the end of prosecution before a competent tribunal /court established under Article 50(1) of *the constitution* the whole exercise would otherwise bring the administration of criminal justice into disrepute. (iv) Whether in the process of making the decision to charge the petitioner there was compliance with the doctrine of fairness and equality before the law. These factors governs the inherent judicial discretion bestowed upon the courts to protect the fundamental rights and freedoms so as to prevent an abuse of the court process by a party set to violate the principles of justice and fairness.

63. The circumstances of the instant petition are such that prima facie blunders on the part of the 1st respondent may have been occasioned but they are of such a nature which on discretionary considerations would not warrant a review of the decision. The petitioner ought to have been reasonably informed of the charges preferred against him and the 3rd respondent ought to have taken the required procedure on the issuance of warrants of arrest as provided under Section 90 (1) of the Criminal Procedure Code which provides that: -

> " Upon receiving a complaint and having signed the charge in accordance with section 89, the magistrate may issue either a summons or a warrant to compel the attendance of the accused person before a subordinate court having jurisdiction to try the offence alleged to have been committed: Provided that a warrant shall not be issued in the first instance unless the complaint has been made upon oath either by the complainant or by a witness or witnesses."

64. It is evident that no such oath was taken to warrant issuance of warrants of arrest against the petitioner.

65. I must be quick to add that the sufficiency and veracity of evidence is a matter of the trial court to decide in determining whether the petitioner is innocent or guilty: see Meixner & Another v Attorney General [2005]2 KLR 189 and R v Attorney General & 4 Others ex p Diamond Hashim Lalji & Another [2014] eKLR.

66. I have also considered the offence with which the Petitioner is charged. It is not for this court to make any conclusions as to whether the evidence is adequate or not. The same interrogation on whether the chief magistrate court is a Forum Non Conveniens has to be determined as a jurisdictional beforehand. Whatever may be the position regarding the primary decision making process by the 1st respondent, a general inquiry by this court as to whether to prohibit or quash the proceedings has to be guided by the principles by the Supreme court of Uganda in Gordon Sentiba v IGG, SCCA No 6 [2006] Preferring charges is a matter for the prosecutor who makes the decision to prosecute anybody depending on the facts of the case before him or her as to whom to criminally charge in a court of law. Whilst this court would view victimization or unequal treatment before the law with disfavor, the suggestion that one could resist prosecution on any flimsy grounds or reasons which are not covered textually by *the constitution* in Article 19, 20, 22, may be contrary to the principles of due process in our criminal justice system."(emphasis added)

PARA 67.

I am aware of the principle that I must refrain from acting as an appellate forum over a decision by the 1st and 3rd Respondents. I am also conscious of the principle that I need to keep away from the arena of trials on the merits which is a preserve of the subordinate court pursuant to Art 50 of *the constitution*.

68. In what may be an aspect of the considerations of prerogative powers and the remedies for constitutional remedy for infringement under Art 23, it is fair to appreciate that the petitioner is never left without a remedy in the scheme and character of *the constitution*. In the comparative cases from the constitutional court of Uganda in Dr. Tiberius Muhebwa v Uganda Constitutional Petition No. 09 of 2012 and Constitutional Petition No 10 of 2008 and Jim Muhwezi & 3 Others v Attorney General and Inspector General of Government, " The trial court is capable of fairly and accurately pronouncing itself on the matter without prejudice to the accused. Where any prejudice occurs the appeal system of this country is capable of providing a remedy".

69. That brings me to the final issue as to whether from the original stand point of this petition the remedy of the judicial review is available to the petitioner against the 1st respondent. Would it be for the interest of justice to grant the remedies under *the constitution* prayed for by the petitioner.

