**Republic v Director of Public Prosecutions & 3 others; Okhako (Exparte Applicant) (Judicial Review Application E019 of 2022) [2024] KEHC 13408 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13408 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**JUDICIAL REVIEW APPLICATION E019 OF 2022**

**OA SEWE, J**

**OCTOBER 17, 2024**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CRIMINAL PROCEDURE CODE, CHAPTER 75 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT,**

**AND**

**IN TH EMATTER OF AN APPLICATION FOR ORDERS OF CERTIORARY AND PROHIBITION**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 3RD RESPONDENT**

**CHIEF MAGISTRATE'S COURT, MOMBASA ..... 4TH RESPONDENT**

**AND**

**JOSEPH PATTERSON OKHAKO ..... EXPARTE APPLICANT**

## JUDGMENT

1. Before the Court for determination is the ex parte applicant's Notice of Motion dated 4th January 2024. It was filed under Sections 7, 8, 9, 10 and 11 of the *Fair Administrative Action Act*, Sections 8 and 9 of the Law ReformAct, Sections 1A and 3A of the *Civil Procedure Act* and Order 53Rules 1 and 2 of the Civil Procedure Rules, 2010 for the following orders:

    (a) That the Court be pleased to grant the ex parte applicant an order of Certiorari to remove into this court and quash the decision of the 1st respondent to prosecute and/or charge the ex parte applicant with the offence of conflict of interest contrary to Section 42(3) as read with Section 48 of the *Anti-Corruption and Economic Crimes Act*, 2003.

    (b) That the Court be pleased to grant the ex parte applicant an Order of Prohibition to prohibit the 1st respondent from prosecuting and/or charging the ex parte applicant with the offence of conflict of interest contrary to Section 42(3) as read with Section 48 of the *Anti-Corruption and Economic Crimes Act*, 2003.

    (c) That costs of the application be provided for.

2. The application was premised on the grounds that, the ex parte applicant (hereinafter, "the applicant") is a former Ethics and Integrity Officer at the Kenya Ports Authority; and that sometime in 2008, the applicant together with other like-minded ethics practitioners founded the Ethics Institute of East Africa as a non-profit organization with the mandate of training and capacity building of public and private ethics practitioners within East Africa.

3. The applicant averred that as a law-abiding citizen and an ethics practitioner, and in line with the *Public Officer Ethics Act*, No. 4 of 2003, he wrote to and personally delivered a letter of declaration of interest dated 6th June 2012 to the Managing Director of the Kenya Ports Authority, declaring his affiliation with the Ethics Institute of East Africa. He also made a similar declaration to his immediate boss, one Sylvester Kundu. He averred that the said affiliation was not in any way in conflict with his duties and responsibilities as an employee of the Kenya Ports Authority.

4. It was the applicant's case that, in the course of his duties, he was tasked with the investigation of corrupt dealings undertaken by employees. In the course of time he recommended the prosecution of some individuals, including the former managing director, Mr. Daniel Manduku. He stated that, as a result of such investigations, unwarranted and unsubstantiated allegations were made against him for supposed conflict of interest while in the employment of Kenya Ports Authority, on the basis of which the 1st respondent intended to have him charged and prosecuted before the 4th respondent.

5. The application was supported by the averments set out in the Statutory Statement dated 7th July 2022, the applicant's Supporting Affidavit sworn on 7th July 2022, as well as the documents annexed thereto. The documents include a copy of a duly approved Charge Sheet dated 5th July 2022 in which the applicant is named as the accused in respect of the offence of conflict of interest pursuant to Section 42(3) as read with Section 48 of the *Anti-Corruption and Economic Crimes Act*.

6. In response to the application, the 3rd respondent relied on the Replying Affidavit sworn on 2nd May 2024 by one of its investigators, Mr. Alex Mbae. The contention of the 3rd respondent was that the application is not only ill-conceived but is also an utter abuse of the court process in that it is based on unsubstantiated allegations. The 3rd respondent averred that the issues referred to by the applicant were the subject of investigations pursuant to its legal mandate under Articles 10, 75, 79 and 252 of

the *Constitution* and Section 3, 11(1)(d) of the Ethics and Anti-Corruption Act, 2011, and Section 43 of the *Leadership and Integrity Act*, Chapter 182 of the Laws of Kenya.

