



**Nurani v Director of Public Prosecutions & 5 others (Constitutional Petition E120 of 2022)  
[2023] KEHC 22348 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22348 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E120 OF 2022**

**AC MRIMA, J**

**SEPTEMBER 21, 2023**

**BETWEEN**

**ZAHIR AHMEDALI LAIJI NURANI ..... PETITIONER**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**RAHAT ROSHANALI SALIM YAKUB ..... 3<sup>RD</sup> RESPONDENT**

**ROSHANALI SALIM YAKUB ..... 4<sup>TH</sup> RESPONDENT**

**BADRUNNISA ROSHANALI SALIM YAKUB ..... 5<sup>TH</sup> RESPONDENT**

**RAEES UL-ZAMAN ROSHANALI YAKUB ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Background:**

1. The dispute, subject of this judgment was precipitated by proceedings in Kibera Chief Magistrates Court Criminal Case No. E110 of 2022, R -vs- Zahir Ahmedali Laiji Nurani (hereinafter ‘the criminal case’) instituted by Rahat Roshanali Salim Yakub, the 3<sup>rd</sup> Respondent herein, on the charge of assault.
2. Before institution of the criminal case, the Petitioner and the 3<sup>rd</sup> Respondent had been in marriage for a period of 15 years in accordance to Islamic and Civil Law.
3. Roshanali Salim Yakub, Badrunnisa Roshanali Salim Yakub and Raees Ul-Zaman Roshanali Yakub, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents are the 3<sup>rd</sup> Respondent’s father, mother and sibling respectively.



4. On 12<sup>th</sup> August 2021, the Petitioner informed the 3<sup>rd</sup> Respondent that their marriage was no longer tenable. Accordingly, he sought its dissolution in Mombasa Chief Magistrates Court Divorce Cause Number 139 of 2021, (hereinafter ‘the Divorce Cause’).
5. It is the Petitioner’s case that the 3<sup>rd</sup> Respondent was disgruntled by the Divorce Cause and on the allegation of having been assaulted by the Petitioner, she instituted the criminal case.
6. To that end, the 3<sup>rd</sup> Respondent lodged her complaint at the Directorate of Criminal Investigations, 2<sup>nd</sup> Respondent herein, whereupon the Petitioner was summoned to Gigiri Police Station on 1<sup>st</sup> September 2021 to record a statement.
7. At the Police Station, the Petitioner informed police officers that the complaint of assault was fictitious and false. He presented audio recordings and threats indicating that the 3<sup>rd</sup> Respondent was only using the criminal process to frustrate his attempt to leave the marriage.
8. On 14<sup>th</sup> January 2022, the Officer Commanding Station (Gigiri Police) Station informed the Petitioner that he should appear at the Kibera Magistrates Court on 20<sup>th</sup> January 2022 for plea taking since the Director of Criminal Investigations, 1<sup>st</sup> Respondent herein, had lodged a formal charge regarding the complaint.
9. Accordingly, the Petitioner appeared for plea taking and denied the charge.
10. It is the foregoing events that yielded the instant Petition.
11. The Petition was opposed by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents.
12. The Director of Public Prosecutions and the Directorate of Criminal Investigations did not participate in the Petition.

**The Petition:**

13. Through the Petition dated 23<sup>rd</sup> March 2022, supported by the Affidavit and Further Affidavit of Zahir Ahmedali Lalji Nurani, deposed 23<sup>rd</sup> March 2022 and 11<sup>th</sup> April 2022 respectively, the Petitioner sought to assert and protect his constitutional rights occasioned by the criminal case.
14. Contemporaneously filed with the Petition was the filing of an application by way of a Notice of Motion which sought interim reliefs pending hearing and determination of the Petition.
15. Prayer two of the reliefs sought in the application was granted thereby staying proceedings in the criminal case pending the hearing and determination of the instant Petition.
16. In the main, the Petitioner, in a bid to demonstrate that there was no assault, referred to the Police report which showed that there were no obvious bruising and that the 3<sup>rd</sup> Respondent was in general good condition at the time she appeared for assessment of the alleged harm or injuries.
17. It was his case that the criminal justice system was being used by the 3<sup>rd</sup> to 6<sup>th</sup> Respondents to settle scores after he instituted the Divorce Cause.
18. It was his case that on 12<sup>th</sup> August 2021, the 4<sup>th</sup> and 5<sup>th</sup> Respondent made false assertions that they found him kicking the 3<sup>rd</sup> Respondent in the abdomen at their residence in Nyari Estate in Nairobi when the truth of the matter is that she has never laid his hand on her.
19. He pleaded that on the material day, their domestic employees heard the 3<sup>rd</sup> to 6<sup>th</sup> Respondents plot to raise a false charge and complaint against him and witnessed all the day’s events.