70. Entering into the realm of judicial review is to invoke prerogative writs of prohibition, certiorari and mandamus. The grounds on which the legality of acts of omission or commission by an inferior body or tribunal are specified under section 7 of the fair administration Act. Standing to bring what are essentially juridical review proceedings against any such public body the court in Pastoli vs Kabale District Local Government counsel & Others [2008] 2EA 300 gave the following guidance" " In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained for is tainted with the illegality, irrationality and procedural impropriety...illegality is when the decision making authorities commits an error of law in the process of making the act the subject of the complaint . Acting without jurisdiction or ultra vires of contrary to the provisions of the law or its principles are instance of illegality ...irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing itself to the fact and the law before it would have made such a decision...such a decision is in defiance of logic and acceptable moral standards. Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non –observance of the rules of natural justice or to fail to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in statute or legislative instrument by which such authority exercise jurisdiction to make adecision."

71. It is pertinent to note the interpretation of Article 157 (6), (9), (10) & (11) of *the constitution* that presents anatomy of discretionary factors by the Director of Public prosecution in decision making process to initiate, or discontinue a prosecution against such person. According to this perspective the DPP enjoys some level of immunity to achieve the purposes and principles in the fair administration of justice within the purview of criminal law. How prosecutors evaluate strength of the evidence and how the evaluations change throughout the life of a case cannot be answered by this court. The discretion is meant to advance the rule of law in a criminal justice system and to inspire public confidence. Consideration also has to be given to the operations of DPP office in the context of *the constitution*. At first sight it must be noted a public body like DPP determines the merits or demerits of a prosecution and its framework on various hypothetical questions which on receipt of a police file ought only to be answered by probative material evidence. I see those to be the contours the, then Deputy Minister of Justice and Deputy Attorney General of Canada, Morris Rosenberg, had in mind in June 2000 as exemplified by the following statement. "That Carrying out the duties of prosecutor is difficult It requires solid professional judgment and legal competence, a large dose of practical life experience and the capacity to work in an atmosphere of great stress.

72. Not everyone can do this. Moreover, there is no recipe that guarantees the right answer in every case, and in many case reasonable persons may differ. A prosecutor who expects certainty and absolute truth is in the wrong business. The exercise of prosecutorial discretion is not an exact science. The more numerous and complex the issues, the greater the margin for error." (See Cowdrey,N, The rule of Law and Director of Public Prosecution,[2010], p.6)

73. As with the relevance of this to the petition the considerable grounds by the petitioner are that the decision to charge was based on no evidence of fact bearing in mind that the commercial transactions arose out of the jurisdiction of this court. Therefore the petitioner imputed improper motive and errors of fact which formed the basis of the 1ˢ respondent decision to prosecute him for an offence whose origin and circumstances are domiciled in the United Kingdom. The 1st}} respondent approach are that the subject matter concerns were considered under the mandate clearly defined in *the constitution* and the applicable statute. Further that the respondent is invariably armed with the relevant facts and expertise in support of the decision to charge the petitioner. The special position of the Director of Public Prosecution in prosecution of criminal cases in express words of *the constitution* is only reviewable by the court as a last resort. For some reason in the supreme law there is some general immunity of independence and it is for the public interest and common good of society. The whole process of discretion unless falling within the exceptions is not amenable by the legal process before the courts. The invalidity of the decision by the director of public prosecution to initiate a criminal process cannot be presumed but one to be proved on a balance of probabilities by the individual petitioners. The doctrines of intra vires & ultra-vires the constitutionality of exercise of discretion by the Director of Public Prosecution is an example upon which courts have a leeway to intervene and grant a remedy on a case to case basis but on compelling circumstances. The limitation on supervisory jurisdiction and the logic around this issue was discussed in George Joshua Okungu & Another v The Chief Magistrate's Court, Nairobi & another [2014] eKLR where it was held: " The law is that the court ought not to usurp the constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertaken 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, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is always open to the petitioner in those proceedings. However, if the petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are

being carried out in breach of threatened breach of the petitioner's constitutional rights, the court will not hesitate in putting a halt to such proceedings. The fact however tht the fact the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceeding and civil proceedings would not ipso facto constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of goods administration See R v monopolies and Mergers Commission Ex Pare Argyll Group PLC [1986] 1 WLR 763 and RE Bivac international SA (Bureau Veritas) [2005] 2 EA 43 (HCK)' (See Republic v Commissioner of Police and Another Exparte Micheal Monari & another [2012] eKLR