7. The 3rd respondent further deposed that, sufficient evidence having been gathered to support a charge of conflict of interest against the applicant, a report with recommendation to charge was made to the 2nd respondent pursuant to the provisions of Section 35 of the *Anti-Corruption and Economic Crimes Act*.

8. It was further the assertion of the 3rd respondent that the 1st respondent, in compliance with the procedures pertinent to its mandate under Article 157 of the Constitution and Section 4 of the *Office of the Director of Public Prosecutions Act*, 2013, independently reviewed the evidence and made a decision to charge the applicant with the offence of conflict of interest contrary to Section 42(3) as read with Section 48 of the *Anti-Corruption and Economic Crimes Act*. The 3rd respondent averred that the decision to investigate, charge and prosecute the applicant was made within the 1st and 3rd respondents' constitutional and statutory mandates and is therefore are not amenable to judicial review.

9. The application was resisted by some of the respondents. Hence, on Act behalf of the 3rd respondent, Grounds of Opposition were filed herein on 23rd August 2022 to the effect that:

   (a) The application is frivolous, misconceived, incurably bad in law, misguided, fatally defective and legally untenable.

   (b) The application is merely speculative and is not substantially supported by evidence to prove any violation of the rights of the applicant by the respondents.

   (c) The application is an abuse of the court process, and has been brought with a view of obstructing the fair administration of justice and the independence of the respondents as provided for in the *Constitution* of Kenya and the applicable provisions of the law that guide the performance of duties of the respondents.

   (d) The application, if granted, will contravene Articles 252(1)(a) and (d), 249(2)(b), 157(10) and (11) as well as 159(2)(b) and (e) of the *Constitution* of Kenya.

   (e) It is in the public interest that the application be dismissed to pave way for the plea-taking and subsequent proceedings in the interest of justice.

10. Directions were thereafter given that the application be canvassed by way of written submissions. Accordingly, the applicant relied on his written submissions dated 15th August 2024 in which he proposed the following issues for consideration:

    (a) Whether the action taken by the 1st respondent constitutes unfair administrative action; and

    (b) Whether the said action amounts to abuse of power.

11. In the applicant's view, the respondents have contravened various provisions of the law, including Sections 4 and 7 of the *Fair Administrative Action Act* which require, inter alia, that notice of the nature and reasons for the proposed administrative action be given. The applicant relied on Josephat Koli Nanok & Another v Ethics and Anti-Corruption Commission [2018] eKLR, Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300 and Republic v Public Procurement Administrative Review Board & 2 Others, Ex Parte Rongo University [2018] eKLR to buttress the argument that the decisions and actions of the 1st and 3rd respondents in initiating the impugned prosecution were made without justifiable cause; and are therefore illegal, irrational and procedurally improper.

12. The 3rd respondent filed written submissions dated 7th June 2024 which were also adopted by the 1st and 2nd respondents. It proposed the following issues for determination:

    (a) Whether the applicant has met the threshold for the grant of the judicial review orders sought.

    (b) Whether the Court should interfere with the mandates of the 1st, 2nd and 3rd respondents.

    (c) Who should bear the costs of the suit.

13. Like the applicant, the 3rd respondent relied on Pastoli v Kabale District Local Government Council & others (supra), Saisi & 7 others *v Director of Public Prosecutions & others, (Petition 39 & 40 of 2019* (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), and Diamond Hasham Lalji & another v Attorney General & others [2018] eKLR, among others, to underscore the argument that it was incumbent upon the applicant to demonstrate that the decision making authority exceeded its powers, or committed an error of law, breach of natural justice or reached a decision which no reasonable tribunal could have reached; or simply abused its powers. The 3rd respondent submitted that the applicant failed to establish any of the parameters aforementioned; and that its investigations were done procedurally, reasonably, legally and rationally in compliance with the provisions of the *Constitution* and statutory law.

14. In the same vein, the 3rd respondent submitted that the decision by the 1st respondent to prosecute the applicant was made on sound basis and in accordance with the 1st respondent's constitutional and statutory mandate. Accordingly, the 3rd respondent urged the Court to exercise its jurisdiction with caution and strike a balance between the unsubstantiated claim of violation of rights by the applicant vis-à-vis the public interest and the constitutional duty of the 1st respondent to ensure that offences are prosecution and those culpable attended to as by law required. To buttress this argument, the 3rd respondent relied on Petition E106 & 160 of 2021: Robert Maina & 4 others v Director of Public Prosecutions & 4 others and Supreme Court Petition No. 38 of 2019:Cyrus Shakhalaga Khwa Jirongo v Soy Developers & 9 others. Hence, the 3rd respondent prayed that the suit be dismissed with costs.

