



**Tapoyo v OCS, Kapenguria Police Station & 5 others (Constitutional Petition  
3 of 2021) [2023] KEHC 22297 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22297 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CONSTITUTIONAL PETITION 3 OF 2021**

**AC MRIMA, J**

**SEPTEMBER 20, 2023**

**BETWEEN**

**JAMES MUSA TAPOYO ..... PETITIONER**

**AND**

**THE OCS, KAPENGURIA POLICE STATION ..... 1<sup>ST</sup> RESPONDENT**

**KAPENGURIA POLICE STATION ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**SGT. SIMON LOSIWA ..... 4<sup>TH</sup> RESPONDENT**

**PKEMEI KAKULO ABRAHAM ..... 5<sup>TH</sup> RESPONDENT**

**SAMSON TAPOYO ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition subject of this judgment was instituted at a time when the police were still undertaking investigations in respect of a complaint lodged by Pkemei Kakulo Abraham, the 5<sup>th</sup> Respondent herein, at the Kapenguria Police Station against the Petitioner herein, James Musa Tapoyo.
2. The Petitioner variously alleges violation of his constitutional rights and fundamental freedoms.
3. The Petition is vehemently opposed by the Respondents save the 6<sup>th</sup> Respondent who did not take part in the hearing.

**The Petitioner's case**

4. The Petitioner filed a Petition dated 6<sup>th</sup> December, 2021. It is hinged upon Articles 3, 10, 19, 20, 21, 22, 23, 25 (c), 27 (1) and (2), 28, 29, 40, 47, 48, 49, 50(1), 157, 159 and 258 of *the Constitution*.



5. The Petition was supported by two affidavits both sworn by the Petitioner. They are the supporting affidavit evenly sworn as the Petition and a Further Affidavit sworn on 9<sup>th</sup> December, 2021.
6. According to the Petitioner, sometimes in 2019, the 5<sup>th</sup> Respondent lodged a complaint against him at the Kapenguria Police Station in respect of a Sale agreement over a portion of the parcel of land known as West Pokot/Keringet 'A'/2428. The sale was between the Petitioner's mother one Chepokamuk Tapoyo (then already deceased) and the 5<sup>th</sup> Respondent vide an agreement dated 16<sup>th</sup> February, 2011.
7. As a part of the police inquiry, the Petitioner was on 16<sup>th</sup> March, 2021 summoned at the Kapenguria Police Station and was interrogated over allegations of obtaining money by false pretence, and in relation to the said sale agreement.
8. The Petitioner then learnt that he was to be arraigned before Court at the Kapenguria Law Courts on 4<sup>th</sup> April, 2021 and he was to be charged with the offence of obtaining money by false pretence.
9. Sensing that he was to be so arraigned before Court, the Petitioner initiated High Court of Kenya at Kapenguria Misc. Criminal Application No. E003 of 2021 wherein he sought anticipatory bond. He was subsequently released on a personal bond of Kshs. 5,000/= pending the determination of the said matter. The application may still be pending before Court.
10. In further protest to the alleged charges, the Petitioner posited that he was never a party to the impugned sale agreement and that the decision to charge him was arrived at whimsically and in total violation of his rights and fundamental freedoms and with a view to embarrass him being a retired KDF soldier and the Chairman of the West Pokot Branch of the KDF Soldiers Welfare whose membership comprises of both serving and retired officers.
11. The Petitioner deposed that he was the Administrator of the estate of his late father one Tapoya Amuruk Silaure vide High Court of Kenya at Kitale Succession Cause No. 194 of 2004 and that the estate thereof had been duly distributed.
12. Through the instant Petition, the Petitioner questioned the motive behind preferring charges where it was apparent that he never received any money in relation to the impugned sale agreement. The Petitioner reads malice, ill-will, abuse of powers, abuse of the Court process and acting contrary to public interest and the administration of justice.
13. Based on the foregoing, the Petitioner prayed for the following reliefs: -
  - a. A declaration that the charges filed against the Petitioner amount to a violation of his constitutional right to a fair administrative action.
  - b. A declaration that the issues pertaining to the alleged offence herein are purely civil in nature and they do not have any criminal element whatsoever therein.
  - c. A declaration that the arrest and detention of the Petitioner at Kapenguria Police Station amount to a violation of the Petitioner's right to equality and freedom from discrimination and Human dignity enshrined Under Articles 27 and 28 of *the Constitution* of Kenya 2010.
  - d. A declaration that the 5<sup>th</sup> Respondent pursues a Civil Claim (if any) against the Petitioner and an Order directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to drop the alleged charges against the Petitioner or any other intended criminal charges with respect to the petitioner's suit land Title No. West Pokot/Keringet "A"3943.



- e. An Order that the Respondents should not abuse the Criminal Justice System by pursuing the Petitioner without following the due process of Law.
  - f. The Respondents to bear the costs of this Petition.
  - g. Any further relief or Orders that this Honourable Court may deem just and fit to grant.
14. The Petitioner further filed written submissions dated 13<sup>th</sup> January, 2023 in urging this Court to allow the Petition.