74. From the strength of these principles it must be noted that the question about the petition is on the scope of procedural fairness rather than the substantive importance of the decision. It is in essence questioning the procedure followed by the 1st respondent to initiate criminal proceedings which in general circumstances did not arise within Uasin Gishu County. However the above case discusses some particular limitations on the scope of judicial review for this court to intervene as the orders in the petition tend to invite the court to do so. In particular, the court is being asked to investigate whether the DPP acted on no evidence or he took into account irrelevant material to initiate a criminal charge against the petitioner. As I have stated elsewhere in this judgement those concerns are to be adjudicated at the right forum. As a matter of emphasis the supervisory jurisdiction of this court to exercise discretion against a public body to review any decision is limited in scope. Courts have no power to substitute their decisions with that of the impugned administrator, public body, tribunal or persons. Those boundaries may not be transgressed at whim. It is now well accepted that as regards the merits of the decision the recourse available is to remit the decision back to the empowered constitutional or statutory body to revisit the issues in compliance with the law. Indeed, in the case of Diamond Hasham Lalji & Another v A G & 4 Others eKLR which this court was referred to by both counsel, the court of Appeal stated " It is also indubitable that the constitutional prosecution power of DPP is reviewable by the High Court as Article 165 (2) (d) (ii) of *the Constitution* ordains, However, the doctrine of separations of power should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia failing to exercise his/her own independent discretion by acting under the control and direction of another person, failing to take into account public interest or interests of the administration of justice in all their manifestations, abusing the legal process, and by acting in breach of fundamental rights and freedoms of an individuals.

75. The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law(Matululu and Anor v DPP [2003] 4LRC 712) further authority show that courts are generally reluctant to interfere with prosecutorial decision made within jurisdiction."

76. Weighing all factors as well as the circumstances of this case, from both sides it appears for the time being despite the robust submissions by the petitioner he has not convinced this court that the constitutional considerations which informed the decision to investigate and prefer a criminal offence by the 1st and the 2nd respondents was motivated by illegality, or irrationality or impropriety factors. What constitutes the principle of rationality in a decision making in a public body was well taken in the case of Pharmaceutical Manufactures Associates of SA. In re ex parte president of the RSA 2000 2 SA 674 (CC) paras 85, 86. In which the constitutional court expressed itself as follows: "That is a requirement of rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power

was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must at least comply with this requirement. If it does not, it falls short to the standards demanded by our constitution for such action. The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place from above substance and undermine important constitutional principles"

77. This legal position settles the issues as to whether the constitutional duty conferred upon the 1st and 2nd respondents on account of the decision made against the petitioner was not ultra vires *the constitution* to grant judicial review remedy as premised in Article 23 of *the constitution* to grant prerogative writs of prohibition and certiorari with regard to the criminal proceedings in the cited as Eldoret CMCR No. E1567 of 2022.

78. From all the case law reviewed and this court's understanding of the issues canvassed by the parties and for the above reasons the petition be and is hereby dismissed with no orders as to costs. There is no merit in delving into the other issues raised by the petitioner. As a consequence of this order the ruling of the court issued on 12th day of May 2023 touching on the anticipatory bail of Kshs 100,000 in favour of the petitioner shall be deemed to guarantee his right to bail under Article 49 (1) (h) of *the constitution* pending the arraignment before the chief magistrate's court. That a declaration be and is hereby made in consonant with Article 49 (1) (c) (d) & (h) in favour of the petitioner as against the 1st and 2nd respondents.

Orders accordingly

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF MAY 2023

In the Presence of:

Mr. Mugun for the State

Mr. Kipkorir holding brief for Mr. Mathai for the Petitioner

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R. NYAKUNDI

JUDGE