



Nyakamba v Directorate of Criminal Investigations & another (Anti-Corruption and Economic Crime Petition 5 of 2022) [2023] KEHC 19021 (KLR) (Anti-Corruption and Economic Crimes) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19021 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION 5 OF 2022**

EN MAINA, J

JUNE 15, 2023

BETWEEN

DANIEL MIRERA NYAKAMBA PETITIONER

AND

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

JUDGMENT

1. The Petitioner is a former employee of the Kenya Revenue Authority, facing charges in Milimani Chief Magistrates Anti-Corruption Case No. E056/2020. He is charged with the offences of Conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 48 of the Anti-Corruption & Economic Crimes Act and Abuse of Office contrary to Section 46 as read with Section 48 of the Anti-Corruption & Economic Crimes Act, all arising from the alleged irregular issuance of a Tax Compliance Certificate to a company known as Konrad Science Limited, a taxpayer that had outstanding tax liabilities. The offences are alleged to have been committed on 1st October 2018.
2. By the Petition dated 3rd November, 2022 which is supported by an affidavit sworn on even date, the Petitioner challenges his arrest and detention by the 1st Respondent. He is also challenging the decision of the 2nd Respondent to charge him in Milimani Chief Magistrates Anti-Corruption Case No. E056/2020. His Notice of Motion dated 3rd November 2022 seeking conservatory orders was dismissed by this court through a ruling delivered on 23rd February 2023.



3. The Petition is expressed to be brought under Articles 1,2,3,4,10,19,20,21,22,23,24,25,27,47,49,73,75 and 165 of the Constitution of Kenya. The orders sought are that:-
- “ a. Pending the hearing and determination of this Petition, this Honourable Court be pleased to issue an order staying Milimani Chief Magistrates Anti-Corruption Case No. E056/2020.
 - b. An order prohibiting the 1st and 2nd Respondents from continuing with the prosecution of the petitioner in the Milimani Chief Magistrates Anti-Corruption Case No. E056/2020
 - c. A declaration that the proceedings in the criminal case were unfounded, malicious, oppressive as against the petitioner and otherwise unconstitutional;
 - d. An order quashing the decision on cash bail and bond terms and the same be refunded to the Petitioner; and
 - e. Costs of this Petition”
4. The 1st and 2nd Respondents opposed the Petition through a Replying affidavit which is undated but which is sworn by No. 237087 IP Norbert Kioko who describes himself as an Investigating Officer with the Directorate of Criminal Investigation.

The Petitioner’s case

5. The Petitioner begins by stating that in years 2018 to 2019 a complaint was lodged by the Kenya Revenue Authority against its own employees on alleged grounds of abuse of office and conspiracy to commit an act of corruption and other preferred charges. The said complaint crystallized in to various anti-corruption cases before the Milimani Chief Magistrates Court and the Petitioner seeks to the Court’s attention to Milimani Chief Magistrates Anti-Corruption Case No. E 056/2020, in which he is the 1st Accused Person; That the Petitioner was an employee of the Kenya Revenue authority, who is the complainant in the aforementioned criminal case, whose duties and responsibilities actively involved his extensive interaction with the iTax platform on which taxpayers interalia would apply for Tax Compliance Certificates; That the Petitioner tendered his resignation on 3rd September, 2018 and the same duly received and acknowledged by the Human Resource function on 6th September, 2018. As per his employment Contract, he was obligated to serve out his notice period which terminated on 16th October 2018 and as such, during the notice period, his roles and participation in the Authority diminished as the Petitioner handed over pending tasks, instructions and privileges to his replacement as he progressively transitioned out of the Authority; That furthermore, the Petitioner enrolled for a Bachelors of Laws Degree (LL.B) in the year 2017 in furtherance of his career at the Kenya Revenue Authority and at all times, had been an active and diligent student. On 1st October, 2018 the day on which the above charges relate, the Petitioner was not present at work as he was sitting for his Second Year End of Semester Examination at the University of Nairobi; That in preparation for the said examination, the Petitioner requested and took time off work to enable him prepare adequately for his examinations that span across two weeks, however, the Kenyan Revenue Authority surcharged 9 days payable salary for his nonattendance at his work station. It is therefore, incapable for him to proceed with official Kenya Revenue Authority duties at South of Nairobi Tax station whilst he was preparing for and sitting his examination at the University of Nairobi Parklands Campus.



