



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E284 OF 2020

BETWEEN

1. CYPRIAN NYAKUNDI

2. EMMANUEL NYAMWEYA.....PETITIONERS

AND

1. DIRECTOR OF CRIMINAL INVESTIGATIONS

2. INSPECTOR-GENERAL POLICE

3. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

AND

VICTORIA COMMERCIAL BANK.....INTERESTED PARTY

JUDGMENT

Introduction:

1. In January 2020, the Petitioners herein, *Cyprian Nyakundi* and *Emmanuel Nyamweya*, were jointly charged with others not before Court with the offence of Extortion contrary to Section 300(1)(a) of the Penal Code. That was before the *Chief Magistrates Court at Milimani in Nairobi in Criminal Case No. 144 of 2020* (hereinafter referred to as '*the criminal case*').

2. They pleaded not guilty.

3. The Petitioners later filed the Petition subject of this judgment challenging the prosecution on grounds that the evidence was illegally obtained by *entrapment*. Together with the Petition, the Petitioners also filed an interlocutory application for conservatory orders. The application was disallowed *vide* a ruling rendered on 22nd October, 2020.

The Petition:

4. The Petition is dated 17th September, 2020. It is supported by the Affidavit sworn by the 1st Petitioner herein on 17th September, 2020.

5. In the main, the Petition seeks the following prayers: -

(a) A declaration be and does issue that evidence obtained by or through entrapment violates Article 50(4) and is therefore inadmissible.

(b) An order of certiorari be and is hereby issued quashing the Respondent's decision to charge the petitioners in Milimani Criminal Case Number 144 of 2020 (Republic V Cyprian Andama & Another). In violation of the petitioner's right to a fair trial under Article 50(4).

(c) An injunction be and is hereby used prohibition prosecution of the Petitioners in Milimani Criminal Case Number 144 of 2020 (Republic Vs Cyprian Andama & another) on evidence obtained by entrapment;

(d) In the alternative the Court does issue an order declaring the evidence obtained from entrapment inadmissible;

(e) The Respondents bear the costs of this action.

6. The Petitioners also filed written submissions dated 24th November, 2020. The Petitioners prays that the Petition be allowed as prayed.

The Responses:

7. The Petition is opposed by the Respondents and the Interested Party.

8. The Respondents filed a Replying Affidavit to both the application for conservatory orders and the Petition. The Replying Affidavit is sworn by No. 85552 Cpl. Charles Odhiambo on 12th October, 2020. The Respondents also filed written submissions dated 14th December, 2020.

9. The Interested Party filed a Replying Affidavit through Yogesh Pattni, its Chief Executive Officer. The Affidavit was sworn on 7th October, 2020. It also filed evenly dated written submissions.

Issues for Determination:

10. Having carefully considered the material presented before Court by the parties including the submissions and the decisions referred to, I discern the following areas of discussion: -

(a) What entails entrapment;

(b) Whether the evidence in the criminal case was obtained by entrapment;

11. I will deal with each of the above issues.

(a) Entrapment:

12. The *Black's Law Dictionary*, 10th Edition, Thomson Reuters at page 650 defines *entrapment* as follows: -

1. A law-enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to cause a criminal prosecution against that person;

2. The affirmative defense of having been so induced.

- To establish entrapment (in most states), the defendant must show that he or she would not have committed the crime but for the fraud or undue persuasion.

13. The High Court in *Mohamed Koriow Nur vs Attorney General (2011) eKLR* relying on *R vs. Mack [1988] 2 S.C.R. 903* dealt with entrapment as follows: -

Entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bonafide inquiry, and (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and include the commission of an offence As far as possible, an objective assessment of the conduct of the police and their agents is required. The predisposition, or the past, present or suspected criminal activity of the accused, is relevant only as part of the determination of whether the provision of an opportunity by the authorities to the accused to commit the offence was justifiable. Further, there must be sufficient connection between the accused's past conduct and the provision of an opportunity, since otherwise the police suspicion will not be reasonable...