15. From the foregoing summary it is not in dispute that the applicant was a public officer and a former Ethics and Integrity at the Kenya Ports Authority. It is common ground that, in the year 2008, the applicant founded the Ethics Institute of East Africa jointly with others. The parties are in agreement that the entity was formed as a non-profit organization with the mandate of training and capacity building of public and private ethics practitioners within East Africa.

16. That the applicant wrote a letter of declaration of interest to the Managing Director of the Kenya Ports Authority dated 6th June 2012 declaring his affiliation with the Ethics Institute of East Africa is also not in dispute. A copy of the letter was annexed to the applicant's Supporting Affidavit and marked as Annexure "JPO-1". In the course of time, a complaint was made to the 3rd respondent that the Institute had been offering services to the Kenya Ports Authority in breach of Section 42(3) of the *Anti-Corruption and Economic Crimes Act*. Upon investigations being concluded, and with the concurrence of the 1st respondent, the applicant was charged with the offence of conflict of interest contrary to Section 42(3) of the *Anti-Corruption and Economic Crimes Act*.

17. The contention of the applicant was that there was no justifiable cause for his prosecution and that the allegations against him were unwarranted and unsubstantiated and were being pursued simply as a backlash because, as an Ethics and Integrity Officer, he had recommended the prosecution of some individuals at KPA, including the former managing director, Mr. Daniel Manduku.

18. In the premises, the issues for determination are:

    (a) Whether the applicant has met the threshold for grant of the orders sought;

(b) What orders ought to issue on costs.

**A. On whether the applicant has met the threshold for the issuance of the orders of Certiorari or Prohibition:**

19. The efficacy and scope of the order of Certiorari were the subject of discussion by the Court of Appeal in Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, in which the Court held:

> ...Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons..."

20. The Court of Appeal then proceeded to discuss the scope of the Order of Prohibition as follows:

> What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury's Law of England, 4th Edition, Vol.1 at pg.37 paragraph 128.

21. The judicial review jurisdiction of the Court was discussed in the Ugandan case of Pastoli v Kabale District Local Government Council & Others (supra), in which it was held:

> In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis BahikirweMuntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E". Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

22. In determining an application of this nature, the court is expected to train its eye, not on the merits of the case, but on the decision-making process or act complained. This is because the judicial review

jurisdiction is supervisory. Accordingly, in Municipal Council of Mombasa v Republic & Umoja Consultants Limited [2002] eKLR the Court of Appeal emphasized that:

> The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

23. It is not lost on the Court that judicial review has, with the promulgation of the *Constitution* of Kenya, 2010, acquired a constitutional grounding; and therefore that its scope has somewhat widened. Hence, in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR by a 5-judge bench of the Court of Appeal held:

> In our considered view presently, judicial review in Kenya has Constitutional underpinning in articles 22 and 23 as read with article 47 of the Constitution and as operationalized through the provisions of the *Fair Administrative Action Act*. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the *Civil Procedure Act* and rules is a procedure for applying for remedies under the common law and the *Law Reform Act*. These common law remedies are now part of the constitutional remedies that the High Court can grant under article 23(3)(c) and (f) of the Constitution."

24. Accordingly, some measure of merit analysis is acceptable. Here is what the Supreme Court had to say in this regard in Saisi & 7 others v Director of Public Prosecutions & 2 Others (supra):

> 77. For the court to get through an extensive examination of section 7 of the FAAA, there had to be some measure of merit analysis. That was not to say that the court had to 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 was reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. It was to be limited to the examination of uncontroverted evidence. The controverted evidence was best addressed by the person, body or authority in charge. There was 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 was limited to a dry or formalistic examination of the process only led to intolerable superficiality. That would be against article 259 of the *Constitution* which required the courts to interpret it in a manner that inter alia advanced the rule of law, permits the development of the law and contributes to good governance."

