



Kaburu v Director of Criminal Investigations & 2 others; Megascope Health Care Limited & another (Interested Parties) (Constitutional Petition E252 of 2020) [2023] KEHC 22349 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E252 OF 2020**

**AC MRIMA, J
SEPTEMBER 21, 2023**

BETWEEN

MERCY NYAWIRA KABURU PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

CHIEF MAGISTRATES COURT KIBERA 3RD RESPONDENT

AND

MEGASCOPE HEALTH CARE LIMITED INTERESTED PARTY

RACHEL MUTHONI MWAURA INTERESTED PARTY

JUDGMENT

Background:

1. The events that precipitated the instant dispute can be traced to 23rd April 2020.
2. On the fateful day, Mercy Nyawira Kaburu, the Petitioner herein, who then was employed as an Accountant by Megascope Healthcare Limited, the Interested Party herein, went to a Bank to forward a list of cheques approved by Richard Ngatia, the Managing Director, for payments and to process a Banker’s cheque to Pharmacy and Poisons Board.
3. On her way, a colleague, one Morgan Kamau gave her Cheque No. 989 from Standard Chartered Bank with the request that she banks it at Cooperative Bank, Lavington Mall in the account of the Interested Party.



4. The Petitioner deposited the said cheque and returned the cheque deposit slip to Morgan Kamau.
5. On 12th May 2020, the Managing Director informed the Petitioner that the Bank had called him with the information that on the same date, Cheque No.994 that was deposited from Karen Hospital was fake.
6. On instructions the Managing Director, the Petitioner went to the Bank to ascertain the issue. Upon meeting the Operations Manager, it was confirmed to her that Cheque No. 994 was fake and not from The Karen Hospital.
7. Unbeknown to the Petitioner, the previous Cheque Nos. 989, 990, 991, 992 and 993 were unpaid for being fake.
8. It then became apparent that some fraudsters purporting to be The Karen Hospital had placed orders through fake LPOs which were processed through the reception, procurement, sales, accounts and stores department until goods were released to fraudsters on consideration of fake cheques.
9. On 21st May 2020 the Petitioner was summoned to appear before Nairobi Area Police Station where she recorded her statement regarding the fraud against the Interested Party.
10. Subsequently, the Petitioner was instructed to relieve herself of her duties as a result of the investigations. She resigned on 28th May 2020.
11. On 5th June 2020, the Petitioner was arrested by the Officers from The Directorate of Criminal Investigations, 1st Respondent herein, for alleged conspiracy with Rachel Muthoni Mwaura, Geoffrey Muhandale Anzeze, Wycliffe Mugwusi Ashema and Ian Adams Owino to defraud the Interested Party of Kshs. 4, 752,826/55.
12. On 8th June 2020, the Petitioner went to Nairobi Area Police Station and the Investigation Officer, James Kariuki informed him that they had no evidence linking her to the crime. He indicated that he would talk to the Interested party to withdraw that complaint against her and make her a witness instead.
13. Upon reporting to the Police station on 12th June 2020, she was informed that the foregoing proposal did not work out.
14. Accordingly, the Petitioner was arraigned in Court on 15th June 2020 to answer to charges in Kibera Chief Magistrates Court Criminal Case No. 535 of 2020 (hereinafter 'the Criminal Case'). The offences were; Conspiracy to commit a felony contrary to section 393 of the Penal Code, obtaining goods by false pretences contrary to section 313 of the Penal Code and making a document without authority contrary to section 357 of the Penal Code.
15. The foregoing sequence of events yielded the instant Petition.
16. The 1st and 2nd Respondents and the 1st Interested Party opposed the Petition. According to the record, the 2nd Interested Party, who was represented by Counsel, did not file any responses and submissions in the matter. The 3rd Respondent did not take part in the hearing.

The Petition:

17. Through the Petition dated 18th August 2020, supported by the Affidavit and Supplementary Affidavit of Mercy Nyawira Kaburu deposed to on 18th August 2020 and 21st June 2021 respectively, the Petitioner sought to vindicate violation of her constitutional rights.