14. In *Lydia Lubanga v Inspector General of Police & 4 others [2016] eKLR*, the High Court had the following to say of entrapment: -

... The Court has defined entrapment as a situation where the officers involved whether members of the security forces or persons acting on their instructions do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is to provide evidence and institute a prosecution.

15. The parties have variously referred to several decisions on entrapment. All the decisions concur on what entrapment entails.

16. Entrapment, therefore, involves a scheme by investigators to induce someone into committing a crime and then use that evidence to prosecute the person. However, as stated in the *Lydia Lubanga* case (supra) '*... entrapment ought to be distinguished from instances where*

investigators use legitimate undercover investigation as accepted methods of police investigation.’

17. The English House of Lords in *R vs Loosey [2001] UKHL* distinguished entrapment from the limits of acceptable police conduct and investigations in the following words: -

As already noted, the judicial response to entrapment is based on the need to uphold the rule of law. A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly. Police conduct which brings about, to use the catch-phrase, state-created crime is unacceptable and improper. To prosecute in such circumstances would be an affront to the public conscience, to borrow the language of Lord Steyn in R v Latif [1996] 1 WLR 104, 112. In a very broad sense of the word, such a prosecution would not be fair.

But what is meant by 'state-created crime'? What is the legal concept underlying oft-repeated expressions such as lure, incite, or instigate? What is the distinction, of relevance in the commission of a crime, which these phrases are seeking to draw? If an undercover policeman asks a known drug supplier for drugs, is he 'luring' the unsuspecting supplier into committing a crime? If not, why not? What does 'lure' mean in this context? By what criteria is a trial judge to distinguish the acceptable from the unacceptable?

Questions such as these have generated extensive overseas judicial utterances and also academic literature, both in this country and abroad. The several suggested answers have different emphases and, to a limited extent, different practical consequences. Underlying some of the learning is the notion that expressions such as state-created crime and lure and incite focus attention on the role played by the police in the formation of the defendant's intent to commit the crime in question. If the defendant already had the intent to commit a crime of the same or a similar kind, then the police did no more than give him the opportunity to fulfil his existing intent. This is unobjectionable. If the defendant was already presently disposed to commit such a crime, should opportunity arise, that is not entrapment. That is not state-created crime. The matter stands differently if the defendant lacked such a predisposition, and the police were responsible for implanting the necessary intent.

18. Drawing from the foregoing, the test in entrapment is the **timing, nature and extent of involvement** by the investigators in a particular matter. For instance, if the investigators are at the centre-stage of the entire process, say from the inception to commission of the crime and subsequent arrest and prosecution of a victim, then depending on the nature and extent of the investigator's involvement, entrapment may be committed. It all depends on the circumstances of each case. The decision in *R vs. Mack* (supra) discussed the various parameters at length.

19. I will look at two decisions in demonstration of the foregoing. The first one is the *Lydia Lubanga* case (supra).

20. The facts in *Lydia Lubanga's* (hereinafter referred to as '*Lydia*') case were well captured by the Court as follows: -

The Petitioner is a civil servant employed by the Public Service Commission as Senior Land Valuer in the Ministry of Land and Settlement at the Kajiado Land Registry since 1st January 2006. She is in charge of all the land revenue collection assessment and valuation within the whole of the Kajiado County. Lydia averred that on 1st March 2013 while working at her offices at the Kajiado Land Registry, she was granted a sum of Kenya Shillings thirty thousand (Kshs. 30,000.00) by two land brokers called Mr. Stephen and Kasaine David both of whom were well known to her for many years, and which was meant to be an appreciation token for having previously and severally been introducing them on diverse occasions to various prospective vendors and purchasers and on successful land transactions.

However, that upon receiving the aforementioned sum of cash Kenya shillings thirty thousand (Kshs. 30,000.00) two gentlemen claiming to be officers from the Kenya Anti-Corruption unit stormed forcefully into her offices which was an open office shared by two other officers, and went straight to her unlocked drawer where they found the cash intact.