6. The Petitioner contends that he was illegally arrested and detained by the 1st Respondent. That from the inception of the complaint and the manner in which the investigations were conducted by the 1st Respondent were in breach of the Petitioner's rights under Articles 10, 12(1), 19(2), 20, 25(b), 27, 28,31, 47 and 49 of *the Constitution* in that the raid conducted the offices of the Kenya Revenue Authority (KRA) on 10th May 2019 was without notice or search warrants in complete breach of Articles 10, 12(1), 19(2), 20, 25(b), 27, 28, 31, 47 and 49 of *the Constitution*. That; his detention and that of his colleagues at Muthaiga, Kamukunji and Gigiri Police stations on 10th May 2019 was in breach of Article 49; and although he was arraigned in court on 17th May 2019 and was granted bail of Kshs. 200,000 but despite complying with the bond terms the 1st Respondent continued to detain him for a further 5 days and nights without justification.
7. The Petitioner contends that the unlawful and arbitrary arrest and detention and his being arraigned without charges until after 1 year, 9 months was a violation of his right under Article 49; That the 1st Respondent failed to observe International Treaties and Conventions that exist in International law to remedy and prevent human rights violations.
8. The Petitioner also contends that the alleged improper issuance of a Tax Compliance Certificate is well documented in KRA internal documents more especially under the Domestic Taxes Department Compliance Procedures and the work instructions manual. That the Kenya Revenue Authority has an alternative mechanism through which a Tax Compliance Certificate erroneously issued could be withdrawn and by which remedial steps could be activated to regularize the taxpayers' status as opposed to victimizing him through investigations and prosecution.
9. With respect to the 2nd Respondent's decision to charge him he contends that the 2nd Respondent is obligated under its policy document to consider the key evidence and the threshold or two-stage test prior to preferring charges; that the 2nd Respondent relied on the evidence that the Petitioner committed the offences on 1st October 2022 yet on that day he was sitting his examinations at the University of Nairobi; That the evidence relied upon does not meet the two-stage test to infer the culpability of the Petitioner. That the Kenya Revenue Authority Domestic Taxes Department Compliance Procedures and Work Instruments Manual provides for the resolution of charges preferred by the 2nd Respondent without reliance on the Criminal Justice System. That Article the charges are contrary to Article 159 of *the Constitution* on alternative forms of dispute resolution.
10. The Petitioner contends further that the 2nd Respondent's decision to charge was solely motivated and driven by the KRA's ulterior motives; that the institution of criminal charges against the Petitioner is mala fides and an improper use of the criminal justice system as the Kenya Revenue Authority has an alternative dispute resolution mechanism; That, the Petitioner failed to exhaust the laid down alternative mechanisms which is prejudicial to the to the Petitioner; That he is entitled to the reliefs sought. That he stands to suffer great prejudice and personal loss as a result of the violation of his rights under Article 25 and 28 of *the Constitution*; That, he has not been able to secure employment due to the adverse media release by the Kenya Revenue Authority; That he retains a legitimate expectation that state organs such as the Respondents exercise their powers impartially and free from undue influence from third parties and further, that this court is enjoined to protect his rights in the Bill of rights.
11. In his further affidavit dated 12th January 2023, the Petitioner reiterates the above grounds and contends that the taxpayer, Konrad Science Limited, understated their tax obligation but no charge has been preferred against them which is contrary to the law; that the signatures appended to the Kenya Revenue Authority worksheet were not his and it is unfathomable that he could forge his own signature. He also contends that the investigations were mired with bias, were partisan and contrary to laid out procedures and the same have caused him loss of earnings and deterioration of quality of life.



