



REPUBLIC OF KENYA



Rolloh v Director of Public Prosecutions & 5 others (Criminal Appeal E017 of 2022) [2023] KEHC 17450 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E017 OF 2022**

MW MUIGAI, J

MAY 11, 2023

BETWEEN

NICKY MUNGUTI ROLLOH APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

MARTIN M. KUVIKA 2ND RESPONDENT

NOEL MUINDI KILONZO 3RD RESPONDENT

STEPHEN WAMBUGU 4TH RESPONDENT

RAPHAEL NZAU MWENGA 5TH RESPONDENT

MARTHA WAVINYA MUTUA 6TH RESPONDENT

(Being an Appeal from the Ruling in the Chief Magistrate's Court at Machakos. Miscellaneous Criminal Number E067 of 2021 by Hon. Eric M. Analo (R.M) in Court 8 on 15th March, 2022)

JUDGMENT

Background

Notice Of Motion

1. Vide application dated 9th November, 2021 was brought by the Applicant Now Appellant under Article 157 (8) of *the Constitution* of Kenya 2010, Section 28 of the Office of the Director of Public Prosecution Act, 2013, the Applicant sought order for grant of leave to commence private prosecution against the respondents and their supervisors for criminal offence of burglary, extortion of monies and abuse of office.



2. The Applicant/ Appellant averred that Respondent made unlawful entry to the store of the Applicant/ Appellant situated at Kaloleni Market on 6/1/2021 at around 4:30 pm and an enclosed metallic cage broken into by the Respondents and made away with two gaming Machines, the property of the Applicant/Appellant which contained Kshs 157,000 in cash.
3. Further averring that the Respondents were not accompanied by the police officers neither did they have a search warrant. That the Respondents were in Government Vehicle Registration number GK 265H and that the seized property was not surrendered to the police.
4. The Applicant contended that he immediately reported to the Assistant County Commissioner on 7/1/2021 at 4:30pm and proceeded to report at Machakos Police Station and obtained OB No 22/15/01/2021 1152hrs.
5. He averred that the police officers and the ODPP failed to prosecute the matter despite the inquiry file being opened stating that the grounds for failure to prosecute are partisan, frivolous and without reasonable cause.
6. The Prosecution vide the Grounds of Opposition and Replying affidavit dated 15th November, 2021 by the ODPP contended that the application be dismissed as it lacks merit, is inept, misconceived and a total waste of court's time stating that the application is frivolous, vexatious, incompetent and malicious and does not meet the legal requisite threshold of the leave sought.
7. The Applicant/Appellant filed a response to the Grounds of Opposition by the Director of Public Prosecution dated 19th November, 2021 stating among other things that it is the Constitutional mandate of the ODPP to prosecute criminal matters and failure to do so is a breach of duty.
8. He reaffirmed his application for private prosecution contending that the said application meets the requisite threshold and the ODPP'S objections had no legal basis and be dismissed.
9. The application was canvassed by written submissions of the parties.

The Trial Court Ruling

10. The Trial Court while finding that no basis was found to grant leave to the Applicant to commence private prosecution in the Ruling dated 15th March, 2022 observed that there was no legitimate expectation that once complaints are investigated, they must lead to prosecution hence found that the Applicant failed to discharge his burden of proof to show that the ODPP abdicated its duty or that the decision not to charge was tainted with malice and ill will.
11. The Trial Court intimated that the Applicant failed to meet the threshold necessary for the grant of leave to institute private prosecution.

The Appeal

12. Dissatisfied with the Ruling the Appellant vide Memorandum of Appeal dated 1st November 2022 sought to have the Appeal allowed, Trial Court Ruling set aside, leave be granted to institute private prosecution against the Respondent be allowed as prayed, and cost of this Appeal and those of the Court below be borne by the Respondent on the grounds that;-
 - i. The learned Trial Magistrate erred in law and conduct by failing to recuse himself from hearing the Appellant's matter before him upon the first instance of finding that the prosecutor assigned to this Court attempted to intermeddle with the matter upon filing as averred in page 3 of the Appellant's Response to the grounds of opposition by the DPP.



- ii. The learned Trial Magistrate erred in law and in fact by not considering the blatant violations of the Appellant's Constitutional rights and freedom enshrined in Article 25 (c) right to fair trial, Article 31 ((a) and (b), right not to have the the property searched and possessions seized, Article 35 (1) (a) and (b) right to information, Article 40 property rights and Article 47 Fair Administrative action.
- iii. The learned Trial Magistrate erred in facts and law by failing to consider all the grounds adduced by the Appellant in his Notice of Motion. He thus failed to consider grounds f, g, h, m, o, p, r, s and t. All of which are demonstrated in the Appellant's Submissions.
- iv. The learned Trial Magistrate erred in law and in fact by deliberately failing state specifically the Appellant's failure of having met the threshold as laid out in Floriculture International Limited & Others v The Attorney General in Nairobi High Court MIS. Civil Application No 114 of 1997, despite the same being determined twice.
- v. The learned Trial Magistrate erred in fact by stating that the 2nd 3rd 4th 5th and 6th Respondents represented by the Attorney General filed any grounds opposing the Appellant's Application. The same was neither in court's file nor served to the Appellant.
- vi. The learned Trial Magistrate erred in fact by stating in his ruling that all parties complied with the Trial Court's directive to file their written submissions. That the ODPP did not participate in the hearing proceedings. On 7/2/2022, the Appellant sought leave of the Trial Court to file further submissions, the same was granted and filed and served on 14/2/2022. The Appellant brought the issue of noncompliance by the ODPP in note 6 on the 3rd page of the Appellant's further submissions the same was never contested.
- vii. The learned Trial Magistrate erred in facts by generalizing issues that were specifically pleaded by the Appellant He thus indicated in his ruling that Respondents were riding GK vehicle and the property of the Appellant was valued at Kshs 157,000.
- viii. The learned Trial Magistrate erred in law and in fact in failing to find that the Appellant had proved his case on a balance of probabilities as is required in law.
- viii. The learned Trial Magistrate erred in fact and in law by failing to consider the Appellant's submissions. That in the entire Ruling no single sentence derived in the consideration of his submissions or bundle of the Constitutional and statutory provisions elucidated in the Appellant's submissions.
- ix. The learned Trial Magistrate erred in fact and in law by failing to consider the Constitutional and Statutory provisions curtailing the power of the 1st Respondent and that not all prosecutorial decisions are solely at her discretion, some decisions are subject to be ratified by the court without which they are subject to abuse.
- x. The learned Trial Magistrate erred in law and fact by not weighing the length of time the inquiry file took at the 1st Respondent's offices, disappearance, the creation of multiple files with the same inquiry number and the failure to record proper entries in the movement register was mala fides.
- xi. The learned Trial Magistrate erred in fact by stating in his Ruling that the decision by the ODPP not to charge the Respondents was communicated to the Applicant.
- Xii. The learned Trial Magistrate erred in fact by Ruling that there was no evidence of any wrongdoing by the ODPP.