18. It was the Petitioner's case that her arrest on 5th June 2020 and subsequently being arraigned in Court on 15th June 2020 violated her right under Article 49(f) of the Constitution that requires an arrested person to be arraigned in Court not later than twenty-four hours from the date of arrest.
19. The Petitioner averred that the failure by the 1st Respondent to forward the investigations it had conducted to the Director to Public Prosecutions, 2nd Respondent herein was contrary to the spirit of Article 157 of the Constitution.
20. It further was the Petitioner's case that the charge sheet dated 15th June 2020 was contrary to Article 157(6) of the Constitution since it was never signed and authorised by the 2nd Respondent before being arraigned in Court.
21. Based on the Investigation Officer's position that the evidence gathered did not justify her prosecution, the Petitioner pleaded that the decision to eventually prosecute her lacked credibility and good administrative value contrary to Articles 10 and 47 of the Constitution respectively.
22. Arising from the fact that the Petitioner was arrested on 5th June 2020 and could not be arraigned in Court until 15th June 2020, the Petitioner averred that the 2nd Respondent did not have any role in the determination of whether to charge her or not.
23. The Petitioner further averred that to date, she has not been furnished with details of which telephone number she used to make calls with (the communication traces) she used to conspire against the Interested Party, a violation of her right to fair hearing under Article 50.
24. The Petitioner pleaded that it only was in her line of duty as an accountant that she banked the Cheque and that had the 1st Respondent complied with the procedure set by law of forwarding the investigation file to the 2nd Respondent for purposes of preferring any charges, no crime or charge would have been preferred against her.
25. The Petitioner thus pleaded that the Criminal Case is an abuse of Court process as there is no evidence that she colluded and conspired with the criminals to defraud the Interested Party.
26. In reference to the 1st Respondent's Covering Report, the Petitioner posited that the documentary evidence recovered from Geoffrey Muhandale and Wycliff Mugwusi Ashema connected the Petitioner to the crime yet to date, none of the documentary evidence recovered from the two incriminate the Petitioner and no communication incriminating her have been tendered to her.
27. The Petitioner pleaded that despite her letter to the 1st Respondent requesting to be furnished with the call logs that linked her to the crime she had not been supplied with when in fact the record in Criminal Case indicated that she had been furnished with all the copies of witness statements and exhibits to be used during the hearing.
28. The Petitioner claimed that despite having requested on four different occasions for the communication traces linking her to the crime, no response was ever made.
29. In the supplementary Affidavit, the Petitioner deposed that her role as an Accountant did not involve releasing goods to various clients as it was an exclusive duty of the stores where medical supplies were kept.
30. She stated that the Respondent had not adduced any evidence showing that she authorized release of any goods. To that end, she referred to the statement written and signed by Norah Mwendu which showed that she (Norah Mwendu) was informed by Rachael Mwaura that there was a sales order which



was lodged in the system for delivery of goods in question. She deposed that the foregoing vindicated her.