Response by the 1st and 2nd Respondents

12. On their part the Respondents contend that the 1st Respondent undertook the investigations on various acts and omissions by the Petitioner constituting criminal offences under the [Tax Procedures Act](#) and the [Anti-Corruption and Economic Crimes Act](#); that the 1st Respondent subsequently submitted the inquiry file to the 2nd Respondent who upon being satisfied that the evidence met the threshold sufficient to sustain charges preferred the charges against the Petitioner.

They aver that the two counts were preferred after an independent review of the evidence filed which led to the following findings:

The Taxpayer in question Konrad Science Limited was registered for Income Tax, VAT and PAYE obligation; The said taxpayer understated their production and turnover leading to tax losses and the principal taxes payable by the company as captured in the charge sheet which is composed of Corporate tax, Excise Tax and VAT; The said taxpayer was made aware of the findings through the demands by KRA and granted an opportunity to raise their objections once the assessments were raised, this was never done and the taxpayer had an outstanding tax liability of Kshs. 20,342/=; That the directors of the said company namely Fredrick Mwanza Makau of KRA PIN No. A003697947P and Irene Nthenya Mutindi of KRA No. A003794759N had outstanding tax liabilities of Kshs. 9,750.99 and 117,797.00 respectively; That despite the outstanding tax liabilities the Petitioner/ Applicant proceeded and approved and issued a Tax Compliance Certificate Serial Number KRASON2837992018 to Konrad Science Limited; and That in order to approve and issue the compliance certificate, the Applicant received a bribe of Kshs. 7,000/-

13. They also contend that the Petitioner seeks to curtail the constitutional mandate of the Respondents by attempting to circumvent the criminal justice system without justifiable reason; that the Petitioner has not demonstrated how the 2nd Respondent has acted ultra vires; that the Petitioner sat for his exams on 1st October 2018 between 1400hrs and 1600hrs which was after the commission of the offence which occurred at 1104 hours before the alleged exam and that the Petitioner had not been released by the Kenya Revenue Authority as at that date, and the Petitioner's name was on the daily attendance sheet confirming that he was working. Further that the Petitioner's allegations that he was out of office was false as the tasks would not have been assigned to him had he been away; that he did not give proof of his leave days and the evidence disclosed criminal culpability of the Petitioner. That the 2nd Respondent is an independent office that exercises its functions free from influence of any entity or person as provided in Article 157 of [the Constitution](#) and Section 6 of the [Office of the Director of Public Prosecutions Act](#). Lastly, that the Petitioner has not particularized the alleged breaches or threats to his constitutional rights; that this court should exercise extreme caution so as not to interfere with the constitutional powers of the 2nd Respondent to institute and undertake criminal proceedings except where it is proven that the same was in bad faith and amounts to an abuse of the court process.

Submissions by the parties

14. Counsel for the parties consented to canvass the petition by way of written submissions but the Petitioner did not file submissions.
15. The Respondent's submissions are dated 14th April 2023.



16. The Respondent framed the following four issues for determination thus:
- a. Whether this Honorable Court ought to issue prohibitory orders restraining the continuation of Milimani Chief Magistrate Anti-Corruption Case No. E056/2020.
 - b. Whether the proceedings in Milimani Chief Magistrates Anti-Corruption Case No. E056/2020 are unfounded, malicious, oppressive otherwise unconstitutional.
 - c. Whether this court should quash the proceedings in Milimani Chief Magistrate Anti-Corruption Case No. E056/2020 and order the refund of the cash bail deposited by the Petitioner.
 - d. Cost of the Petition.

17. The Respondents submit that the Petitioner has been charged before a court of law and subjected to a fair public hearing, and continues to be presumed innocent until the contrary is proved. He has been informed of all the charges with sufficient details to answer them in accordance with the law on drafting of charges; that the Petitioner has been informed in advance of the evidence the prosecution intends to rely upon and has been provided with full disclosure thereof and has a chance to challenge the said evidence and to cross examine all witnesses and to participate in the trial fully. That therefore, the Petitioner has been accorded all the rights to a fair trial as enshrined in *the Constitution* and this Petition is an abuse of the court process and ought to be dismissed; that *the Constitution* does not envisage that these rights would be enjoyed to the detriment of the citizens of Kenya.