- xiii. The learned Trial Magistrate erred in law and fact by not ruling on the orders sought by the Appellant in his initial and further submissions. Without the issues raised in the orders canvassed and determined, the Appellant's right to a fair trial was infringed upon.
- xiv. The learned Trial Magistrate erred in law and fact by allowing the counsel from the office of the Attorney General to Represent the ODPP despite the Appellant objecting in court (see note 5 on page 3 of the Appellant's further submissions)
- xv. The learned Trial Magistrate erred in law and fact by not informing the Appellant of his right of Appeal.
- xvi. The decision of the said trial Magistrate was against the weight of the evidence adduced.

Submissions

Appellant's Submissions

- 12. The Appellant filed submissions dated 30th November 2022.
- 13. Contending on the question of failure by the Trial Magistrate to recuse himself from hearing the appellant's matter, it was submitted inter alia that the prosecutor being a respondent in the matter and employing her rapport with the Presiding Magistrate, the independence and impartiality of the juror was invaded and the outcome of the matter was therefore predictable and predetermined.
- 14. It was submitted that 2nd and 6th Respondent did not file Memorandum of appearance, did not file their defence as it is laid down in law. Further, the Respondents did not appear in court nor were they represented. Reliance was made to Rex vs Sussex.
- 15. On the violation of the Appellant's Constitutional rights and Freedoms reliance was made on Articles 50 (1),35(1), 47 of *the Constitution* of Kenya 2010 and Section 4 (1) and (2) of the *Fair Administrative Action Act*,2015. It was averred that Article 165; 2 (b) of *the Constitution* clothes this honorable court with jurisdiction to determine whether a right or fundamental freedom has been denied, threatened or violated.
- 16. Averting on whether the Trial Magistrate covered all grounds in the Appellant's Notice of Motion and supporting affidavit, it was contended that the 20 grounds were raised in the Notice of Motion and that the Trial Court only considered some and deliberately left others out. Reference was made to ground f, g, and h on page 27 in the Record of Appeal further, items 6, 7 and 8 on page 29 of the Record were ignored. It was averred that all the above among others were not considered.
- 17. On the question of whether the Trial Magistrate erred in law and in fact by deliberately failing to state specifically the Appellant's failure of having not met the threshold as laid out in *Floriculture International Limited & Others vs The Attorney General in Nairobi High Court Misc. Civil Application No 114 of 1997*, it was submitted that grounds upon which leave to institute a private prosecution were elucidated by Kimaru J in *Shamsher Kenya Limited v Director of Public Prosecutions & Another [2017]* in which the court held that: -

“There is no dispute that any person may be granted leave to institute private prosecution provided such person is able to establish certain conditions precedent. These conditions were set out in the case of *Floriculture International Limited & Others v The Attorney General Nairobi High Court Miscellaneous Civil Application No.114 of 1997* and were reiterated with modifications in *Nairobi High Court Petition No.339 of 2013 Isaac*



Oluochier v Stephen Kalonzo Musyoka & 217 Others. In this case, Mumbi Ngugi J citing Kuloba J (as he was then) in the Floriculture Case.....

18. That whether or not to rely on judicial precedence is entirely on the Magistrate's discretion, it was the Appellant's submission that that judicial precedence is meant to supplement the independent reasoning of the Trial Magistrate and not to supplant it. Reliance was made on the case of Mahabir Prasad Santosh Kumar v State of U.P and ORS [1970] where it was held;

The recording of reasons in support of a decision on a disputed claim ensures that the decision is not as a result of caprice, whim or fancy but arrived at after considering the relevant law and that the decision was just and ensure that the ultimate mental process leading from the dispute to its solution is recorded.....