20. He posited that he was confronted by the 3<sup>rd</sup> - 6<sup>th</sup> Respondent and to avoid further confrontation with the 6<sup>th</sup> Respondent, who had made it a habit to physically assault him, he walked out of the property for his own safety.
21. He pleaded that it is after the foregoing confrontation that officers of the 2<sup>nd</sup> Respondent accompanied the 3<sup>rd</sup> - 6<sup>th</sup> Respondents to Gigiri Police Station to record the fictitious complaint against him.
22. To corroborate fabrication of the charges, the Petitioner pleaded that the officers of the 2<sup>nd</sup> Respondent confided in him that they had been threatened with dismissal by the 3<sup>rd</sup> Respondent if they did their lawful duty.
23. The Petitioner further had Geoffrey Shabola, one of their domestic employees, record a statement at the police station as to what had transpired on the fateful day. It was his case that the 3<sup>rd</sup> Respondent terminated her employment as a result.
24. To further lend credence to the fictitious charges, the Petitioner referred to audio recordings that documented the events of 12<sup>th</sup> August 2021 which contained threats to send him to jail for attempting to leave the marriage and to cause him physical harm.
25. The Petitioner pleaded that he subsequently made a complaint to Nyari Police Station under OB. No. 02/13/08/2021) and presented evidence regarding the threats of the 3<sup>rd</sup> Respondent and how she had indicated that she and her family would visit harm upon him and his family, which was not acted upon.
26. On the foregoing, the Petitioner claimed that his constitutional rights under Article 27 entitling him to full and equal benefit and enjoyment of all rights and freedoms had been violated.
27. The Petitioner further pleaded as a result of the criminal charges his freedom and security of the person guaranteed under Article 29 of *the Constitution* had been violated.
28. He stated that owing to the frivolous criminal case, the threats to physical harm and death, the disparagement of his choice of religion, he had suffered extreme mental anxiety and discomfort contrary to Article 29(c) of *the Constitution*.
29. It was further the Petitioner's case that upon institution of the Divorce Cause, he and his family had suffered hostile attacks and ridicule on his religion from the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents contrary to Article 32 of *the Constitution* that assures every person to freedom of conscience, religion belief and opinion.
30. The Petitioner further posited that his right to property had been violated as a result of the Divorce Cause by being denied access to his personal belongings including personal files, debit cards for his personal account, cartons containing personal files of financial data and projects and his car.
31. The Petitioner further pleaded that the 1<sup>st</sup> Respondent's failure to consider exculpatory evidence that exonerates him violated his right to due process under Article 50 of *the Constitution*.
32. It was his case that the criminal case is an abuse of legal process and is not in the interest of the administration of justice meant to frustrate his attempt to leave a marriage that has irretrievably broken down.
33. In sum the Petitioner pleaded that the decision of the 1<sup>st</sup> Respondent to charge him was an abuse of its mandate enshrined in Article 157(11) of *the Constitution* and sought the following reliefs:
  - a. A declaration that the prosecution of Zahir Nurani Ahmedali Lalji in MCCR E110 of 2022 is unconstitutional, unlawful, irregular, and unfair.



- b. A declaration that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents culminating in the prosecution of Zahir Nurani Ahmedali Lalji in MCCR E110 of 2022 amount to misfeasance in public office, and abuse of the legal process under Article 157 of *the Constitution*.
- c. An order of certiorari hereby issues calling, removing, delivering up to this Honourable Court and quashing, or revoking the decisions to charge and prosecute Zahir Nurani Ahmedali Lalji in MCCR E110 of 2022.
- d. An order of prohibition hereby issues prohibiting the Office of the Director of Public Prosecutions, Directorate of Criminal Investigations, and the Chief Magistrates Court Kibera from prosecuting, trying, hearing, or taking any further proceedings whatsoever in MCCR E110 of 2022.
- e. A declaration that the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents' actions have violated the Petitioner's rights under Article 27, 29, 32, and 40 of *the Constitution*.
- f. An order of compensation in favour of the Petitioner and against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents.
- g. An order of return of all property belonging to the Petitioner unlawfully held/deprived by the 3<sup>rd</sup>– 6<sup>th</sup> Respondents.
- h. Costs of the Petition.
- i. Any other relief the Court may deem fit.

**The submissions:**

34. The Petitioner filed written submissions dated 11<sup>th</sup> April 2022.
35. It was his case that on a balance of probabilities, he had satisfied the standard of proof for abuse of legal process under Article 157 of *the Constitution*.
36. The Petitioner relied on the English decision in *Grainger v. Hill*, 1838, 4 Bing. N.C. 212, 132 Eng. Rep. 769 where abuse of legal process was summarised as follows;
 

...this is an action for abusing the process of the law, by applying it to extort property from the Plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved. [Plaintiff's] complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause.
37. While relying on the decision in Civil Application No. 406 of 2001 R vs. Attorney General ex parte Kipng'eno arap Ngeny, the Petitioner submitted that his personal liberty and security is not to be tested on flimsy grounds.
38. The Petitioner submitted that for a successful claim in abuse of legal process, it is not necessary to argue or prove that reasonable and probable cause is lacking, or that malice is present. To that end,



reliance was placed on Sarvold v. Dodson 237 N.W.2d 447 (1976) Supreme Court of Iowa) where it was observed: -

.... it is immaterial that the process was properly issued, that it was obtained in the course of proceedings which were brought with probable cause and for a proper purpose or even that the proceedings terminated in favour of the person instituting or initiating them.

39. Based on the foregoing, Petitioner submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were guilty of misfeasance in public office for seeing in motion a criminal process which they knew or ought to have known by investigation was meant to oppress him.
40. As regards violation of the right to property, Petitioner submitted that the 3<sup>rd</sup> to 6<sup>th</sup> Respondents had not controverted his case.
41. In urging the Court to abide by the dictates of fair trial under Article 50 of *the Constitution*, the Petitioner submitted that it was proper to terminate the criminal proceedings.