31. The Petitioner reiterated the fault in the 1st and the 2nd Respondents failure to avail the allegedly incriminating communication traces (call logs) to her despite numerous requests.
32. The Petitioner averred that the 1st Respondent's conduct offended basic tenets of justice and good policy in matters involving right to fair hearing provided for in Article 50(2)(j) and access to information under Article 35(1)(a)(b) of *the Constitution*.
33. It was the Petitioner's case that if the criminal proceedings were allowed to proceed, her rights enumerated in the foregoing paragraphs would be violated.
34. The Petitioner posited that it is the duty of this Court under Section 193A of the Criminal Procedure Code to stop oppressive vexatious proceedings to ensure that Courts are not abused to use to perpetuate injustice or for improper motives.
35. In the end, the Petitioner urged the Court to uphold the sanctity and dignity of the Court process and prayed for the following reliefs;
 - a. A declaration that the charges in Kibera Chief Magistrates Court Criminal Case no. 486 of 2020, Republic-vs- George Nganga and 7 others against the Petitioner herein is an abuse of the criminal justice process and contravenes the Petitioners constitutional rights to fair hearing.
 - b. A declaration that the charges in Kibera Chief Magistrates Court Criminal Case no. 486 of 2020, Republic-vs- George Nganga and 7 others against the Petitioners have no legal or factual background.
 - c. A declaration that the institution, maintenance and prosecution of Kibera Chief Magistrates Court Criminal Case no. 486 of 2020, Republic-vs- George Nganga and 7 others against the Petitioner herein is oppressive, malicious and an abuse of the Court process.
 - d. An Order prohibiting continuance of Kibera Chief Magistrates Court Criminal Case no. 486 of 2020, Republic-vs- George Nganga and 7 others against the Petitioner herein.
 - e. A consequential Order to quash the proceedings in Kibera Chief Magistrates Court Criminal Case No. 486 of 2020, Republic-vs- George Nganga and 7 others against the Petitioner herein.
 - f. The Costs of the Petition.

The Submissions

36. The Petitioner filed written submissions dated 23rd October 2020.
37. In urging the Court to exercise its powers to stop proceeding in the Criminal Case, the Petitioner referred to the Court of Appeal in Joram Mwenda Guantai -vs- the Chief Magistrate Nairobi (2007) eKLR where it was observed: -

... It is trite that an Order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention the leas of the land. it lies not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.

38. The Petitioner submitted that the 1st Respondents findings that there was no evidence linking him with the crime were not rebutted and were enough to make the charge against her withdrawn.



39. In asserting violation of her right to be arraigned in Court within 24 hours of arrest, provided for under Article 49 of *the Constitution*, the Petitioner submitted that even though she was granted police bond on 5th June 2020 which was extended on various dates to 15th June 2020, it did not take away the application of Article 49 of *the Constitution*.
40. The Petitioner relied on Ann Njogu -vs- Republic (2007) eKLR where the Court observed as follows: -
- ... There is as yet no known cure for the nullity that results from attempted prosecution of any person, in this country, once it is shown that his/her constitutional or fundamental rights were violated prior to the purported institution of the criminal proceedings complained against. Nor there is any room for extension of the constitutionally provided period of 24 hours.
41. The Petitioner further highlighted unconstitutionality of the charge sheet by stating that it was signed by the Officer in Charge Nairobi Area Police Station and not The Director of Public Prosecutions.
42. As regards violation of her fair hearing rights provided for under Article 50 of *the Constitution*, the Petitioner submitted that there was a sustained effort by the 1st and 2nd Respondents in failing to avail alleged call logs that linked her to the crime.
43. The Petitioner relied on High Curt Civil Application No. 406 Of 2001, R -vs- Attorney General exp Kipng'eno arap Ngeny where it was observed: -
- ... A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper motive. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case.
44. In the end, the Petitioner urged that the Petition be allowed as prayed.

1st and 2nd Respondents' case:

45. The Director of Criminal Investigations and The Director of Public Prosecutions responded to the Petition through an undated Replying Affidavit of No. 64790 PC. James Kariuki.
46. He deposed that on diverse dates between 20th April 2020 and 7th May 2020, the Petitioner, in her course of duty caused the Interested Party to suffer losses by negligently generating seven invoices purported to be invoices addressed to The Karen Hospital against fake LPO's which led to release of goods from the stores.
47. It was further his case that on diverse dates between 20th April 2020 and 7th May 2020 the Petitioner caused the Interested Party to suffer losses by negligently and without due diligence receiving and further banking six fake cheques purported to be cheques drawn from The Karen Hospital an act that led to release of medical equipment worth Kshs. 4,752,826/-.
48. He deposed that the Petitioner had not been subjected to any psychological torture. It was his case that they were right in the decision to charge her as the whole exercise fell in her line of duty.
49. In denying violation of the Petitioner's right to fair hearing in respect to the failure to supply call logs, it was his deposition that the communicating logs would not be used as evidence in its current form and thus could not be supplied to the Petitioner.