19. . Submitting on whether the 2nd to 6th Respondents represented by the Attorney General filed any Grounds opposing the Appellant's Application, the Appellant contended that the Trial Magistrate indicated in his Ruling that that the Respondents filed Grounds of Opposition to the application, they averred that the Grounds of Opposition together with Replying Affidavit were by one Felister Njeru for the DPP. He averred the question that arises is when the Attorney General had access to the same grounds filed by the ODPP and the response thereof by the Appellant whilst the same was not served to her office so as to rely on them as to make submissions on behalf of the Respondents. The Appellant submitted that the Respondents & ODPP have been working in cahoots to pervert and subvert the fair administration of justice.
20. Contending on whether all parties complied with the Trial Court's directive to file their written submissions, it was argued that all parties did not comply with the directives. The ODPP other than filing Replying Affidavit and Grounds of Opposition, abstained from the rest of court proceedings including filing submissions.
21. As to generalization of issues specifically pleaded, it was averred that the Appellant wrote "the Respondent rode in government vehicle registration No GKB 265H and ... "the property of the Appellant which contained Kshs 157,000 in cash. Instead of '2 gaming machines were taken away the property of the Applicant valued at Ksh 157,000/-..' and 'the said property was not surrendered and the Respondents were riding GK vehicles.'
22. . On the question of whether the Trial Court considered the Appellant's submissions, it was submitted that the grounds form the body of the matter but it is the submissions that gives life unto the grounds thereof. It is the submissions that facts, circumstances and evidence surrounding a matter is brought to clarity. Reliance was made on the case of Sangram Singh v Election Tribunal, Kotah, AIR 1955 SC 664 at 711, Samuel Musingila Mwinzi v Esther Maasa Kaesa [2021] eKLR all on the issue of observing natural justice; the right to appear and plead one's case.
23. On the question of whether all criminal prosecutorial decisions are solely at the discretion of the ODPP, reliance was placed on Article 157 (8) of *the Constitution* which provides that; - The Director of Public Prosecutions may not discontinue a prosecution with permission of the court. it was further contended that this is particularly so when it is not the DPP who have instituted the prosecution. The matter of the Appellant was instituted by the Appellant in person and passed on to the Director of Criminal Investigations to undertake investigations after which it was to submit to the legally recognized institution- ODPP to undertake Prosecution. Hence, to discontinue such prosecution should have undergone ratification by the Court as per Article 157 (8) of *the Constitution*.
24. On the question of whether the trial Magistrate erred in fact and law by finding that there was no evidence of wrongdoing by the ODPP and lack of good faith, reliance was made on grounds 10 and



- 12 of the Memorandum of Appeal in which it was contended that page 15 of the record contains the Appellant's email to the ODPP on 25/8/2021 which email was never replied to. Reliance was made to Section 42(5) of the *Leadership and Integrity Act*, 2012, Article 157 (4) of *the Constitution* and Section 14 (5) (c) of the ODPP Act, 2013. The DPP has power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and not to impede investigations or direct the Police to abandon investigations altogether by indicating; 'This file should therefore be closed with no further Police Action'.
25. On the issue of whether trial Magistrate erred in fact by stating in his Ruling that the decision by the ODPP not to charge the Respondents was communicated to the Appellant, the Appellant submitted that the decision not to charge was not communicated either by the ODPP or the DCI. reliance was made on Section 10 (b) of *Leadership and Integrity Act*, 2012
 26. . On the question whether the trial Magistrate erred in allowing the State Counsel from Attorney General Chambers to represent the ODPP, the Appellant opined that the Attorney General and the ODPP had no regard to the doctrine of separation of powers by dint of the fact that the Attorney General is part of the Executive and representing the Respondents who work for the Executive cannot purport to represent the ODPP which is an Independent Constitutional Institution. Reliance was made on Article 157 of *the Constitution*
 27. Further, on the question of whether the trial Magistrate erred in law and fact by not informing the Appellant of his right of Appeal and delivering a ruling which was inconsistent with the evidence adduced, it was the Appellant's argument that in criminal proceedings such as this, the losing party has a right to be informed by the trial Court the right of Appeal and the time frame for lodging such Appeal if any hence, the Appellant was prejudiced and had to seek legal counsel which was unnecessary. It was contended that the trial Magistrate erred by not considering all the facts and evidence adduced before making the decision which he opines was prejudicial to him.

The 2nd to 6th Respondents Submissions

28. The 2ND TO 6TH Respondents filed their Submissions dated 13th December, 2022 in which the following issues were raised.
 1. whether the ODPP was unreasonable and without legally justifiable reason in failing to prosecute the 2nd to 6th Respondents.
 2. whether the Appellant meets the threshold for grant of leave to institute private prosecution.
29. On whether the ODPP was unreasonable and without legally justifiable reason in failing to prosecute the 2nd to 6th Respondents, it was submitted that the Director of Public Prosecution is governed by the Office of Director of Public Prosecution Act, 2013. Reliance was made on Article 157 (6) of *the Constitution* which provides that; - The Director of Public Prosecutions shall exercise State powers of prosecution and may,
 - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority and
 - c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).



7. If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

8. The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

9. The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

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

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

30. It was argued that Section 6 of the Office of Director of Public Prosecution Act, 2013 provides that pursuant to Article 157 of *the Constitution* the Director shall not require consent from any person or authority but subject to *the Constitution* and law.

31. Consequently, it was averred that DPP in this case found that there was no sufficient evidence to prosecute the 2nd to 6th respondents. In the case of Communications Commission of Kenya v ODPP & Another [2018] eKLR. Stated that; -

“we only wish to add that whereas generally speaking a complainant would ordinarily expect the DPP to prosecute suspected offender based on the evidence availed to or gathered by the police, the DPP in exercise of the discretion conferred upon him by *the Constitution* and statutes, cannot be accused of having breached a complainant's legitimate expectation if he chooses not to institute criminal proceedings.”

32. Arguing that DPP'S decision not to charge was legal and within the bounds of legal reasonableness hence court should not interfere with the said decision. Relying in the case of Peter Ngunjiri v DPP [2017] eKLR.

33. Submitting on the issue of whether the Appellant meets the threshold for grant of leave to institute private prosecution, the Respondents herein opined that the Applicant should satisfy the court that the application for leave to institute private prosecution is merited. They relied on the case of Isaac Aluoch Polo Alouchier v National Alliance & 440 Others [2017] eKLR in which Achode J stated that the best authority to demonstrate merit was Floriculture International Limited & Others vs The Attorney General in Nairobi High Court Misc. Civil Application No 114 of 1997, where Kuloba J outlined these principles as follows;

- i. that he had made a complaint to the police and had accorded reasonable opportunity for the police to investigate the case;
- ii. that the Director of Public Prosecutions had been seized of the case and had declined to institute or conduct criminal proceedings;
- iii. that the failure by the State agencies to prosecute is culpable, unreasonable and without any legally justifiable reason;
- iv. that unless the suspect is prosecuted there is likelihood there will be failure of public and private justice;