### **The 3<sup>rd</sup> Respondent's case:**

42. Rahat Roshanali Salim Yakub challenged the Petition through her Replying Affidavit deposed to on 7<sup>th</sup> April 2022.
43. It was her deposition that the Petition was a red herring instituted in bad faith for purposes of protracting the hearing of the criminal case and or intimidating her into dropping the charges.
44. It was her deposition that the Petitioner waited for 6 months to complain about the charges and 2 months to institute the Petition herein, an unreasonable period in a bid to avoid the due process.
45. She deposed further that the Petition was instigated by her refusal to accept Kshs. 100,000/- monthly maintenance of children and the request to drop the criminal charges.
46. She deposed that the Petitioner caused her injury through a fist blow to her belly which could not be visible.
47. To that end he referred Part B of the Medical Examination Report (P3 form) which assessed her injuries to be 'harm'.
48. The 3<sup>rd</sup> Respondent deposed that the Petitioner's rights were not going to be infringed when the complaint in the criminal case was going to be resolved by application of the law.
49. The 3<sup>rd</sup> Respondent further asserted that the Petition was not pleaded with particularity regarding constitutional violations infringed.
50. The 3<sup>rd</sup> Respondent denied violation of the right to fair trial by deposing that the 2<sup>nd</sup> Respondent had relied on verifiable documentary medical evidence which could not be challenged or undermined during trial.
51. It was her case that the charges were only preferred after the 1<sup>st</sup> Respondent reviewed reports, witness statements and invoked its mandate under Article 157 of *the Constitution*.
52. In urging the Court to dismiss the Petition with costs, she deposed that she was a victim of domestic violence and wanted justice to take its course.



### **The 6<sup>th</sup> Respondent's case:**

53. Raees Ul-zaman Roshanali Yakub, the 3<sup>rd</sup> Respondent opposed the Petition through his Replying Affidavit deposed to on 7<sup>th</sup> April 2022.
54. It was his case that the Petition was misconceived and in bad faith, as it fails to meet the particularity test and discloses no cause of action against him for the alleged infringements.
55. It was his position that the Petition was hinged on private family issues and does not meet the threshold of a constitutional Petition.
56. He deposed that on the day of assault he was away from Nairobi for his pilot duties and was not in any way involved in the matter and not a witness in the criminal case.
57. It was his case that the Petitioner filed the Petition to scuttle the criminal case.
58. He urged the Court to find that he was a misjoinder in the Petition and prayed the Petition be dismissed with costs.

### **The 3<sup>rd</sup> and 6<sup>th</sup> Respondents' submissions:**

59. In their joint submissions dated 4<sup>th</sup> May 2022, the 3<sup>rd</sup> and 6<sup>th</sup> Respondents in relying on Kiambu County Tenants Welfare Association -vs- The Attorney General & Anther (2017) eKLR, submitted that the Petitioner had not attained the threshold for grant of reliefs in Constitutional petitions.
60. It was their case that the Petitioner could not sustain an action for breach of fundamental rights against the 3<sup>rd</sup> and 6<sup>th</sup> Respondents as private individuals.
61. The Respondents drew support from Godfrey Paul Okutoyi & Others -vs- Habil Olaka & Another (2018) eKLR where it was observed: -

... It is time it became clear to both litigants and counsel that rights conferred by the statute are not fundamental rights under the Bill of Rights and therefore, a breach of such rights being breach of an ordinary statute are not redresses through a court of law in a manner allowed by the statute or in an ordinary suit.

62. It was their case that the Petitioner's assertions of attacks on religion, threats of harm and death are vague and need investigations to ascertain veracity.
63. Further to the foregoing, the 3<sup>rd</sup> and 6<sup>th</sup> Respondent opposed any misfeasance on the part of 1<sup>st</sup> and 2<sup>nd</sup> Respondent by submitting that according to Article 157 of *the Constitution*, they operate independent of the direction of any person.
64. They urged the Court not to interfere with proceedings in the criminal case and to that end, relied on R -vs- Director of Public Prosecutions & 2 Others; Evans Muriuki Kariuki (Interested Party\_ Ex-Parte James M. Kahumbura where it was observed: -

... these powers should be exercised sparingly and should not carry any effect of frustrating the judicial process.

65. In the end it was urged that the Petition be dismissed with costs.



### **The 4<sup>th</sup> and 5<sup>th</sup> Respondents' case:**

66. Roshanali Salim Yakub and Badrunnissa Roshanali Salim Yakub opposed the Petition through their joint Replying affidavit deposed on 7<sup>th</sup> April 2022.
67. It was their deposition that they went to the rescue of the 3<sup>rd</sup> Respondent on 12<sup>th</sup> August, 2022.
68. It was their case, therefore, that the Petition was an afterthought deliberately instituted to curtail completion of their daughter's criminal case.
69. It was their deposition further that the Petitioner sought to harass them as potential witnesses in the criminal case which amounts to witness interference and obstruction of justice.
70. The 4<sup>th</sup> and 5<sup>th</sup> Respondents claimed that they had been dragged into the Petition needlessly whereas the criminal case was based on factual foundation upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's review of Medical and Witness account of the complaints.
71. It was urged that the right place to challenge the 3<sup>rd</sup> Respondents' criminal case was at the trial Court where the Petitioner would have an opportunity to cross-examine the Doctors who treated her.
72. The 4<sup>th</sup> and 5<sup>th</sup> Respondents did not file written submissions.

### **Analysis:**

73. The discussion which follows is aimed at determining whether the Petition is merited. In undertaking that journey, I will consider two main issues. They are a general discourse on the investigative and prosecutorial powers in criminal proceedings and whether the Petition is merited.
74. The Court will consider the issues in seriatim.

### **a.A general discourse on the investigative and prosecutorial powers in criminal proceedings:**

75. The resolution of this Petition calls for a scrutiny of the legal regime giving the Director of Public Prosecutions (the Prosecutor) and the police the mandate to investigate offences and to prosecute those culpable and whether they exercised those powers within the constitutional and legal limits.
76. This Court has lately broadly discussed this issue in Nairobi High Court Constitutional Petition No. E033 of 2021 Maura Muigana vs. Stellan Consult Limited & 2 Others (2021) eKLR 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.
77. As part of the introduction of the subject in Maura Muigana vs. Stellan Consult Limited & 2 Others case (supra), the Court acknowledged the many writings by legal scholars and decisions by Courts and appreciated that whereas it would have been desirable to come up with all the marvellous work on the issue in a 'one-stop shop', that was a tall order given the time constraints and the need for expeditious disposal of cases. The Court, however, rendered a concise discussion on the subject.
78. The Court then traced the legal basis of the exercise of prosecutorial powers in Kenya to *the Constitution* and the law. Article 157 of *the Constitution* establishes the Office of the Director of Public Prosecutions as under: -
  1. There is established the office of Director of Public Prosecutions.
  2. The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.