25. Nevertheless, the Supreme made it clear that:

76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the *Fair Administrative Action Act*. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1) (e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the 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.

26. The applicant has, in essence, challenged the decision to charge and prosecute him for the offence of conflict of interest contrary to Section 42(3) of the *Anti-Corruption and Economic Crimes Act*. Hence the basic issue for consideration is whether the decision can be faulted on the grounds of illegality, irrationality or procedural impropriety.

27. The mandate of the 3rd respondent to investigate offences of corruption and economic crimes is not in question. That mandate is provided for in Articles 10, 75, 79 and 252 of the *Constitution* as well as Sections 3, 11(d) of the *Ethics and Anti-Corruption Commission Act*, Section 43 of the *Leadership and Integrity Act*. In particular, Article 79 of the *Constitution* provides that

> Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter."

28. And, Section 11 of the *Ethics and Anti-Corruption Commission Act* sets out the various functions of the Commission. In particular Subsection (1)(d) states:

> In addition to the functions of the Commission under Article 252 and Chapter Six of the *Constitution*, the Commission shall—
>
> ...
>
> (d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the *Anti-Corruption and Economic Crimes Act* or any other law enacted pursuant to Chapter Six of the *Constitution*.

29. At paragraphs 3.4 and 3.5 of his Statutory Statement, the applicant alleged that on or about the 16th January 2020 he wrote to the 3rd respondent in response to allegations of investigations against him for improper conduct outlining his role in the formation and operation of the Ethics Institute of East

African in addition to disclosing his personal declaration of interest to his former employer, Kenya Ports Authority. He further stated that on or about the 5th day of July 2022, he wrote to the Director of Criminal Investigations rising his suspicions that the purported ongoing investigations against him was an outright show of intimidation to get him to drop his bid to follow up and see the eventual conviction of known corrupt individuals formerly of Kenya Ports Authority, including the former Managing Director whose case was being handled by the Director of Criminal Investigations.

30. As has been pointed out herein above, in the Replying Affidavit sworn by Mr. Mbae, the 3rd respondent averred that its investigations were conducted in accordance with the *Constitution* and the applicable law; and that upon sufficient evidence being gathered to support a charge of conflict of interest against the applicant, a report with recommendation to charge was made to the 2nd respondent pursuant to the provisions of Section 35 of the *Anti-Corruption and Economic Crimes Act*. In particular, the 3rd respondent disclosed that the investigations and analysis of the evidence pursuant to Section 11 of the *Ethics and Anti-Corruption Commission Act* established that:

    (a) The applicant was a public officer employed as such at the Kenya Ports Authority since 26th June, 1997.

    (b) The like-minded ethics practitioners and founders of the Ethics Institute of Easter Africa that the applicant alleged to have established the institution turned out to be only his wife, Rose Nafula.

    (c) Between 2nd July 2012 and 11th July 2017, the Ethics Institute of East Africa conducted workshops/seminars/training for the Kenya Ports Authority and public funds in the sum of Kshs. 2,431,614.60 were paid to the said institution through Account 0100001581524 held at CFC Stanbic Bank Digo Road Branch.

    (d) The applicant and his wife are the signatories of the said account and therefore the applicant benefited from the said business from his employer.

    (e) The applicant never made any declaration of interest as stipulated in his letter Ref. JPO/014/212 dated 6th June 2012 to the Kenya Ports Authority as alleged and upon subjecting the said letter to further scrutiny by the document examiner, it was established that it was tainted with forgery.

    (f) The declaration of interest by the applicant alleged to have been made vide the letter dated 6th June 2012 was done on 20th June 2017.

    (g) The applicant's letter of declaration of conflict of interest Ref: JPO/014/2012 date 6th June 2012 and the letter to the Ethics and Anti-Corruption Commission dated 16th January 2020 did not deter the 3rd respondent from carrying out the investigations with objectivity and in accordance with the law.

31. In the premises, the applicant failed to show that in the discharge of its mandate, the 3rd respondent acted illegally, irrationally or unprocedurally. In any event, the impugned decision was not exhibited herein for the Court's scrutiny.

32. It is also noteworthy that, although the Inspector General of Police was cited herein as the 2nd respondent, the exact role played by him in the investigation and decision to prosecute the applicant was not demonstrated. Nevertheless, that the Police have the constitutional mandate to investigate the

commission of criminal offences is not in dispute. Indeed, in Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR, it was held:

> 42. ...the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and 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."