- v. that the person instituting private prosecution has suffered him and is not motivated by malice, politics or some other ulterior consideration devoid of good faith, and finally,
 - vi. that there was demonstrable ground that grave social evil will occur if the police and the Director of Public Prosecutions have acted capriciously, corruptly and in a biased manner that the only remedy is to grant leave to the aggrieved party to institute private prosecution.
34. It was opined that the matter was reported to police who investigated the matter and forwarded the investigation to the DPP who declined to institute criminal proceedings against the 2nd to 6th Respondents for the reason that evidence was not sufficient, having analyzed the facts and evidence before concluding that the Respondents would not be charged. They averred that the Appellant failed to demonstrate that failure to prosecute led to any injustice.
35. Relying on the case *Isaac Aluoch Polo Alouchier v National Alliance & 440 Others* [2017] eKLR, they opined that the application by the Applicant/ Appellant was premised on an illegality, unmerited and ready for dismissal and prayed that Court upholds the Ruling of the Trial Court.

Appellant's Rebuttal on 2nd to 6th Respondents' Submissions

36. The Appellant further filed his rebuttal to the 2nd to 6th respondents' submissions and supporting affidavit to the Appellant's submission both dated 14th December, 2022 in which he submitted that 2nd to 6th Respondents submission that the Appellant's Application was dismissed by the trial Magistrate and praying the same to be upheld by this Honorable Court, he raised a question whether it really constitutes a ruling by the dictates of law. Reliance was made on Section 169 (1) of Criminal Procedure Code Cap 75 provides
- “Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”
37. It was submitted for the Appellant that ruling was a copy and paste of the previous judgments and has no input of independent reasoning of trial magistrate in relation to the facts and evidence adduced. In *Okethi Okale & Others v the Republic* [1965] EA 555, the court held that failure to consider the defence case is contrary to natural justice. It submitted that nothing in the entire ruling show what the respective parties submitted.
38. In the submissions they faulted the entire process right from the investigations of the matter referring particularly on the proceedings of the trial Court and the conduct of the 2nd to 6th Respondents and the Office of the Director of Public Prosecution in their connivance to defeat the application of the Appellant. Arguing that the 2nd to 6th Respondent's allegations of illegality is hot hear and wild goose chase as it invites the court to a fishing expedition.
39. He opined that the 2nd to 6th Respondents by their own submitted that the property is irrecoverable as they destroyed it without the due process of the law reference is to page 22 lines 1-4 of the report and page 58 line 28.
40. In the Affidavit the Appellant deposed that at 1135hrs on the 9th November, 2021, an officer from the ODPP, Grace Musangi stormed the registry, past the service desk and went straight to the registry officer handling his file; that the Said DPP officer started objecting the filing of his matter citing that



the same had been declined by her office; that she implored the registry officer not to enter in the system as she knew how to deal with it and was warned that the Appellant was present that is when she toned down; that she was the Court prosecutor in court8 where his matter had been assigned and was the one who presented the ODPP's grounds of opposition to his letter; deposing that due to the influence of the prosecutor the Appellant's matter ended up not being recorded in the manual register, did not appear in the court's cause list for three consecutive sittings yet it was the first order of business in court; deposing that the prosecutor interfered with the administration of justice in a matter where she was a respondent and that justice was compromised.

41. The Appellant reaffirmed the Application and asked this Honorable Court among other things to quash the ruling of the trial Magistrate, grant leave to the Appellant to proceed with private prosecution.

1st Respondent's Submissions

42. The respondent ODPP herein filed its Submissions on 15th March 2023 in which the Appeal was opposed on the following grounds

1. Constitutional Mandate of the ODPP
2. Decision to charge
3. Whether the Appellant's rights were infringed by the decision not to charge the suspects.

43. On the Constitutional Mandate of the ODPP, reliance was made on Article 157 (6) of [the Constitution](#) of Kenya provides: -

“ 157 (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may,

- a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority and
 - c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
7. If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.
 8. The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.
 9. The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
 10. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the



exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

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

44. Relying on the case of *Musyoki Kimanathi v Inspector General of Police & 2 Others* 2014 eKLR where Majanja J held:

“In light of the mandate conferred upon the DPP in Article 157 of *the Constitution*, the High Court therefore ought not interfere with the above mandate unless cogent reasons are given thus; that the DPP has acted without due regard to public interest, against the interest of the administration of justice and has not taken account of the need to prevent and avoid abuse of court process.

Further, reliance was made on National Prosecution Policy 2015 at page 4 which among other things is to the effect that State powers of prosecution are derived from the people and vest in and shall be exercised by the DPP and Officers subordinate to him or her.

45. On the decision to charge, it was submitted by the Respondent that the decision to charge or no to charge is the hallmark of the institution of criminal proceedings and the heart of the state’s criminal justice. In the Case of *Communications Commission of Kenya v Office of the Director of Public Prosecution & Another* [2018] eKLR, the Court of Appeal observed that:-

“the decision whether or not to institute criminal proceedings is purely discretionary. That discretion must however be exercised by the DPP within the constitutional limits, that is, with regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process”

46. Arguing that Section 88(1) of the Criminal Procedure Code is the law on private prosecution, it was opined that the grounds upon which leave to institute private prosecution were elucidated by Kimaru J in *Shamsher Kenya Limited v Director of Public Prosecutions & Another* [2017] in which the court held that: -

“There is no dispute that any person may be granted leave to institute private prosecution provided such person is able to establish certain conditions precedent. These conditions were set out in the case of *Floriculture International Limited & Others vs- The Attorney General Nairobi High Court Miscellaneous Civil Application No.114 of 1997* and were reiterated with modifications in *Nairobi High Court Petition No.339 of 2013 Isaac Oluochier v Stephen Kalonzo Musyoka & 217 Others*. In this case, Mumbi Ngugi J citing *Kuloba J* (as he was then) in the *Floriculture Case*

47. whether the Appellant’s rights were violated by the decision not to charge the suspects, it was argued that the complainant was investigate and forwarded to the ODDP County office for advice and upon perusal the decision not to charge the suspects was arrived at as there was no sufficient evidence to sustain the offence of abuse of office and extortion. Relying on the cases of *Kuria & 3 Others v Attorney*



General [2002] 2 eKLR 69 and Communications Commission of Kenya v ODPP & Another [2018] eKLR, it was observed that:-

“we only wish to add that whereas generally speaking a complainant would ordinarily expect the DPP to prosecute suspected offender based on the evidence availed to or gathered by the police, the DPP in exercise of the discretion conferred upon him by *the Constitution* and statutes, cannot be accused of having breached a complainant’s legitimate expectation if he chooses not to institute criminal proceedings.”