3. The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.
  4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
  5. The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.
  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, with the permission of the 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.
  12. Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.
79. There is, as well, the Office of Director of Public Prosecutions Act No. 2 of 2013 (hereinafter referred to as 'the ODPP Act'). It is an Act of Parliament aimed at giving effect to Articles 157 and 158 of *the Constitution* and other relevant Articles of *the Constitution* and for connected purposes. The ODPP Act provides in Section 4 the guiding principles in prosecution of cases as follows:
- (4) In fulfilling its mandate, the Office shall be guided by *the Constitution* and the following fundamental principles—
    - (a) the diversity of the people of Kenya;
    - (b) impartiality and gender equity;
    - (c) the rules of natural justice;



- (d) promotion of public confidence in the integrity of the Office;
- (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
- (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
- (g) protection of the sovereignty of the people;
- (h) secure the observance of democratic values and principles; and
- (i) promotion of constitutionalism.

80. The ODPP Act, among other statutes, variously provide for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers by the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed.
81. Article 239 of *the Constitution* provides for the national security organs. They include the National Police Service. The primary object of the national security organs and security system is to promote and guarantee national security in accordance with the principles mentioned in Article 238(2).
82. Article 243 of *the Constitution* establishes the National Police Service. Under Article 244, *the Constitution* provides the objects and functions of the National Police Service as follows: -
- (a) strive for the highest standards of professionalism and discipline among its members;
  - (b) prevent corruption and promote and practice transparency and accountability;
  - (c) comply with constitutional standards of human rights and fundamental freedoms;
  - (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
  - (e) foster and promote relationships with the broader society.
83. The National Police Service is under the command of the Inspector-General of Police. The manner in which the Inspector-General of Police is to carry out its mandate is provided for under Article 245(2) (b) and (4) of *the Constitution* as follows: -
1. The Inspector General –
    - a. ....
    - b. shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
  4. The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector General with respect to—
    - (a) the investigation of any particular offence or offences;
    - (b) the enforcement of the law against any particular person or persons; or
    - (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.



5. Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.
84. Article 157(4) of *the Constitution* provides that: -
- The Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
85. The independence of the Inspector-General of Police is constitutionally-insulated from any form of interference or directional command. Apart from the Director of Public Prosecutions and only to the extent so provided, no other person, body or entity has the power to give any form of directives to the 2<sup>nd</sup> Respondent on how to discharge its functions. The position is further ring-fenced in that even the power donated to the Cabinet Secretary under Article 254(4) of *the Constitution* to issue any directives to the Inspector-General of Police is only limited to policy issues.
86. Pursuant to the provisions of Article 239(6) of *the Constitution*, The *National Police Service Act*, No. 11A of 2011 (hereinafter referred to as ‘the Police Act’) was enacted on 30<sup>th</sup> August, 2011. It is an Act of Parliament to give effect to Articles 243, 244 and 245 of *the Constitution*; to provide for the operations of the National Police Service; and for connected purposes.
87. Sections 24, 27 and 35 of the Police Act variously provide for the functions of the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations respectively as follows: -
24. The Functions of the Kenya Police Service
- The functions of the Kenya Police Service shall be the—
- a. provision of assistance to the public when in need;
  - b. maintenance of law and order;
  - c. preservation of peace;
  - d. protection of life and property;
  - e. investigation of crimes;
  - f. collection of criminal intelligence;
  - g. prevention and detection of crime;
  - h. apprehension of offenders;
  - i. enforcement of all laws and regulations with which it is charged; and
  - j. performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.
27. The Functions of the Administration Police Service
- The functions of the Administration Police Service shall be the—
- (a) provision of assistance to the public when in need;



- (b) maintenance of law and order;
- (c) preservation of peace;
- (d) protection of life and property;
- (e) provision of border patrol and border security;
- (f) provision of specialized stock theft prevention services;
- (g) protection of Government property, vital installations and strategic points as may be directed by the Inspector-General;
- (h) rendering of support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties;
- (i) co-ordinating with complementing Government agencies in conflict management and peace building;
- (j) apprehension of offenders;
- (k) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

35. Functions of the Directorate

The Directorate shall —

- a. collect and provide criminal intelligence;
- b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;
- c. maintain law and order;
- d. detect and prevent crime;
- e. apprehend offenders;
- f. maintain criminal records;
- g. conduct forensic analysis;
- h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*;
- i. co-ordinate country Interpol Affairs;
- j. investigate any matter that may be referred to it by the Independent
- k. Police Oversight Authority; and perform any other function conferred on it by any other written law.

88. Having set out the constitutional and statutory parameters within which the Prosecutor and the police must exercise their powers, this Court will now look at some decisions which dealt with the various aspects of the scope and exercise of the said powers.