50. It was his deposition further that it was the prerogative of the trial Court to determine the innocence of an accused and not otherwise.
51. In response to the claim of impropriety of charge sheet, PC. Kariuki deposed that it was signed by the Officer of the 2nd Respondent, one Mr. Geoffrey Obiri formerly head of Station at Kibera Law Courts and currently the Regional Head of the 2nd Respondent, Nyanza Region.
52. PC. Kariuki further denied there ever being any evidence that the Investigating Officer indicated that there was no evidence against the Petitioner. He deposed that the allegations were malicious aimed at injuring the character of the investigating officer.
53. In conclusion, he urged the Court to allow the criminal case to proceed to finality.
54. The Respondents did not file written submissions.

The Interested Party's case:

55. Megascop Healthcare Limited opposed the Petition through the Relying Affidavit of Richard Ngatia Waweru, the Managing Director, deposed to on 27th October 2020.
56. He deposed that the loss was a result of criminals masquerading as officials of the Karen Hospital in collusion with the Company's Staff.
57. He deposed that being aggrieved by the loss, the matter was reported to Kenya Police at Kilimani Police station where investigations were carried out.
58. He deposed that it is only after the investigations that the police arrested and charged various persons including the Petitioner herein for the offence of conspiracy to commit a felony contrary to section 393 of the Penal Code, obtaining goods by false pretences contrary to section 313 of the Penal Code and making a document without authority contrary to section 357 of the Penal Code.
59. It was his deposition that the Petitioner did not demonstrate any breach of process by the trial Court.
60. He deposed further that the Petition is an attempt to challenge the merits of the criminal case, a clear abuse of Court process.
61. It was his case that the issues raised in the Petition can competently be handled by the trial Court and if not satisfied, has the right to appeal to the High Court.
62. On the issue of termination of employment, the Mr. Ngatia deposed that the Employment and Labour Relations Court has the constitutional and statutory mandate to hear and determine it.

The Submissions:

63. The Interested Party further urged its case through written submissions dated 9th June 2022.
64. In denying violation of Article 49 of *the Constitution*, it submitted that the Petitioner was arrested on June 2020 and was released on cash bail on the same day, within the 24-hour period.
65. With respect to violation of fair trial rights guaranteed under Article 50(2)(b)(j) of *the Constitution*, the Interested party submitted that the claim is premature since the trial is yet to begin. It was its case that it is an issue that should be raised at before the trial Court during pre-trial.
66. The Interested Party submitted that the threshold for prohibition of the criminal case had not been achieved as was set out in Director of Public Prosecutions -vs- Martin Maina & 4 Others (2017) eKLR.



67. It was its case that allowing the prayers sought in the Petition will be akin to inviting this Honourable Court to assume and undertake the place of the trial Court.

68. Further to the foregoing, the Interested Party submitted that this Court has no jurisdiction to usurp the powers of the 2nd Respondent to investigate and or prosecute. The decision in Republic -vs- Director of Public Prosecutions and 2 others Ex-Parte Stephen Mwangi Macharia (2014) eKLR was partly referred to where the Court observed as follows: -

... The mere fact that there is no sufficient evidence to sustain a conviction is no ground for halting or termination a criminal case. The trial Court is usually in a better position to scrutinize the evidence presented before it in determining whether such evidence prove the accused guilty beyond reasonable doubt.

69. On the issue of impropriety of the charge sheet, the Interested party associated itself with the 1st and 2nd Respondents position and added that the failure by the DPP to sign the Charge sheet does not render it defective because it does not touch on the material conduct of the charge sheet or the elements as required by section 135 of the Criminal Procedure Code and neither did it lead to any miscarriage of justice.

70. While relying on the High Court in Amos Mbugua -vs- Republic (2017) eKLR, the Interested Party asserted that section 134 and 137 of the Criminal Procedure Code as appreciated alongside Article 157(6) of *the Constitution* do not require that the DPP must sign a charge sheet and it that does not cause any injustice to the Petitioner.