They contend that they have no doubt that that trial court has the mechanisms to safeguard the rights of the Applicant as provided in Article 50 of *the Constitution* and that the court is well placed to determine the charges against the Petitioner on merit. They submit further that in his decision to prefer the charges against the Petitioner, the 2nd Respondent took into consideration the evidence in totality, the public interest, and the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Learned Counsel for the Respondents relied on the case of Ezekiel Waruinge v Director of Public Prosecutions & 2 Others [2017] where the court held that the objective of the criminal prosecution is to present available credible evidence in a fair and public hearing in an impartial court of competent jurisdiction as prosecution should not be calculated for a conviction and the Petitioner would have an opportunity to ventilate the same as his rights are protected under Article 50 of *the Constitution*.

18. They submit further that the 1st Respondent has the constitutional mandate to carry out investigations; that the violations by the Petitioner, to wit illegal arrest and detention are unsubstantiated; that the 1st Respondent procured the requisite search warrants to search the Kenya Revenue Authority offices as provided in the law contrary to the submissions of the Petitioner. Further that the 1st Respondent arrested and detained the Petitioner as stipulated in law; that once the Respondents have demonstrated that they have plausible grounds to justify arrest, indictment and prosecution of the Petitioner there are Constitutional guarantees under Article 50 of *the Constitution* which safeguards his rights and he is still presumed innocent. In regard to investigations, Learned Counsel submitted that *the Constitution* and the *National Police Service Act* give the Police the mandate to undertake investigations. Counsel cited



the case of Republic vs. Commissioner of Police and Another ex-parte Michael Monari & Another [2012] eKLR, where the court stated: -

“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 decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

19. Counsel submitted that the 1st Respondent herein undertook investigations in respect to various acts and omissions constituting criminal offences under the [Tax Procedures Act](#) and the [Anti-corruption and Economic Crimes Act](#) No. 3 of 2003 and forwarded the inquiry file to the 2nd Respondent that the Office of the Director of Public Prosecutions is an independent office and enjoys the status of all independent commissions and offices under Chapter 15 of [the Constitution](#) of Kenya 2010; that the 2nd Respondent was guided by its Decision to Charge Policy taking into account the key evidence, two-stage test and threshold test which was followed to the letter; That at all times, the question the Director of Public Prosecutions (DPP) or its agents is faced with is whether or not to prosecute, which however must be decided judiciously in all cases. Counsel placed reliance on the case of Douglas Maina Mwangi vs. KRA & Another, Constitutional Petition No. 528 of 2013, where the court addressed the issue as follows:

“When dealing with the decision as to whether or not to prosecute, the Office of the DPP exercises independent judgement as envisaged under Article 157(1) of [the Constitution](#) and Section 5 the DPP Act 2013, and the court cannot interfere unless it is shown that the exercise is contrary to [the Constitution](#), is bad in faith and amounts to an abuse of the process.

20. Counsel asserted that the best forum to ventilate the alternative set of facts raised by the Petitioner is the trial Court which has the sufficient tools within the law to look into the evidence, its admissibility, veracity, trustworthiness and or the weight to attach to the evidence to be adduced by the Respondents to prove their case. For this Counsel placed reliance on the case of Meirner & Another v The Attorney General [2005] 1 KLR 189, where the Court held that “It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the [judicial review] court was to usurp the function of a trial court.”
21. Counsel contended that the mere fact there is no sufficient evidence to sustain a conviction is no ground for halting or terminating a criminal case; that the trial Court is usually in a better position to scrutinize the evidence presented before it in determining whether such evidence proves the accused’s guilt beyond reasonable doubt. For their Counsel cited the case of Republic Vs. Director of Public Prosecutions & 2 Others Ex-Parte Stephen Mwangi Macharia.
22. On whether the court should quash the proceedings in Milimani ACC E056 of 2022, Counsel submitted that the court ought to exercise its discretionary jurisdiction in order to ensure good judicial administration, that the public interest is upheld and that the criminal justice system is not abused or brought to disrepute. Counsel stated that order staying criminal proceedings ought to be issued sparingly and in exceptional circumstances and that the discretion of this court should not avail the Petitioner. Counsel also relied on the case of Tom Onyango & 5 Others v Independent Police Oversight Authority & 4 Others [2015] eKLR and the case of Republic V Director Public Prosecutions & Another Exparte Justus Ongera [2019] eKLR