89. The Supreme Court in Petition No. 38 of 2019 *Cyrus Shakhhalanga Khwa Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR discussed some of the applicable parameters.
90. On whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the Director of Public Prosecutions contrary to *the Constitution*, the Supreme Court stated as follows: -
- (79) The High Court in its finding, prohibited the Respondents from proceeding with any criminal proceedings against the Appellant in relation to the suit property or any subject matter and transaction connected to the suit property. The Court of Appeal reversed this judgment by holding that the High Court had interfered with the discretion given to the Director of Public Prosecutions (DPP) to initiate and conduct prosecution. Essentially, the Court of Appeal found that the High Court went against public interest in preventing investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property and that the learned Judge interfered with the prosecutorial mandate of the DPP to decide on whether to charge or not to charge an individual.
- [80] The 5th, 6th and 7th Respondents on their part, maintain the position that the decision to commence investigations against the Appellant was consistent with the provisions of Article 157 of *the Constitution* and Section 6 of the Office of Director of Public Prosecutions Act. They also submitted that the decision to institute criminal proceedings by the DPP is discretionary and that such exercise of power is not subject to the direction or control by any authority as provided for under Article 157(10) of *the Constitution*.
- (81) Under Article 157(6) of *the Constitution*, the DPP is mandated to institute and undertake criminal proceedings against any person before any Court. Article 157(6) provides as follows:
- (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.”
- Article 157(4) provides that:
- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
- However, Article 157(11) stipulates that:
- (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.
- (82) Although the DPP is thus not bound by any directions, 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 therefrom and make appropriate orders.



- (83) In that regard, the Court of Appeal in the case of Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 Others [2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power and held that: -

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v. R.* [2002] 1EA 205. See also *Kuria & 3 Others V. Attorney General* [2002] 2KLR. (emphasis supplied)

- (84) Furthermore, the Supreme Court of India in *R.P. Kapur v State of Punjab* AIR 1960 SC 866 laid down guidelines to be considered by the Court on when the High Court may review prosecutorial powers. They are as follows:

- (I) Where institution/continuance of criminal proceedings against an accused 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; or
- (II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or
- (III) Where the allegations in the First Information Report or the complaint taken 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.



- (85) We are persuaded that this is a good guide in the interrogation of alleged abuse of prosecutorial powers and read alongside Article 157(11) of *the Constitution*, we have sufficiently expressed ourselves elsewhere in this Judgment to show that the unconstitutional continuance of the criminal proceedings against the Appellant amounts to abuse of Court process and that, balancing the scales of justice, the weight would favor the Appellant and not the Respondents.
91. On public interest, the Supreme Court expressed itself as follows:
- (86) On public interest, what is in issue is a dispute arising from a commercial transaction 24 years ago where the complainants have not denied receiving part payment of the purchase price. There is hardly any public interest element in such a transaction save the wide interest of the law to apprehend criminals.
- (87) The learned Judge of the High Court, in our view, was well within his mandate under Article 165(3)(d)(ii) as read with Article 157(11) of *the Constitution* to curtail the Appellant's prosecution and the DPP'S powers have not in any way been interfered with, outside the constitutional mandate conferred on the High Court.
92. This Court also discussed the various principles and guidelines in *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties) case (supra)* as follows: -
91. Regarding the exercise of prosecutorial discretion by the Director of Public Prosecutions, the Court of Appeal in *Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR* stated as follows: -
- (41) ] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the Courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in *Mohit v Director of Public Prosecutions of Mauritius [2006] 5LRC 234*:
- these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...
- In *Regina v. Director of Public Prosecutions ex-parte Manning and Another [2001] QB 330*, the English High Court said partly at para 23 page 344:
- At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.
- Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.
- (42) ] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.



In *Ramahngam Ravinthram v Attorney General* (supra) the Court of Appeal of Singapore said at p. 10. Para 28:

however, once the offender shows on the evidence before the court, that there is a prima facie breach of fundamental liberty (that the prosecution has a case to answer), the prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At this stage the prosecution will not be able to rely on its discretion under Article 35(8) of *the Constitution* without more, as a justification for its prosecutorial decision.

92. The High Court in *Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others* [2019] eKLR had the following to say about the role of the Director of Public Prosecutions in prosecuting criminal offences: -

25. It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in *the Constitution* and in the aforesaid Act have not been adhered to, this Court cannot shirk its constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, *the Constitution* itself. I associate myself with the sentiments expressed in *Nakusa vs. Tororei & 2 Others* (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that:

the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret *the Constitution* and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting *the Constitution*, the Court must uphold and give effect to the letter and spirit of *the Constitution*, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General* Miscellaneous Application No. 494 of 2003 is that interpretation of *the Constitution* has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of *the Constitution* as they stood at the time *the Constitution* was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.



93. Long before the advent of *the Constitution* of Kenya, 2010 the High Court in R vs. Attorney General exp Kipngeno arap Ngeny Civil Application No. 406 of 2001 expressed itself as follows: -

... Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognized, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognized lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds....

94. It has also been well and rightly argued that, on the basis of public interest and upholding the rule of law, Courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. The Court of Appeal in Diamond Hasham Lalji & another v Attorney General & 4 others (supra) stated as follows: -

The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, inter alia, that persons reasonably 'suspected of committing a crime are prosecuted and convicted, punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by state and citizens.

95. The Court of Appeal in Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR referred to the Supreme Court of India in State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007, where the Court stated:

The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are



so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, 227 of *the Constitution* of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as “Cr.P.C.”) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.

96. The High Court in Bernard Mwikya Mulinge case (supra) expressed itself as follows: -

14. As has been held time and time again the Court ought not to usurp the constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of *the Constitution*. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto 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. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon.....

97. In Meixner & Another vs. Attorney General [2005] 2 KLR 189 the Court stated as follows: -

The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of *the Constitution*. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of *the Constitution*). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in *the Constitution* particularly the right to the protection by law enshrined in section 77 of *the Constitution*....

98. Mumbi Ngugi, J (as she then was), in Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others (2014) eKLR stated that:

The criminal justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference



from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated...