48. The respondent concluded by submitting that the Trial Court was right in dismissing the application for grant of leave to institute private prosecution.

Determination

49. This Court considered the pleadings and written submissions and the appeal presents 17 grounds in the Memorandum and Petition of Appeal which are condensed into the issues for determination as follows;
- a. The jurisdiction of the Court and if a competent appeal is before Court.
 - b. Whether the Law Enforcement Agencies/Institutions facilitated fair Administrative Action to the Citizen/Applicant
 - c. Whether the Trial Court accorded the Appellant Fair Hearing under Article 50 CoK 2010
 - d. Whether the Appellant is granted leave to conduct private prosecution against the Respondents or not.
 - e. What remedy/remedies are available if any to the Appellant;

Jurisdiction

50. *The Constitution* not only vests in the High Court unlimited original jurisdiction in criminal matters [Art.165(3)(a)] but also ordains that the High Court shall have such appellate jurisdiction as conferred by legislation [Art.165(3)(e)].
51. Appeals from subordinate courts to the High Court are provided for under Part XI (Section 347-361) of the Criminal Procedure Code, Cap.75 (CPC).

Section 165 (3) of *the Constitution* provides;

Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c)
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;



- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii)
 - (iv)and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
52. This Court notes the Appellant commenced proceedings in the Trial Court in form of Criminal Miscellaneous Application E067 of 2021 vide Notice of Motion filed on 9/11/2021 and not by substantive claim through a Petition, originating summons or Plaint as the case may warrant. Considering the appellant appeared in person and represented himself, the anomaly shall be cured through Article 159 (2) (d) CoK 2010 that prescribes as part of judicial authority that; justice shall be administered without undue regard to procedural technicalities; Therefore, in spite of the anomaly that the proceedings were not commenced vide filing of a petition in the Trial Court, they are competent proceedings and appeal before this Court.
53. This being a first appeal, this court relies on the case by the Court of Appeal of David Njuguna Wairimu vs Republic [2010] eKLR where the Court stated:-
- “The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.
54. The thrust of the appellant’s claim/appeal is that on 6/1/2021, the Respondents conducted a raid in the Appellants premises situated at Kaloleni market and they broke into a cage and took away 2 Gaming Machines which contained Ksh 157,000/- and made away with them in motor vehicle Reg GKB 265H. They were not accompanied by Police Officers and they did not have/present a Search Warrant. He alleged that earlier similar raids were carried out in Kithima & Kisekini. The confiscated items were not surrendered to the Police nor report made and/or suspects handed over to the Police for investigations but were released on allegedly paying bribes.
55. The Appellant reported the incident to the Assistant County Commissioner on 7/01/2021. On 9/1/2021 he wrote a letter of complaint to the Assistant County Commissioner and gave details of the conduct of his team that conducted the raid. He was summoned on 15/1/2021 and interviewed in the presence of the Deputy Commissioner and was directed to report the matter to the Police.
56. The Appellant reported the incident to the Police on the same day and got OB NO 22/15/1/2021; The DCIO Machakos opened an Inquiry File 7/2021 and the same was forwarded to the Office of Director of Public Prosecution (ODPP) and he made several enquiries and visits for 3 months and finally on 29/9/2021 he was served with a copy of the outcome of investigations and prosecution. The report culminated to the fact that there was no sufficient evidence or proper threshold to mount a credible prosecution.



56. The Appellant annexed copy of purchase of the 2 Gaming machines of 8/8/2018 and the Landlord & Tenant Agreement of 22/3/2020 leasing the premises to the tenant whose employee was arrested from the premises and later released. The document confirmed ownership of the 2 gaming machines and premises as the Landlord.
57. It is for the above circumstances that the Appellant applied to the Trial Court vide the Notice of Motion of 9/11/2021 to commence private proceedings against the Respondents and their Supervisors for criminal offence of burglary, extortion of monies and abuse of office.
58. In the Trial Court, the Applicant served the Respondents who then filed Grounds of Opposition and Replying affidavit that the investigations did not meet the threshold of the Evidential test and Public Interest Test as provided for in the National Prosecution Policy. Parties were asked to file written submissions which the Applicant filed on 14/12/2021 and the Respondents represented by the Attorney General Office on 16/12/2021 and the Applicant filed Further Submissions on 14/2/2022. The ODPP did not file Written Submissions in the Trial Court as evidenced by the Trial Court Record. The Trial Court rendered itself vide Ruling of 15/3/2022.
59. On appeal, the Appellant complained that there was interference with the filing of the appeal, the delay in the process and mistaken file number and/or name in the process was part of a process to curtail right of appeal. During oral submissions the Appellant stated that the appeal was misfiled and the file appeared by different parties' names not the parties herein. He followed up the matter in the Registry, checked Manual Register, File Movement Register and the Case Tracking System (CTS) and later retrieved the file which was not registered and was duly processed.

Constitutional Breach

60. Article 2 of *the Constitution* declares *the Constitution* as the supreme law which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of *the Constitution* is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of *the Constitution* is invalid.
Article 3 places an obligation upon every person to respect, uphold and defend *the Constitution*.