71. To drive the point further home, the Court of Appeal decision in Obedi Kilonzo Kevevo -vs- Republic (2015) eKLR was referred to where it was observed thus: -

.... It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.

Although the charge sheet was defective the evidence proved the charge under section 4A(1)(b) of the *Firearms Act*, 2015.

72. In conclusion, the Interested Party maintained the position that the Petitioner had failed to prove even on a prima facie basis that the Respondents acted in an unconstitutional manner to warrant the interference of this Court.

Analysis:

73. Having carefully perused the Petition, the responses, the parties' submissions, the written submissions and the decisions referred to, this Court finds that the main issue for determination in this matter is whether the decision to charge and to sustain the criminal case against the Petitioner contravened Article 157(11) of *the Constitution*.

74. In urging this Court to allow the Petition as prayed, the Petitioner fronted several grounds including that her right under Article 49(f) of *the Constitution* that requires an arrested person to be arraigned in Court not later than twenty-four hours from the date of arrest was violated, that the decision to charge her was not made by the 2nd Respondent since the charge sheet dated 15th June 2020 was not signed and authorised by the 2nd Respondent, there was no adequate evidence to support the charges and that the Respondents had failed to furnish her with details of which telephone number she allegedly used to make calls within the period the offences were committed.



75. The 1st and 2nd Respondents as well as the Interested Party strenuously opposed each of the grounds. They maintained that the Petition be dismissed and the criminal case be heard on its merit. The 3rd Respondent did not participate in the matter.
76. As a precursor, suffice to remind ourselves that *the Constitution* is a solemn and sacred instrument which inter alia guarantees people's rights and fundamental freedoms as well as appropriate legal redresses in protecting *the Constitution* itself and the said rights and fundamental freedoms.
77. Perhaps the sovereignty of the people, guaranteed under Article 1 of *the Constitution*, seals the unalienable right for a litigant to invoke this Court's jurisdiction as established under Article 165 of *the Constitution*. There is indeed a calling on this Court to uphold and defend *the Constitution* as structured in Article 3 of *the Constitution*. Ultimately, a breach of *the Constitution* or any of the human rights and fundamental freedoms in the Bill of Rights is shunned and condemned.
79. The resolution of the issue herein calls for a scrutiny of the legal regime giving the 2nd Respondent the mandate to prosecute those culpable of committing criminal offences and an interrogation as to whether the 2nd Respondent exercised those powers within the constitutional and legal limits.
80. This Court has previously and so broadly discussed the above issue in Nairobi High Court Constitutional Petition No. E033 of 2021 Maura Muigana vs. Stellan Consult Limited & 2 Others (unreported) and also in Nairobi High Court Constitutional Petition No. E216 of 2020 Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR.
81. In the said cases, this Court ventured into the constitutional and statutory functions and powers of the 1st and 2nd Respondents. The Court also looked into several decisions variously dealing with the instances where the powers of the 2nd Respondent could be legally curtailed in reference to Article 157(11) of *the Constitution*.
82. In January, 2023, the Supreme Court of Kenya in Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), in a precise manner, summed up the instances in which Article 157(11) of *the Constitution* would come into play to forestall a criminal prosecution. In particular, the Court dealt with how a constitutional Court or judicial review Court ought to handle the interrogation of facts and evidence in determining whether the interests of the administration of justice, the need to prevent and avoid abuse of the legal process and the larger public interest considerations are sustained.
83. In delineating the powers of the 2nd Respondent under Article 157 of *the Constitution*, the Apex Court had the following to say:
81. Article 157(6) of *the Constitution* empowers the DPP to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. Being one of the independent Constitutional offices established, article 157(10) of *the Constitution* safeguards this independence by decreeing that the DPP shall not require the consent of any person or authority before commencement of proceedings, neither shall he be under the direction or control of any person. That is not to say that this power is absolute. Article 157(11) requires the DPP in exercise of his duties to have regard for public interest, interests of administration of justice and to prevent or avoid abuse of the legal process.