99. In Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR the Court held that:
- ... the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene...
100. Recently, the High Court in Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties) [2021] eKLR dealt with several instances where a Court may intervene and stop a prosecution. They include where: -
- i. There is no ostensible complainant in respect to the complaint;
  - ii. The prosecution fails to avail witness statements and exhibits without any justification;
  - iii. There is selective charging of suspects; or
  - iv. An Advocate is unfairly targeted for rendering professional services in a matter.
93. And, in Maura Muigana vs. Stellan Consult Limited & 2 Others case (supra), I further discussed the subject as follows: -
58. I have also come across several other decisions on the subject. I will refer to only some few. In Anthony Murimi Waigwe v Attorney General & 4 others [2020] eKLR, the Court held that the Prosecutor has a duty to analyze the case before prosecuting it and it should let free those whom there is no prosecutable case against them. It expressed itself thus: -
48. It is no doubt dear that under Article 157 (1) of *the Constitution* the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article 159 (2) of *the Constitution* is crying loudly every day, every hour that "justice shall be done to all, irrespective of status". Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.
49. The Petitioner in support of interest of administration of justice dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction, In other words Public Prosecutors should ask themselves• would an impartial tribunal convict on the basis of the evidence available?"
50. In the case of Republic v. Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No. 78 of 2015 while quoting the case of R vs.



Attorney General ex Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001; the Court held;

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper ... there must be in existence material evidence on which the prosecution can say with certainty that it has a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and inactionable.

51. In a democratic society like ours, no one should be charged without the authorities conducting proper investigation. The prosecutor on the other hand is under duty to consider both incriminating and exculpating evidence, In the case of Republic v. Director of Public Prosecutions & Another ex parte Kaman/ Nairobi Judicial Review Application Nog 78 of 2015 (supra), the court expressed itself as follows:

this court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of justice is a hallowed place and ought to be reserved for those matters in which the protagonists have a conviction stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the [Office of the Director of Public Prosecutions Act](#) to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a catwalk.

59. In Meme -vs- Republic & Another (2004) eKLR the Court of Appeal discussed abuse of the Court process thus: -

An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.

60. In quashing a criminal prosecution on the basis of abuse of Court process, the Court in Peter George Anthony Costa v. Attorney General & Another Nairobi Petition No. 83/2010 expressed itself thus: -

The process of the Court must be used properly, honestly and in good faith, and must not be abused This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or of oppression in the process of litigation. It follows that where there is an abuse of the court process there is a breach of the petitioner's fundamental rights as the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.



61. Still on abuse of Court process in using Court to settle personal scores, the Court in *Rosemary Wanja Mwangiri & 2 Others V Attorney General & 2 Others*, Mumbi J (as she then was) stated that: -

The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.

62. On the need for a Prosecutor to act within the law, the Court in *Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others* stated that: -

The discretionary power vested in the Director of Public Prosecution is not an open cheque and such discretion must be exercised within the four corners of *the Constitution*. It must be exercised reasonably within the law and to promote the policies and objects of the law which are set out in Section 4 of the Office of Director of Public Prosecution Act. These objects are as follows: the diversity of the people of Kenya; impartiality and gender equity; the rules of natural justice, promotion of public confidence in the integrity of the office; the need to discharge the functions of the office on behalf of the people of Kenya, the need to serve the cause of justice; prevent abuse of legal process and public interest, protection of the sovereignty of the people; secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.

63. In *Republic v. Commissioner of Co-operatives ex parte Kirinyaga Tea Growers Cooperative Savings & Credit Society Ltd CA 39/97 119991 EALR 245* the Court of Appeal warned against the improper use of power in the following words: -

...it is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allowed anyone on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith....

64. The above position was amplified in Nairobi High Court Miscellaneous Application No. 1769 of 2003 *Republic vs. Ministry of Planning and Another ex-parte Professor Mwangi Kaimenyi*, where it was held:

So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power, The reason why the court has to intervene is because there is a presumption that



where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner.

65. The need for Courts to act with deference and accord constitutional and legal entities to discharge their mandates was revisited in *Paul Ng'ang'a Nyaga vs Attorney General & 3 Others* (2013) eKLR, where it was held that: -

.... this Court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of *the Constitution*.

66. I believe I have said enough on the general exercise of prosecutorial powers and for the purposes of this case. I will now look at what Legal Scholars and Courts have rendered on concurrent civil and criminal proceedings.

94. In the same case, *Maura Muigana vs. Stellan Consult Limited & 2 Others* case (supra), I also dealt with the issue of abuse of Court process. This is what I stated: -

67. The subject of abuse of Court process was discussed by the Court of Appeal in *Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No. 25 of 2002 [2009] KLR 229, as follows: -

The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

- i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.
- iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

68. The Court of Appeal went on and stated as follows: -

In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial



time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice...We approve and adopt the principles so ably expressed by both Lord Roskil and Lord Templeman in the case of *Ashmore V Corp Of Lloyds* [1992] 2 All E.R 486 at page 488 where Lord Roskil states:

It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues.

Unless a trial is on discernable issues it would be farcical to waste judicial time on it.

69. In Nairobi Civil Appeal No. 70 of 2017 *Prafulchandra Bharmal v Chief Magistrate Kibera & 3 others* [2020] eKLR, the Court of Appeal further rendered itself as follows:

20. In answering whether there was abuse of power, the Judge too discussed at length the safeguards that exist under criminal law in regard to an accused person to ensure a fair trial which is also a guaranteed right enshrined in *the Constitution*. He also appreciated that Section 193 A of the Criminal Procedure Code, allows concurrent litigation of civil and criminal proceedings arising from the same issues but cautioned that the prerogative of the police to investigate crime must be exercised according to the laws of the land and in good faith. What we understand the Judge to be saying in this regard is that the mere fact that leave was granted to the appellant to institute private criminal prosecution, this ipso facto did not mean that the 2<sup>nd</sup> respondent would not get a fair trial because the principles of a fair trial are well ingrained in law and practice. Having said that, the Judge went further to infer the unique circumstances prevailing in this matter, and posited that, if the private prosecution were to proceed, it would amount to an abuse of process. He pointed out and rightly so in our view, that if both the civil and the private criminal prosecution cases which were all centred on the Bakarania agreement were to proceed for hearing in both courts, there was a likelihood of the two processes giving rise to two different outcomes as there were also two sets of evidence in form of document examiners' reports. To us this was not a merit determination but a commentary on the process. We do not also see any contradictions as the Judge was restating the well-established principles of a fair trial.