It is the Petitioner's claim that although she made attempts to explain to the said officers that the cash had been given to her by the Land Brokers voluntarily as an appreciation and hence it was not solicited nor was it received as a bribe, the said officers proceeded to dust the offices and the wad of notes smeared with chemical treatment and arrested the Petitioner and took her to Kajiado Police Station for further interrogations. The petitioner was subsequently released on a bond of Kenya shilling twenty thousand (Kshs. 20,000.00) and directed to appear in the Nakuru Anti-Corruption Court on 20th March 2013 to be charged with the offence of soliciting and receiving a bribe contrary to the provisions of section 50 of the Ethics and Anti-Corruption Act.

21. After being charged, Lydia petitioned the High Court contending that the evidence to be used in the trial was illegally obtained by entrapment. The Court in dismissing the Petition stated as follows: -

Further, that there was no entrapment in the circumstances leading to the arrest of the Petitioner for the reasons that firstly, the Petitioner had already solicited for benefit and the complainant reported the same to the commission on 28th February 2013, and the complainant availed the money on 1st March 2013 as advised by the Petitioner. Secondly, for the reason that the Petitioner was not induced or coerced by any law enforcement officer to commit a crime. And lastly, because the criminal plan did not originate from the state agents but the Petitioner herself when she solicited for a benefit from the complainant.....

In the present Petition the Respondents claim that the Petitioner had already solicited the money that she describes as a gift, and that they acted upon a complaint made by the person who was to provide the said gift. The Respondents have in addition identified the provisions of the law that create possible offences arising from the Petitioner's conduct namely section 14 of the Leadership and Integrity Act and section 50 of the Anti-Corruption and Economic Crimes Act 2003.

The Petitioner admits to knowing and receiving the said money from the said complainant, but alleges that it was not solicited but

was a token of appreciation for a successful land transaction she had completed.

In the circumstances I do not find that there was any entrapment of the Petitioner, given that she has indicated that she was a willing participant in receiving the money that is the subject matter of the criminal charges that have been instituted against her, and therefore had an intention of receiving the same. All the Respondents did in the circumstances that are said to constitute entrapment was to document the receipt of the said money, and they did not lure, incite or instigate the Petitioner in any manner to receive the said money.

22. The other case is that of **Mohamed Koriow Nur (supra)** case. The Court summarized the facts of the case as follows: -

... According to **Mr. Jeremiah Kaluma Buchianga** from Kenya Anti-Corruption Commission, he was assigned to investigate an alleged grabbing or acquiring of a piece of land LR. NO.209/16441 meant for Racecourse Primary School in Nairobi by an individual developer. On 13th March 2007 the head teacher of Racecourse Primary School **Mrs. Gitonga** sent him a document which he had earlier requested with a message that the proprietor **Northern Construction Company** wanted to meet him. He alleges that on the same day he received a call on his cell phone from a man who identified himself as Sheikh with a view to meet him in town. They agreed to meet in town but **Mr. Buchianga** equipped himself with a tape recorder to record the conversation between him and the said Sheikh. After preparing the tape recorder and all the necessary steps, **Mr. Buchianga** called **Mr. Sheikh** so that they could meet on 14th March 2007 at Hilton hotel. Together with other officers they proceeded to town and met **Mr. Sheikh** at Stanley along Kimathi Street. **Mr. Buchianga** then secretly switched on the tape recorder and began by asking Sheikh why he had called him. It was then **Mr. Sheikh** asked him to make a favourable investigation report about the acquisition so that the land could not be repossessed from him. In return for such a report he promised to do anything that was asked for. It is alleged that the agent engaged in a mock bargaining that led to settling of 1 million shillings' payable in two installments of Kshs. 500,000/= each. It was then agreed the first installment would be paid the following day. On 15th March, 2007 together with five other officers, **Mr. Buchianga** proceeded to an agreed venue with a view to arrest **Mr. Sheikh** if he bribed him as he promised the previous day. **Mr. Sheikh** who is the petitioner herein arrived at the scene and allegedly gave a brown A4 size envelope which contained Kshs. 500,000/=. He was promptly arrested and charged with three counts namely;