Fair Administrative Action

61. *The Constitution* of Kenya 2010 provides Article 47 for Fair Administrative action as follows;
 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair
Section 4(1) Fair Administrative Act provides;
Administrative action to be taken expeditiously, efficiently, lawfully etc
(1)
Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
Public officers are obliged to adhere to these principles when taking administration actions. They are fortified by Article 232 CoK 2010 that provides for values and principles of public services which provides
(a) all State organs in both levels of government; and



(b) all State corporations.

62. The Appellant's position is that his premises situated at Kaloleni market were invaded by the Respondents among others in a swop/raid illegally and without any court order or warrant on 6/1/2021, and they broke into a cage and took away 2 Gaming Machines which contained Ksh 157,000/- without taking a proper inventory of the recovered exhibits or handing over the Gaming machines to the Police for investigations and/or prosecution.
63. The Appellant's claim posited that no charges were preferred against him, his tenant or the employees found at the premises during the raid. It was therefore contended that the Respondents actions were/ are unconstitutional and unlawful and that the continued detention of the said machines caused him suffering, economic loss to the source of livelihood. The Respondent's actions amounted to trespass and an infringement of his right to property as enshrined in Article 40 of *the Constitution* as well as a violation of his right to privacy under Article 31 thereof & Article 27 & 35 of *the Constitution*.
64. This Court found that the Respondents did not file responses to the alleged claims but justified their actions under the law as submitted by the ODPP vide Grounds of Objection & Replying Affidavit and Written Submissions filed by the AG on their behalf. The Appellant attached various correspondences seeking information whereabouts of his property to Gaming Machines and money confiscated by the raid. The Respondent as Public Officers did not comply with Fair Administrative action on the part of the confiscating and not releasing to police or accounting the same or returning the same to the Appellant which was contrary to Article 47 CoK 2010. There was no evidence to controvert the claim or create any doubt to the Appellant's case. Cumulatively, this Court finds that the Respondents failed to exercise fair administrative action in the circumstances even as they carried out their legal mandate to conduct carry out swoops/raids to maintain law & order.

Fair Hearing

65. In the case of Francis Karioko Muruatetu & Anor vs Republic SC 2017 eKLR states of Fair Trial thus;

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

63. In Pinnacle Projects Ltd v PCEA Ngong Parish PCEA Foundation HCCC 21 of 2012 provides;

"Fair Trial in civil cases includes; the right of access to Court, the right to be heard by a competent, independent, impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit filed, the right to public hearing and right to be heard within reasonable time....."

I have this to say it is important that in any judicial process adjudication parties involved be given an opportunity to present their case and have a fair hearing before the decision against



them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.”

Recusal By Trial Court

66. The Appellant raised the issue that the Trial Court ought to have recused himself from hearing the matter upon finding out at the 1st instance that the Prosecutor of the Court had on 9/11/2021 showed up in the Criminal Registry and opposed the filing of the application and on 16/01/2021 continued to intermeddle with the matter.

67. Prof Anyang Nyong'o & 10 Others EACJ where the Court held;

We think that the objective test of reasonable apprehension of bias is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of a reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially.

68. The Court of Appeal in R vs David Makali & Others CA Criminal Application No 4 & 5 of 1995 went on and considered;

I take the view that the Petitioner should establish such material facts as attend personal inclination or prejudice on the part of the judge towards a party on some extrajudicial reasons....The Applicant must therefore specifically set out facts constituting bias and prove them as such in order to establish real likelihood of bias for purposes of disqualification of the judge.....it is absolutely necessary that the party applying should lay all relevant material before court. The best way of delivering that requirement is by adopting a method that inherently enables some form of deposition and production of evidence.

69. In the case of Florence Chelangat Langat v Timoi Farms and Estates Limited & Another [2015] eKLR the objective test was explained as follows;

“The test is not the subjective notion of the applicant but rather the objective test of the reasonable man. It follows therefore that a judge does not have to disqualify himself merely because one party has stated that he is of the opinion that he will not get a fair hearing, or that such party feels that the judge will be impartial or prejudiced.... It is clear from the foregoing that it is settled law that the test is that of the reasonable man, not the subjective views of the applicant, who invariably thinks that the judge will not give him a fair trial. The subjective view of the applicant in this case is therefore not the applicable standard, but the standard applicable, is that of the reasonable man. In other words, the fact that the applicant feels that she will not get a fair trial, is not itself sufficient for me to recuse myself, for the test applicable is not her subjective feeling. Her feelings may be relevant, but not critical to the determination of this application.”

70. The case-law above sets out standards and objective test applied to the question of recusal of Judge/Magistrate/Judicial Officer presiding over proceedings that ought to in accordance with the constitutional benchmark an impartial and independent forum.

71. In the instant case, the Appellant castigated the Prosecutor on alleged actions that took place outside the Court in the Registry during filing of the application. There is no evidence on record that the Trial court was privy to the alleged actions of the Prosecutor or that the Trial Court was in the Registry during filing of the application. This Court finds whereas the proceedings must conform to Article 50 CoK 2010, tents of a fair hearing that include an independent and impartial forum of adjudicator



and is granted an opportunity to present their case, the Trial court was not partial and dependent. Secondly, any application for recusal is made before the Trial Court, in this case from the proceeding such application was not made. Thirdly, the conduct of the Prosecutor cannot legally be visited on the Trial Court. For these reasons, I find the ground for recusal not defended by the evidence on record. The Appellant was granted a fair hearing.