82. Stemming from these provisions of the law, the courts have consistently held that whenever it seems that the DPP is utilizing criminal proceedings to abuse the court process, to settle scores or to put an accused person to great expense in a case which is clearly not otherwise prosecutable, then the court may intervene. These decisions include *Commissioner of Police & the Director of Criminal Investigation Department & another v. Kenya Commercial Bank Ltd & 4 others*, Civil Appeal No 56 of 2012 (2013) e KLR by the Court of Appeal. It also includes the case of *Cyrus Shakhhalanga Khwa Jirongo v Soy Developers Ltd & 9 others*, SC Petition No 38 of 2019; (2021) eKLR where this court held that although the DPP is not bound by any direction, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising and make appropriate orders. The court found the following guidelines read alongside article 157(11) of *the Constitution* to be a good gauge in the interrogation of alleged abuse of prosecutorial powers:
- i. Where institution/continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
 - ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings, eg. want of sanction;
 - iii. Where the allegations in the First Information Report or the complaint take at their face value and accepted in their entirety, do not constitute the offence alleged; or
 - iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.
83. We are also minded of this Court's decision in *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others*, SC Petition No 42 of 2019; (2021) eKLR where the court upheld the High Court's position to the effect that in matters involving exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised. Further that the only exception where a court can compel a public agency to implement a recommendation is where "there is gross abuse of discretion, manifest injustice or palpable excess of authority" equivalent to denial of a settled right which the petitioner is entitled, and there is no other plain, speedy and accurate remedy.
84.
89. 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.” [Emphasis added]

84. The Supreme Court further made a case for merit review of decisions. It stated in paragraph 75 as follows: -

75. In order for the Court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the Court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly “in the circumstances of the case”, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses.

85. The Court was, however, cautious in clarifying the extent of the merit-based review. It stated as under: -

75. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in Judicial Service Commission & another v Lucy Muthoni Njora, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of *the Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.

86. The Court further rendered itself as follows: -

88. 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.

87. Having laid down the parameters within which the discussion on whether the 2nd Respondent remained true to Article 157(11) of *the Constitution* ought to be manoeuvred, this Court will now apply the foregoing to this case.
88. This Court will begin with the contention that the Petitioner's right under Article 49(f) of *the Constitution* that requires an arrested person to be arraigned in Court not later than twenty-four hours from the date of arrest was violated.
89. It is on record that the Petitioner was arrested on 5th June 2020 and subsequently arraigned in Court on 15th June 2020. It is also the position that the Petitioner was released on police bond the same day she was arrested. The reason was that the police were still conducting investigations over the matter. She was then summoned to, and appeared before Court for plea-taking.
90. The Petitioner was, therefore, not arrested for a period more than 24 hours as alleged. That is because she was arrested and released on the same day. The police were indeed within their powers conferred under *the Constitution* and the Police Act to release her and require her to report to their offices as the investigations were ongoing.
91. To this Court, the right under Article 49(f) of *the Constitution* was, therefore, not infringed.
92. Next is the contention that the decision to charge the Petitioner was not made by the 2nd Respondent since the charge sheet dated 15th June 2020 was not signed and authorised by the 2nd Respondent.
93. There is an uncontroverted disposition by the Investigating Officer one PC Kariuki negating the averment. It was deposed that the 2nd Respondent reviewed the evidence and gave its consent to charge the Petitioner alongside the other accused in the criminal case. In fact, it was further deposed that the charge sheet was signed by an Officer of the 2nd Respondent, one Mr. Geoffrey Obiri formerly the Head of Prosecutions at Kibera Law Courts and currently serving as the Regional Head of Prosecutions in Nyanza Region.
94. But, even if it was true that the charge sheet was signed by the police instead of the 2nd Respondent, still the argument cannot, at the moment, hold since a decision of this Court in the High Court of Kenya at Milimani Constitutional Petition No. E495 of 2021 Geoffrey Kaaria Kinoti & 7 Others vs. The Chief Magistrates Court Milimani Law Courts & Others delivered on 23rd day of May, 2022 which decreed as such was stayed by the Court of Appeal pending the outcome of an appeal lodged against the decision. The contention, therefore, falls by the wayside.
95. There is also the issue as to whether there is adequate evidence to support the charges against the Petitioner. According to the Petitioner, no such evidence was gathered and that she was not incriminated by any of the witnesses. The Respondents, however, had a contrary position. They contended that there was sufficient evidence to link the Petitioner to the instant charges.
96. The Petitioner was charged with over ten counts. They include several counts of conspiracy to commit a felony, obtaining goods by false pretences and making a document without authority. It was alleged that the Petitioner, then the Interested Party's Accountant, generated false invoices which led to the loss of the Interested Party's goods and that she was as much implicated by witnesses.