#### **The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' cases**

15. The first four Respondents were all represented by the Office of the Director of Public Prosecutions. They opposed the Petition vide a Replying Affidavit sworn on 15<sup>th</sup> March, 2022 by one No. 42721 Sgt. Simon Losiwa, the 4<sup>th</sup> Respondent and who is one of the investigating officers in the matter.
16. It was deposed that the 5<sup>th</sup> Respondent laid a complaint over his property being part of parcel of land known as West Pokot/Keringet 'A'/2428 (hereinafter referred to as 'the Plot') which he had bought from one Chepokamuk Tapoyo, who was the Petitioner's mother, through an agreement dated 16<sup>th</sup> February, 2011. The complaint related to the destruction of the barbed wire which the 5<sup>th</sup> Respondent had put around his plot and the subsequent sale of the plot to third parties.
17. Investigations revealed that indeed the plot had been sold to one Patrick Pusia by the Petitioner and his brother one Samson Tapoyo while well aware that the plot had been sold by their mother to the 5<sup>th</sup> Respondent.
18. The police then summoned and interrogated the Petitioner over the matter. However, the police were surprised that even before the investigations were completed and a decision made, the Petitioner rushed to Court and filed for anticipatory bail.
19. It was deposed that the police have a constitutional and statutory duty to investigate all complaints laid before it and that it can only be fair that the investigations be allowed to be completed and the 3<sup>rd</sup> Respondent be accorded an opportunity to accordingly make a decision in the matter.
20. Butressing the foregoing, the Respondents filed written submissions dated 30<sup>th</sup> January, 2023 wherein several decisions were referred to and urged this Court to dismiss the Petition.

#### **The 5<sup>th</sup> Respondent's case**

21. The 5<sup>th</sup> Respondent also opposed the Petition. He filed a Replying Affidavit on 14<sup>th</sup> July, 2021 which was erroneously stamped with a Court date stamp for 13<sup>th</sup> July 2021.
22. The deponent stated that he truly lodged a complaint to the police over the plot which he had bought. He was also surprised that the Petitioner was already in Court opposing a prosecution even where the investigations were ongoing. He urged the dismissal of the Petition.
23. The 5<sup>th</sup> Respondents did not file any written submissions.

#### **Analysis**

24. Having considered the pleadings, the responses, the written submissions and the decisions referred to, what emerges for determination is whether the 1<sup>st</sup> to 4<sup>th</sup> Respondents acted in contravention of *the*



Constitution and the law in dealing with the complaint that was lodged by the 5<sup>th</sup> Respondent against the Petitioner.

25. 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.
26. 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.
27. The resolution of this issue, therefore, calls for a scrutiny of the legal regime giving the Police and the Director of Public Prosecutions the mandate to investigate offences and to prosecute those culpable.
28. This Court has previously and so broadly discussed this 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.
29. As part of the introduction to the subject in Maura Muigana vs. Stellan Consult Limited & 2 Others case (supra), this 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.
30. The Court then traced the legal basis of the exercise of prosecutorial powers in Kenya to the Constitution and the law.
31. 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



- marital) 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.
32. 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.
33. The ODPP Act, among other statutes, variously provide for the manner in which the Director of Public Prosecutions (hereinafter referred to as 'the 3<sup>rd</sup> Respondent' or '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.
34. Article 239 of *the Constitution* is on the National security organs. They are the Kenya Defence Forces, the National Intelligence Service and the National Police Service.
35. The primary objective of the national security organs and security system is to promote and guarantee national security in accordance with the principles in Article 238. In line with that, *the Constitution* calls upon the organs not to act in a partisan manner, not to further any interest of a political party or cause and not to prejudice a political interest or political cause that is legitimate under *the Constitution*.
36. Whereas the Kenya Defence Forces are mainly responsible for the defence and protection of the sovereignty and territorial borders and integrity of our Republic, the National Police Service majorly deals with maintaining law and order within the Kenyan territorial borders.
37. By its nature, the National Police Service is one of key players in the criminal justice system in Kenya. Other players include the Director of Public Prosecutions, the Courts and the correctional services.
38. Having said so, I will now look at the National Police Service as established in *the Constitution* and the law.
39. Article 243 of *the Constitution* establishes the National Police Service to be comprised of the Kenya Police Service and Kenya Administration Service. The National Police Service is under the command of the Inspector General.
40. The Inspector General enjoys operational autonomy in respect to the conduct of any investigation, law enforcement and employment matters. It is only the Director of Public Prosecutions under Article 157(4) of *the Constitution* who has power to direct the Inspector General to investigate any matter of criminal conduct and the Inspector General must comply.
41. There is also the Cabinet Secretary responsible for police services who may give the Inspector General direction with respect to any matter of policy.
42. Article 243(4) of *the Constitution* empowered Parliament to legislate to give full effect to the Article. As a result, Parliament enacted the *National Police Service Act*, No. 11A of 2011 (hereinafter referred to as 'the Police Act') as 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.
43. The Police Act provides the functions of inter alia the Kenya Police Service, the Administration Police Service and the Director of Criminal Investigations under Sections 24, 27 and 35 respectively.