23. On the issue of exhaustion of internal disciplinary mechanisms, Counsel stated that the decision to institute charges lies with the 2nd Respondent; that upon review of the inquiry file, the 2nd Respondent was satisfied that the evidence was sufficient to sustain the charges facing the Petitioner and that the only Alternative Dispute Resolution Mechanism recognized in the Criminal Law is spelt out in Section 137(A-O) of the Criminal Procedure Code, and the Petitioner has not sought to utilize the same.

PARA 24.

Issues for determination

- a. Whether the criminal proceedings against the Petitioner in Milimani Chief Magistrates Anti-Corruption Case No. E056/2020 are a violation of the Petitioner's constitutional rights
- b. Whether the Petitioner is entitled to the reliefs sought

Analysis and determination

Whether the criminal proceedings against the Petitioner in Milimani Chief Magistrates Anti-Corruption Case No. E056/2020 are in breach of the Petitioner's constitutional rights

25. The Petitioner invokes this court's jurisdiction under Article 23(1) of *the Constitution*, which bestows upon the court the authority to uphold and enforce the Bill of Rights as follows:

“23 (1). The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

26. The Petitioner's case is that the investigations, his arrest and detention by the 1st Respondent and the subsequent decision of the 2nd Respondent to charge him were unlawful and in breach of his constitutional rights.

27. It is trite that in a petition such as this one the Petitioner must set out with some degree of particularity the right allegedly infringed and how the right has been infringed. This requirement has been codified in Rule 10(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the “Rules”) which provides strict details on the form and contents of a constitutional Petition. In the case of *Amos Kiumo & 19 Others vs The Cabinet Secretary Ministry Of Interim And Coordination of National Government* Petition No. 16 OF 2013 Lesiit, Makau and Bwononga JJ citing with approval the case of *Anarita Karimi Njeru V AG (No.1) 1979 KLR 154* stated :-

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

28. It is the Petitioner's case that the Respondents herein treated him unfairly for charging him although he was not at the work place when it is alleged he committed the offence; that moreover there was an internal mechanism at the Kenya Revenue Authority (KRA) for dealing with the issue that gave rise to his prosecution and that mechanism ought to have been followed



and that as a result of the adverse media publicity he can no longer get employment anywhere. He cites the above as the manner of violation of his rights enshrined in the articles of *the Constitution* cited. I am satisfied therefore that his pleadings meet the test in the Anarita Karimi Njeru case.

29. It is now settled that while the Office of the Director of Public Prosecutions (the 2nd Respondent herein) is an independent office this court can impeach his decision to charge in certain circumstances. This should however be done sparingly and only in cases where it is manifest that the 2nd Respondent has exercised his decision unreasonably and in clear violation of the rights and fundamental freedoms enshrined in *the constitution*. There is a long line of cases such as the case of Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR where it was held:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said 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. Also the case of Beatrice Ngonyo Kamau & 2 Others v Commissioner of Police and the Director of Criminal Investigations Department & Another Petition 251 of 2012 [2013] eKLR, where the court in determining the circumstances under which the DPP’s decision may be interfered with held:

“[22]. The DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial.”

31. The Petitioner alleges that the charges in ACC No. E056/2022 are unfounded, malicious and oppressive and that the Kenya Revenue Authority ought to have resolved the dispute internally under the Domestic Taxes Department Compliance Procedures by revoking the irregularly issued tax compliance certificate and taking remedial measures. The Petitioner relied on Article 159(2)(c) of *the Constitution* which encourages the use of alternative dispute resolution. However, this court finds that the mechanism referred to by the Petitioner was not one for alternative dispute resolution but one that gave the Kenya Revenue Authority power to put right the “breaches” of its employees. However, in my view if those “breaches” by the employees were committed in bad faith and if investigations revealed criminal culpability then the 2nd Respondent was entitled to step in so as to protect the public interest as the funds involved belong to the public. In this case the 1st Respondent has affirmed that after investigating the matter it came to the conclusion that a crime may have been committed. It therefore forwarded its findings to the 2nd Respondent who made a decision to charge the petitioner. It is my finding that the fact that the Kenya Revenue Authority had a mechanism for setting aside the impugned certificate of compliance was not a bar to the institution