Private Prosecution

72. The Appellant took issue with the finding of the Trial Court that the Appellant failed to meet the threshold necessary to grant leave to institute private prosecution. The Trial Court further found no evidence of any wrong doing by ODPP and the Court found no basis to interfere with the ODPP decision not to charge the Respondents herein. 73. The Appellant relied on the facts and law that the Trial Court failed to consider grounds outlined in the Notice of Motion specifically paragraphs, f, g, h, m, o, p, r, s, and t of the Notice of Motion that outline the chronology of events that culminated to the application in the Trial Court and the instant appeal. The objection is that the Trial Court failed to consider constitutional and statutory provisions and considering the weight of the evidence adduced. The Appellant contended that the Trial Court failed to consider that prosecutorial powers are subject to affirmation from the Courts.
73. Each of the parties on appeal and in the Trial Court submitted extensively on the grant of leave to conduct private prosecution as outlined above. *The Constitution* bestows prosecutorial powers on the Director of Public Prosecution by virtue of Article 157 (6) CoK 2010. In executing the mandate, the Office of the Director of Public Prosecution is guided by Article 157 (11) CoK 2010 to take in to account the following parameters;

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.

In *Rufus Riddle Barger v Brian John* [1959] EA 8 The court stated among other things that,

“a private prosecution can only be given legitimacy and allowed by the court if instituted or maintained if it serves as a remedy against a culpable inertia or partiality on the part the public prosecuting authority”

In *Kimani v Kihara* [1983] eKLR, the court held that

the Applicant needs to have prove that he or she has locus standi “...even if it be true that every citizen has sufficient interest in seeing that the law is enforced it does not follow that every citizen has a sufficient interest in conducting the prosecution of other citizen for an offence which has caused him no damage or injury ...”

In *Amwona & others v KBLHC*.Misc.App No.19/04, at page 19 and 20 Emukule J. said: -

“In our custom and practice, where an offence is alleged to have been committed, or that there is a conspiracy in the air to commit a crime, an offence, cognizable in law, the first public right of defence is to hasten to report the matter to the nearest Police Station. That is the exhortation of “Utumishi Kwa Wote” that is spread all over the city “to help us fight crime.” If there is no response from the Police, or the Police appear reluctant to take up the matter, [the next course of action is to report or write to the Attorney General who has power under Section 26(4) of *the Constitution* to require the Commissioner of Police to investigate any matter which, in the Attorney’ General’s opinion, relates to any offence or alleged offence



or suspected offence, and the Commissioner is bound to comply with that requirement and is further bound to report to the Attorney General upon such investigation. If the Plaintiff has exhausted those channels and to his dismay, neither the Police, nor the Attorney General take up his complaint] he/she is legally entitled to seek permission under Section 88(1) of the Criminal Procedure code, to institute what is commonly called a “private” or a “citizen’s” prosecution.”

74. In the landmark case of Floriculture International Limited & Others vs The Attorney General in Nairobi High Court Misc. Civil Application No 114 of 1997, where Kuloba J outlined principles for private prosecution as follows;
- i. that he had made a complaint to the police and had accorded reasonable opportunity for the police to investigate the case;
 - ii. that the Director of Public Prosecutions had been seized of the case and had declined to institute or conduct criminal proceedings;
 - iii. that the failure by the State agencies to prosecute is culpable, unreasonable and without any legally justifiable reason;
 - iv. that unless the suspect is prosecuted there is likelihood there will be failure of public and private justice;
 - v. that the person instituting private prosecution has suffered him and is not motivated by malice, politics or some other ulterior consideration devoid of good faith, and finally,
 - vi. that there was demonstrable ground that grave social evil will occur if the police and the Director of Public Prosecutions have acted capriciously, corruptly and in a biased manner that the only remedy is to grant leave to the aggrieved party to institute private prosecution.

Section 6 of the Office of Director of Public Prosecution Act, 2013 provides

- (a) not require the consent of any person or authority for the commencement of criminal proceedings;
- (b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under *the Constitution*, this Act or any other written law; and
- (c) be subject only to *the Constitution* and the law.

75. The above cited case-law spells out the checklist to comply with in order to result to private prosecution pursuant to section 2 (1) of the *Office of the Director of Public Prosecutions Act*, 2013 (the Act) provides for the definition of a prosecutor to include private prosecutors.

Consequently, Section 28 of the Act provides inter alia that any person can commence private prosecution however, (30) days notification is required to the Office of Public Prosecution of the commencement of such proceedings. In addition, Section 28 (3) of the Act guarantees the power of the ODPP to take over or discontinue any private prosecution. Section 88 (1)(2) and (3) of Criminal Procedure Code Cap 75 (CPC). espouses right to private prosecution.

Did/has the appellant met the threshold and fulfilled the checklist?

76. The appellant submitted that the swoop/raid of 6/1/2021 was illegal, unlawful and irregular as it contravened his Constitutional right to privacy, [Art 31] to information [Art 35] on why the invasion of his premises and carting away 2 gaming machines and Kshs 157,000/- right to property [Art 40] as the confiscated items were not returned or released to him nor were they taken to the Police Station



and /or charges preferred [Art 47] and was denied fair hearing/ due process [Art 50] and he was denied equal benefit and protection of the law [Art 27] of the Constitution.