21. Was there abuse of process to warrant an order prohibiting the criminal charge? In *Jago v District Court (NSW)* 168 LLR 23, 87 ALR 57 Brennan, J. said in part at p. 47-48: -

An abuse of process occurs when the process of court is put in motion for purposes which in the eye of the law, it is not intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in a conduct which amounts to an offence and on that account is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process.

We are aware that the categories of abuse of process are not limited. Whether or not an abuse of power of criminal process has occurred ultimately depends on the circumstances of each case. One of the important factors



at common law which underlie a prosecutorial decision is whether the available evidence discloses a realistic prospect of a conviction. In *Walton v Gardener* [1993] 177 CLR 378, the High Court of Australia said at para 23 –

The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all categories of cases in which the process and procedures of the court which exist to administer justice with fairness and impartiality may be converted into instruments of injustice and unfairness. Thus, it has long been established that regardless of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be seen clearly to be foredoomed to fail..., if that court is in all circumstances of the particular case a clearly inappropriate forum to entertain them..., if, notwithstanding that circumstances do not give rise to an estoppel their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a case which has already been disposed of by earlier proceedings.

22. It is not lost to us that both the appellant and 2<sup>nd</sup> respondents are siblings; they have been involved in a dispute over the suit property for a long time; the appellant is the one who filed a civil suit, a defence was filed and when the civil suit was still pending, he instituted a private criminal prosecution. At the backdrop of all this, even the appellant's complaint against the 2<sup>nd</sup> respondent was subjected to police investigations and the DPP directed the police file be closed. We are on our part persuaded that in the circumstances of this matter, an order of prohibition was justified to protect the court process from being used to settle a civil dispute which was pending and that allowing the criminal process was likely to embarrass the courts. To us, this order was appropriate as the Judge had to navigate carefully so as not to make far reaching pronouncements that would embarrass the pending civil trial.

83. The High Court in *Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009* stated as follows with respect to the Court's power to prevent abuse of its process: -

This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court



of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it. (emphasis added).

84. From the foregoing, it is the case that the subject of abuse of Court process is wide and whether there is an abuse of the due process depends on the circumstances of a case.
85. As I come to the end of the second issue, I must state that I have deliberately endeavored the above somehow elaborate discussion covering the general exercise of prosecutorial powers, the concurrent civil and criminal proceedings under Section 193A of the CPC and the subject of abuse of Court process so as to lay a sound basis for consideration of the main issue in this matter which is whether the prosecution facing the Petitioner herein should be stopped since the dispute is civil in nature and the criminal case amounts to an abuse of Court process.
86. That consideration is the gist of the next issue.
87. From the foregoing, it comes to the fore that there are instances where a Court ought to exercise its discretion and stop a prosecution. Such instances, include, and where it is demonstrated that: -
  - i. Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;
  - ii. Where the quashing of the impugned proceedings would secure the ends of justice;
  - iii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
  - iv. Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged;
  - v. 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.
  - vi. The prosecution is not in public interest;
  - vii. The prosecution is not in the interests of the administration of justice;
  - viii. The prosecution is oppressive, vexatious and an abuse of the court process;
  - ix. The prosecution amounts to a breach of rights and fundamental freedoms;
  - x. The investigation and prosecution amounts to abuse of power and discretion and is aimed at achieving an ulterior or improper motive;
  - xi. The investigation and the prosecution are tainted with illegality, irrationality and procedural impropriety;
  - xii. The investigation and prosecution is in gross contravention of *the Constitution* and the law.
95. Having laid the constitutional and legal parameters in respect to the exercise of the powers of the Prosecutor and the Police respectively, the Court will now consider the next issue.



**(b) Whether the criminal case is in violation of the Petitioner's rights and fundamental freedoms under Articles 27, 29, 32, 40, 50, and 157 of *the Constitution*:**

96. Having set out the parameters for the exercise of prosecutorial and police powers in the first issue, the Court will now interrogate whether the Respondents' actions were within *the Constitution* and the law.
97. However, before this Court decides to do, it must first deal with a preliminary issue which was raised by the Respondents. The issue is whether the Petition in this case has attained the required threshold in presenting constitutional Petitions.
98. In the event the Court finds the preliminary issue in the affirmative, only then will it proceed to deal with the second main issue.
99. The practice and procedure in presentation of constitutional Petitions is provided for under *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to as 'the Mutunga Rules').
100. The burden of proof on a Petitioner in a constitutional Petition was addressed by the Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR as follows: -

Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

101. The Court of Appeal in in Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR stated as follows on the threshold required to prove an allegation of infringement of rights and fundamental freedoms: -

.... We find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of *the Constitution*. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat.

102. This Court has carefully perused the Petition herein. In a nutshell, the Petition complies with the basic requirements of a Constitutional Petition. The Petition has description of parties, the constitutional and legal foundations in support of the Petition, the locus standi, the facts of the Petition, the violations of *the Constitution* and the remedies sought.
103. Having settled the preliminary issue in the affirmative, the Court will now ascertain whether the Petitioner has proved any constitutional infractions in the Petition.