44. The functions are as follows: -

24. 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 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. The Director 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 Police Oversight Authority; and perform any other function conferred on it by any other written law.

45. Flowing from the foregoing, a key distinction in the functions of the National Police Service and the DPP is that whereas the National Police Service is limited to undertaking investigations on criminal culpability and may even recommend charges against the suspects, the DPP then receives and reviews the evidence from the National Police Service and has the sole discretion over the decision on the way forward. The DPP may agree or disagree with the recommendations made. Further the DPP has the unfettered power to direct the National Police Service over any investigations.

46. In other words, once the National Police Service conducts and completes any investigations and makes recommendations then, unless sanctioned by the DPP to arrest suspects or to undertake further investigations over the matter, that is the end of the role of the National Police Service in the criminal justice system. The matter is then taken over by the DPP.

47. It is the DPP to decide on whether or not to prefer any charges against the suspects, if any, since the DPP is not bound by the recommendations made by the National Police Service. Therefore, as long as the DPP is acting within *the Constitution* and the law, it has the discretion of making any appropriate order in a matter including closure of the police file.

48. The above is the constitutional and statutory regime within which the 1<sup>st</sup> to the 4<sup>th</sup> Respondents must exercise their various powers. Suffice to say that the manner in which the said Respondents ought to exercise such powers has been, over time, subject of many Court decisions.



49. For instance, the Supreme Court in *Petition No. 38 of 2019 Cyrus Shakhlanga Khwa Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR discussed some of the applicable parameters. 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:

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

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”

157(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:

157(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.

50. 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.

51. 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.



52. In further delineating the powers of the DPP 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 Shakhlanga 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]

53. 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.

54. 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.

55. 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.

56. Having laid down the parameters within which the discussion on whether the Police and the DPP remained true to *the Constitution* and the law ought to be manoeuvred, this Court will now apply the foregoing to this case.

57. In this matter, there is no doubt that the police were still carrying out investigations before the Petitioner went to Court to apply for anticipatory bail. The DPP has confirmed that the office is yet to receive the police file for purposes of reviewing the evidence and appropriate action.

58. There is no evidence that the Petitioner engaged the DPP in any way prior to instituting any Court proceedings. There is as well no demonstration of how the DPP erred thereby infringing *the Constitution*. As such, and given the state of affairs in this matter, the inclusion of the DPP in the Petition did not add any value.

59. Apart from contending that there is no evidence incriminating him with the alleged offence, the Petitioner put the cart before the horse. There was no police bond or any communication that was annexed in evidence to the effect that the Petitioner was to be arraigned before Court either as alleged or otherwise. Further, the Petitioner failed to demonstrate how the police infringed or were likely to



infringe on his rights and fundamental freedoms in undertaking investigations as called upon by *the Constitution* and the law.

60. There is, as well, no evidence that a decision to charge the Petitioner had been made. Further, the error on the part of the 5<sup>th</sup> and 6<sup>th</sup> Respondents that necessitated them being enjoined as Respondents was also not deduced. Maybe, the Petitioner ought to have considered them as Interested Parties.
61. On a proper and sober assessment of the facts and the law in this case, it is apparent that the Petition was prematurely filed and is not proved. A proper Petition ought to have been founded on the manner in which the Respondents acted outside *the Constitution* and the law. Such was not demonstrated or at all by the Petitioner. (See Supreme Court of Kenya in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR).
62. Having said as much, this Court, in determining this matter must also make orders bringing the High Court of Kenya at Kapenguria Misc. Criminal Application No. E003 of 2021 to an end.

### **Disposition**

63. Deriving from the foregoing, the following final orders do hereby issue: -
  - a. The Petition dated 6<sup>th</sup> December, 2021 is hereby dismissed.
  - b. The police shall continue with their investigations over the complaint lodged by Pkemei Kakuro Abraham against the Petitioner.
  - c. Pending a decision to be made by the Director of Public Prosecutions over the complaint lodged by Pkemei Kakuro Abraham against the Petitioner, (which may include a decision to charge the Petitioner and the eventual appearance before Court), the personal bond issued in High Court of Kenya at Kapenguria Misc. Criminal Application No. E003 of 2021 shall remain in force and the Petitioner shall not be arrested by the police.
  - d. The Petitioner shall, however, cooperate with the police during the time of investigations and shall honour any summons issued to him by the police and in default, the Petitioner shall be liable to be arrested order (c)above notwithstanding.
  - e. The Petitioner shall bear the costs of the Petition.
  - f. This file as well High Court of Kenya at Kapenguria Misc. Criminal Application No. E003 of 2021 are hereby marked as closed.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