of investigations and subsequent arraignment of the culprit for any offences that may have been committed. The decision to charge him was therefore not unreasonable or oppressive. Secondly, it is my finding that the charges preferred against the Petitioner constitute offences known to law. Thirdly, by stating that he was not at his place of work when it is alleged he committed the offence he is raising an alibi. The best tribunal to determine whether the alibi can hold is the trial court which is charged with the duty of determining contentious issues of fact but not this court.

32. In the case of Republic vs Attorney General & 4 others Ex-Parte Kenneth Kariuki Githi [2014] eKLR it was held that:

“The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision-making process. That an applicant 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 open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.”

33. Similarly in the case of Meirner & Another v The Attorney General [2005] 1 KLR 189, the court made a similar finding and held that:-

“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the [judicial review] court was to usurp the function of a trial court.”

34. The above findings were reiterated by the Supreme Court in the case of Praxidis Namoni Saisi and 7 others v Director of Public Prosecutions and 2 others (Petition No. 39 of 2019 Consolidated with Petition No. 40 of 2019) (unreported) where the court stated:-

(92) It is our considered opinion that these are not issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. In Hussein Khalid and 16 others v. Attorney General & 2 others, SC Petition No. 21 of 2017; [2019] eKLR this Court held that it was not for the High Court as a Constitutional Court to go through the merits and demerits of the case as that is the duty of the trial Court. Similarly, and as we have held hereinabove, it not for the judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.

(93) We are emphatic that the High Court, whether sitting as a constitutional court or a judicial review, may only interfere where it is shown that under Article 157(11) of *the Constitution*, criminal proceedings have been instituted for reasons other than enforcement of criminal law or otherwise abuse of the court process. We reproduce the



words of this Court in Hussein Khalid and 16 others v. Attorney General & 2 others [supra] as follows;

“[105] It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it will not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence (s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount.

(94) ■ From the circumstances of this case, we agree with the determination of the Court of Appeal that a distinction of the applicable procurement laws and whether the Appellants participated in the tender process hence liable to prosecution is a determination best arrived at upon consideration of viva voce evidence and through cross examination of witnesses. We therefore come to the conclusion that the Court of Appeal did not err in holding that the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in *the Constitution*.” (Emphasis mine)

35. With respect to the alleged delay of 1 year and 9 months in bringing the charges, the Petitioner has not demonstrated that as a result of the long delay in bringing the criminal charges his defence has been compromised or it would be impossible for him to effectively present a reasonable defence which he could have done had the charges been preferred earlier. In other words, he has not demonstrated that he has suffered any prejudice. As was held in the case of George Joshua Okungu & Another vs. The Chief Magistrate’s Anti-Corruption Court at Nairobi & Another [2014]eKLR, and I agree:

“78. It is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial.”

36. From the foregoing, it is my finding that the Petitioner has not proved any constitutional breaches that would warrant this court to halt the proceedings in ACC E056 of 2022. It is in the public interest that the ACC E056/2022 is heard to its logical conclusion and determined by the trial court. It cannot be gainsaid that the Petitioner will be afforded an opportunity to defend himself, to cross-examine witnesses and to adduce evidence in support of his case.

Issue b: Whether the Petitioner is entitled to the reliefs sought

37. Having come to the conclusion that the petitioner has failed to prove a violation of his rights, there is no basis for this court to grant the reliefs sought in the upshot is that the Petition dated 3rd November 2022 is dismissed with costs to the 1st and 2nd Respondents.



SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 15TH DAY OF JUNE 2023

E N MAINA

JUDGE

ACEC PETITION NO. 5 OF 2022 - JUDGMENT.	0
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