104. The completeness and propriety of any prosecution is anchored on presence of a complainant and an offence known in law. Section 2 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya defines a ‘complaint’ as follows: -
- an allegation that some person known or unknown has committed or is guilty of an offence.
105. The Black’s Law Dictionary 10<sup>th</sup> Edition defines a ‘complainant’ as follows: -
- The party who brings a legal complaint against another.
106. An ‘offence’ is defined under the [Office of the Director of Public Prosecutions Act](#), No. 2 of 2013 to mean: -
- an act, attempt or omission punishable by law.
107. The facts surrounding the prosecution of the Petitioner are well captured in this judgment.
108. The Petitioner was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The offence is codified and is one known in law.
109. Was there any reasonable and probable cause that the Petitioner be linked with the commission of the said offence?
110. In *Glinsk -vs- McIver* [1962] AC 726, Lord Devlin defined reasonable and probable cause as follows: -
- ...reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction...
111. In this case, the Petitioner strenuously contended that he was being framed for having instituted divorce proceedings against his wife, the 3<sup>rd</sup> Respondent herein. He alleges a scheme to have him charged mounted by the Respondents in collusion.
112. The Respondents variously explained the events leading to the arrest and the arraignment of the Petitioner. Some of the Respondents are witnesses in the criminal case.
113. In Civil Appeal 370 of 2014, *Communications Commission of Kenya -vs- Office of the Director of Public Prosecutions & another* [2018] eKLR the Court of Appeal considered the two-pronged test on the decision to prosecute, as hereunder: -
36. To determine whether or not the DPP applied the right test in making the impugned decision, the starting point is to consider what the National Prosecution Policy states about the “Decision to Prosecute” which is as follows:
- In exercising the prosecution mandate the DPP is constitutionally bound to have due regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This provision applies equally to the DPP and officers acting on his or her behalf. This requirement is generally accepted as an international best practice whose origins are in common law.
- The decision to prosecute as a concept envisages two basic components, namely, that the evidence available is admissible and sufficient and that public interest requires a prosecution be conducted. This is what is commonly referred to as the Two-Stage Test in making the decision to prosecute.



Each aspect of the test must be separately considered and satisfied before the decision to charge is made. The Evidential Test must be satisfied before the Public Interest Test is considered.”

38. Whereas the National Prosecution Policy states that the standard of evidence required under the Evidentiary Test is less than the court’s “beyond reasonable doubt”, where the DPP has reviewed the available evidence and arrived at a considered conclusion that the Evidentiary Test threshold has not been realized, we do not think that he can be accused of applying the standard of proof of a judicial officer. We are satisfied that the DPP applied the right test in declining to prosecute the 2<sup>nd</sup> respondent.
114. The facts in this matter are fairly straight-forward. A complaint on assault was made by the 3<sup>rd</sup> Respondent to the police. Investigations ensued where witnesses, including eye-witnesses, recorded statements. The police were satisfied that an offence known in law had been disclosed and recommended the prosecution of the suspect to the Prosecutor.
115. The Prosecutor reviewed the evidence. It was satisfied that indeed an offence known in law had been disclosed. It approved the prosecution of the Petitioner.
116. The Petitioner was subsequently arraigned before Court and was accordingly charged in the criminal case.
117. Against that background, the Petitioner decries the violation of Articles 27, 29, 32, 40, 50 and 157 of *the Constitution*.
118. Having patiently considered the various complaints raised by the Petitioner in this matter, this Court is not persuaded that any of the matters fall within the twelve issues discussed in Maura Muigana vs. Stellan Consult Limited & 2 Others case (supra) which may call upon the High Court to vitiate a criminal trial.
119. The issues tend to challenge the veracity of the evidence which is to be adduced in the criminal case. There is no challenge on the constitutionality of the manner in which the said evidence was gathered. The evidence was based on witnesses regardless of the issues surrounding the pendency of the divorce proceedings. If there is any nexus between the criminal case and the divorce proceedings, then such issues ought to be dealt with at the trial of the criminal case where the parties will have the opportunity to examine the witnesses.
120. As to whether the Prosecutor in maintaining the criminal case infringed Article 157(11) of *the Constitution*, this Court is also at pains in ascertaining as much.
121. There is no evidence demonstrating that the Prosecutor acted in disregard to the public interest and against the interests of the administration of justice. There is also no affirmation that the criminal case is an abuse of the legal process.
122. Whereas the Petitioner has a right not to be subjected to an illegal and/or unwarranted criminal process, the police and the Prosecutor are also under a public duty to ensure that offences are prosecuted and those culpable attended to as law requires. That is the balance created by *the Constitution* and the law and which this Court is called upon to seriously undertake. In fact, that is the essence of the rule of law, as a constitutional principle under Article 10.
123. It is, therefore, apparent that the termination of the criminal case in the circumstances of this case will frustrate, instead of advancing, the rule of law. The Petitioner still has constitutional safeguards in respect of his rights even when undergoing the trial. The Petitioner will, at the trial, also be accorded



an opportunity to challenge the veracity of the evidence including whether the evidence was properly obtained.

124. Based on the foregoing, this Court is, therefore, not persuaded that the prosecution of the Petitioner infringes any of the various provisions of *the Constitution* either as alleged or otherwise.
125. This Court further finds and hold that the Petitioner has failed to show how the criminal case is an abuse of the criminal justice system.

**Disposition:**

126. In the end, the Petition and the Notice of Motion dated 23<sup>rd</sup> March, 2022 are found to be wholly without merit and the following final orders hereby issue: -
- a. The Petition and the Notice of Motion dated 23<sup>rd</sup> March, 2022 are hereby dismissed.
  - b. Given the age of the criminal case, the trial Court shall accord priority to the early hearing and determination of the said criminal case.
  - c. The Petitioner shall bear the costs of the Petition.

It is so ordered.

**DELIVERED, DATED and SIGNED at KITALE this 21<sup>st</sup> day of SEPTEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Mr. Rosanna, Learned Counsel for the Petitioner.

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

Mr. Omondi, Learned Counsel for the 3<sup>rd</sup> to 6<sup>th</sup> Respondents.

Regina/Chemutai – Court Assistants.