97. As the facts are contested, and, there is no demonstration of abuse of powers or the Court process, then this Court is bound to follow the law as laid down by the Supreme Court in *Saisi & 7 others v Director of Public Prosecutions & 2 others* case (supra) that any consideration of review of the evidence should be limited to the examination of uncontroverted evidence and that the controverted evidence is best addressed by the person, body or authority in charge.
98. Since the evidence is hotly contested in this matter, this Court finds that the appropriate forum for examination of such evidence is before the trial Court.
99. The other issue raised by the Petitioner is that the Respondents had failed to furnish her with details of which telephone number she allegedly used to make calls within the period the offences were committed. Responding to the matter, the Respondents contended that they were not in possession of such evidence and that they did not intend to use any such evidence in their case.
100. With such a position, then the contention must fail. If the Petitioner still needs such evidence to aid her in her defence, then she remains at liberty to request for it from the service providers otherwise it will be inappropriate for a Court to compel a party to adduce evidence which is not in its possession and does not require such evidence to further its case.
101. Having considered the grounds as tendered by the Petitioner, this Court finds that the Petitioner's averments did not reach the threshold of proving that the 2nd Respondent and/or the Respondents charged the Petitioner in disregard to public interest, contrary to the interests of the administration of justice and the need to prevent and/or in abuse of the legal process.
102. There is, therefore, no evidence that Article 157(11) of *the Constitution*, as well as other Articles of *the Constitution* and any provisions of the law were infringed in this case.
103. The foregoing is buttressed by the words of the Supreme Court in the *Saisi & 7 others v Director of Public Prosecutions & 2 others* case (supra) thus: -
 94. This Court having already demonstrated that there was nothing untoward in relation to the charges levelled against the appellants; the allegations of malice and discrimination having not being properly canvassed/demonstrated by the appellant, it follows that the claim for constitutional rights violations equally falls by the wayside. It is our considered opinion that it would be pragmatic that the appellants let the trial commence and conclude, during which trial they may raise all the issues they have as against the law under which they are charged. If successful, it is only then that they will pursue their rights on appeal.

Disposition:

104. On costs, having taken into account the industry of the parties, the purpose and intent of the Petitioner and the issues canvassed in this matter, the fact that the issues raised by the Petitioner are issues that had to be seriously interrogated by this Court and the fact that the criminal case is still pending, this Court finds that the appropriate order on costs is that each party bears its own costs.
105. Flowing from the above discussion, the following final orders of this Court hereby issue: -
 - a. The Petition dated 18th August 2020 is hereby dismissed.
 - (b) Kibera Chief Magistrates Court Criminal Case No. 535 of 2020 to proceed and be heard on priority basis. The conservatory orders issued on 7th October, 2021 be and are hereby set-aside and/or discharged.



c. Each party to bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF SEPTEMBER, 2023

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Gikandi, Learned Counsel for the Petitioner.

N/A for the 1st and 2nd Respondents.

Mr. Njenga, Learned Counsel for the 1st Interested Party.

N/A for the 2nd Interested Party.

Regina/Chemutai – Court Assistants.