77. The Respondents, the Chief and Assistant County Commissioners on 6/2/2021 during the Corvid 19 pandemic period carried out raids/swoops within Machakos County and made several arrests in various markets including the Appellants premises in connection with illegal sale of alcohol against the Government's Policy during the pandemic period. Therefore, under Section 15 of the National Government Coordination Act that provides for appointment of national and Government administrative Officers. They derived their mandate from Executive Order No 1 of 2019 & the Chief's Act No 128/2012. The Assistant Commissioner & Chief were acting in accordance with the law, the raids/swoops were lawful and legal.
78. To these competing legal interests, was/is private prosecution merited?
79. This Court takes judicial Notice of the fact of Corvid 19/Corona virus pandemic that swept across the world/nation 2019-2021. The pandemic caused devastating adverse and debilitating side effect to the nation and mankind. There was deterioration of political, economic and social development and growth. All activities movement interactions were by the Government directives limited outlaws and only essential services to the bare minimum. Consequently, entertainment was curtailed through lockdowns and curfews to avoid minimize and/or stop close human contact interaction or engagement in order to control and manage the spread or infection of the virus. To ensure observance of avoiding crowded social places and groups, the patrols, raids and swoops were lawful and legal to protect the general public from widespread of the Corona virus. Therefore, whereas each citizen enjoys right of association, liberty, privacy and to property, during the said period, when the pandemic was declared a national issue, each citizen's rights were curtailed to the extent that it was to ensure public safety and security and to maintain law and order. To this extent and with the prevailing unique circumstances at the time, the raids and swoops to close entertainment joints and stop or avoid crowds and cart away exhibits of illegal activities there was no Constitutional breach and no criminal offence was/is disclosed.
80. The Office of the Director of Public Prosecutions by the Report of 7/9/2021 gave detailed analysis of the evidence, availed and why the same was not sufficient to mount a prosecution case against the Respondents. Having found that during the pandemic it was through Government Directive that the raids were conducted, it would be difficult to legally pursue prosecution either through public prosecution or private prosecution when the threshold is not met.
81. It is on record that the Appellant reported the matter of the raid and confiscation of 2 gaming machines and Ksh 157.000/- to the Deputy County Commissioner and was directed to report the Police. He reported to Police and obtained the OB Number. The Appellant was directed to the ODPP office where after 3 months received a Report that the prosecution would not be undertaken due to insufficient evidence and no reasonable and probable cause was established. Further, the burden and standard of proof in criminal cases prescribed by Section 107 – 112 of the Evidence Act would have to be met to mount a prosecution case.
82. In the case of Republic v DPP & Anor Ex parte Chamanlal Vraslal Kamani & Others 2015 eKLR the Court observed;
-That a prudent and conscientious Prosecutor must be able to demonstrate that it has a reasonable and probable case for mounting criminal prosecution otherwise the prosecution will be malicious and actionable...
83. The Appellant's claim that there was unlawful entry into his premises and items carried away was/is confirmed as part of maintenance of law and order at the time. Pursuing criminal proceedings against



the Respondent for acting in the course of their duty would not cure the injustice unless proved that they acted outside the law in conducting the raid, which would in turn confirm the Prosecution decline to prosecute is unreasonable and unjustifiable hence grant of leave to pursue private prosecution.

84. The appellant preferred charges are burglary, extortion of monies and abuse office. From the pleadings, the Applicant/appellant was not the complainant/victim in all 3 scenarios, the breaking in to his premises and breaking the cage and confiscation of 2 gaming machines pertains to him personally and he attached Tenancy Agreement as landlord and Sale/Purchase Agreement as owner of 2 Gaming Machines. Apart from this claim which is legally justified and explained, the claims of extortion of monies were not to him but others and on abuse of office, the Respondent were on duty with the mandate to manage crowds and curtail entertainment in light of the pandemic.
85. On locus standi, the Appellant suffered financial loss closure of business and loss of confiscated property and use of such property. It is not denied that the 2 Gaming Machines were carted away, they were not released to the Police for investigations and/or prosecution and no inventory was taken at the scene. He made reports and demanded return/release of the 2 Gaming Machines to no avail.

In the case of Peter Ngunjiri Maina v Director of Public Prosecutions p2017] eKLR, the Court held that:-

“The decision of the DPP is unfettered but it must be accountable. The discretion of the part of the court to interfere with the decision of the DPP is untrammelled but it is not to be exercised whimsically.”

86. From the rival submissions made on appeal and the Trial Court record, I find that from the circumstances of the instant matter, the Appellant has not/did not meet the threshold for leave to conduct private prosecution. I uphold the Trial Court’s finding.
87. However, this Court also finds that even if the raid/swoop was legally mandated the manner it was carried out ended up vitiating the Appellant’s right own property. If the gaming machines and Ksh 157,000 (if proved) were confiscated and not released to the Police to investigate the matter/offence nor an Inventory was drawn showing what was carried away, in light of the Document of Purchase of the machines attached to his pleadings, the fact of ownership is not controverted.
88. Therefore, even if no criminal offence was/is disclosed, the raid, search and seizure ought to have been carried out in such a manner that any goods carted away were accounted for either placed with Police or released to the owners if no charges were preferred.
89. In the case of Samuel Kahiu v Muktar Mahat, Deputy Administration Police Commander (D.A.P.C) Athi River & 3 others [2019] eKLR G.V.Odunga J (as he then was) stated;

(36) Article 47(2) of *the Constitution* provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. That the Applicant’s rights have been adversely affected by the 1st and 2nd Respondents’ action cannot be doubted. The Applicant is no doubt entitled to use its machines pursuant to Article 40 of *the Constitution* unless in so doing the law has been violated and if his interest therein is to be restricted, he is entitled to written reasons for the said denial. The said Article imposes a duty on the 1st Respondent and 2nd Respondents to furnish the Applicant with written reasons why the subject machines are still being impounded



(35) I also agree with the decision in Ugandan case of Uganda Commercial Bank v Kigozi [2002] 1 EA. 305 that:-

“where there is no justifiable cause for impounding or seizing and detaining the property; and where there is no logical explanation as to why police would, given the entire set of circumstances, take action to seize and detain the property such seizure and detention was not only wrongful but also unlawful; and calls for atonement in damages”.

Disposition

1. The appeal against the Ruling of 15/3/2022 is partly upheld and partly dismissed as follows;
2. The Appellant failed to meet the threshold necessary to grant leave for private prosecution the Ruling is upheld and appeal dismissed.
3. The Appellants right to own property under Article 40 CoK 2010 and Fair administrative action under Article 47 Cok 2010 was denied namely 2 Gaming machines that were confiscated during the search seizure and raid were not returned to him nor taken to Police for investigation and/or prosecution and have not been released /returned todate. The 2 gaming machines shall be returned to the Appellant.
4. In default if destroyed, the Appellant shall be compensated by damages through civil proceedings.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 11TH MAY 2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

Mr. Momanyi holding brief 2nd & 6th Respondents

Mr. Nicky Munguti - The Appellant

Mr. Mwongera - for the Respondent

Geoffrey/Patrick - Court Assistant(s)