33. Similarly, in Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another (supra), it was held:

> The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

34. As against the 1st respondent, the applicant alleged that in sanctioning his prosecution, the 1st respondent acted prematurely and without sufficient proof of wrongdoing on his part. It is unquestionable that it is the mandate of the 1st respondent to make independent decisions on whether or not a prosecution ought to be mounted. Article 157 of the Constitution is explicit that the DPP is not bound by any directions, control or recommendations made by any institution or body, being an independent public office. Consequently, the Court can only intervene in the exercise of the 1st respondent's prosecutorial decision where it is shown that the decision was made in disregard of the public interest or for some ulterior motive.

35. In *Jirongo v Soy Developers Ltd & 9 others (Petition 38 of 2019)* [2021] KESC 32 (KLR) (16 July 2021) (Judgment), the Supreme Court held:

> 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.

36. Likewise, in the case of Anthony Murimi Waigwe v Attorney General & 4 others [2020] eKLR, the court held: -

48. It is no doubt clear 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 everyday, 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 purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. 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 actionable."

37. Hence, in the Jirongo Case (supra) the Supreme Court relied on a decision rendered by the Supreme Court of India, namely RP Kapur v State of PunjabAIR 1960 SC 866 in which the factors to be

considered by the court in similar circumstances were discussed. It was held that the Court can intervene:

(a) 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

(b) 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

(c) 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

(d) 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.

38. In this instance, the respondents contend that the allegations of conflict of interest were investigated and a report with recommendation for prosecution forwarded to the 1st respondent for independent appraisal. The 1st respondent thereupon made an independent decision to prosecute. The decision to prosecute was therefore within the constitutional and legal mandate of the 1st respondent.

39. As to whether there is sufficient evidence to back up the decisions is an entirely different matter. Indeed, authorities abound to show that the best forum for testing the sufficiency or otherwise of evidence is the trial court itself. For instance, in Erick Kibiwott & 2 Others v Director of Public Prosecution & 2 Others [2014] eKLR it was held that:

> ...In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. In dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the *Constitution*. There mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings..."

40. Additionally, and more importantly, Article 50(1) of the Constitution provides that:

> (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

41. The essence of Article 50(1) of the *Constitution* is the concept of a fair hearing; which envisages the context of the fair hearing to be a public hearing before "...a court or, if appropriate, another independent and impartial tribunal or body..." in which the accused person is afforded all the safeguards set out in Article 50(2) of the Constitution. It is for the foregoing reasons that it is always preferable that disputes about facts, such as those raised herein by the applicant, be ventilated before the 4th respondent, which is itself a creature of the *Constitution* pursuant to Article 162 and 169 of the Constitution.

42. Thus, at paragraph 89 of the Saisi case, the Supreme Court held:

> The right to a fair hearing was broad and included the concept of the right to a fair trial as it dealt with any dispute whether it arose in a judicial or an administrative context. By refusing

to submit to the jurisdiction of the trial court where their innocence may be upheld or their guilt established, the appellants removed themselves from the protections of article 50(1) of the *Constitution*. Whatever the case, the criminal justice system was required to protect against the abuses claimed by the appellants, which the trial court was competent to resolve when challenged by an accused person, properly, during the trial.

43. In the premises, I agree entirely with the position taken in Michael Sistu Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others [2016] eKLR, that:

> The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... "

44. Regarding factual aspects of a case, such as the ones raised herein by the applicant, the Supreme Court pointed out in Saisi & 7 Others v the DPP that:

> 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.
>
> 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]

45. For the foregoing reasons, it is my considered view that the Notice of Motion dated 4th January 2024 lacks merit. The same is hereby dismissed.

**B. What orders ought to issue on costs?**

46. It is now settled that costs follow the event and are awardable at the discretion of the court. In Jasbir Singh *Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No 4 of 2012*; [2014] eKLR the Supreme Court laid the guidelines that a court must consider when exercising its discretion to either award or deny costs. The Court held:

> (18) ...the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.....
>
> (22) Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant..."

47. Accordingly, taking into account the circumstances of this case, it is hereby ordered that each party to bear own costs of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF OCTOBER 2024.**

**OLGA SEWE**

**JUDGE**