..... It is the Petitioner's case that in mid-March 2007 he received several calls from a gentleman who introduced himself as **Buchianga** who stated that he was an investigator with Kenya Anti-Corruption Commission. It is contended that the said officer informed the Petitioner that he was carrying out an investigation with respect to the allocation of the land adjacent to Racecourse Primary school. The said agent insisted that the petitioner must meet him, otherwise he would write his investigation report in such a manner as to implicate him in alleged fraud and in acquisition of the land. **Mr. Buchianga** further intimated to the petitioner that his report was dependant was whether the petitioner reached an agreement with him or not. As a result, the petitioner met with **Mr. Buchianga**. It was then that **Mr. Buchianga** turned the conversation in the direction of performance and reward when he talked of what he could do for the Petitioner. The said officer also confirmed to the petitioner that what he proposed to do did not constitute an offence and that he would not be charged.

23. **Mohamed Koriow Nur was accordingly charged. He petitioned the High Court on the ground that the evidence was obtained illegally by entrapment. In allowing the Petition, the Court had the following to say: -**

Essentially, entrapment is a complete defence and it does not matter that the evidence against the person is overwhelming or that his guilt was undisputed. The court must refuse to convict an entrapped person not because his conduct falls outside the proscription of the statute but because even if his guilt is admitted, the methods and manner employed on behalf of the State to bring about the evidence cannot be countenanced.

In law, entrapment is viewed as a type of lawlessness by law enforcement officers. It is a substitute for skillful and scientific investigations. It is a tactic which is rationalized under the theory that the end justifies the employment of the illegal means. Entrapment occurs if the action or the omission of the investigating officer in dealing with a person would likely have induced a normally law-abiding citizen to commit a crime which he would not have committed if the normal and the requisite warning was administered. Because entrapment usually depends on the conduct of the State agent, the courts will not take into account the defendant's conduct, character, intent or criminal history. In doing so, the court must address itself to the various surroundings and peculiar circumstances such as transactions, receding the offence, the suspect's response to the inducement, the gravity of the offence and the difficulty of detecting the commission of certain crimes.

.....

In determining whether entrapment occurred, it is important to analyze and scrutinize how much and what manner of persuasion, pressure and cajoling was brought to bear by the law enforcement agent to induce persons to commit crime.

I agree that there are occasions when it is necessary for the police to resort to investigatory techniques in which the police themselves are the reporters and the witnesses of commission of a crime. Sometimes the particular techniques adopted is acceptable, sometimes it is not. For even when the use of these investigatory techniques is justified, there are limits to what is acceptable. All in all, in order to bring the evidence collected within the inhibition clause, it must be shown, not only that, the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement but also that he was compelled to make the statement. What is clear is that the State agent conditioned the mind of the applicant to some extraneous process as to render the making of the conversation involuntary and therefore extorted and distorted. The police must understand and appreciate that each individual by virtue of his guaranteed dignity, has a right to a private enclave, where he may lead live without overbearing investigatory invasion or even crypto-coercion administered against him. That is basic or minimum guarantee afforded to all persons in our Constitution.

.....

*Taking into consideration the above factors, this court concludes that the actions and conduct of **Mr. Buchianga** went beyond those of undercover agent because he instigated the offence and that there is nothing to suggest that without his intervention and participation, the offence would have nevertheless been committed.*

24. The two decisions emphasize the *test of timing, nature and extent of involvement* by the investigators in a particular matter.

25. In the *Lydia Lubanga's case*, the investigators only came into the picture after Lydia had solicited the bribe. Their role was to equip the complainant with the tape recorder for purposes of gathering evidence. The investigator then arrested Lydia. On the contrary, in the **Mohamed Koriow Nur's case**, the investigator was at the centre of the entire ordeal. He is the one who reached out to the victim, had discussions, led the victim to believe that the investigator will make a favourable report, assured the victim that the engagement did not constitute any crime, agreed to receive the money from the victim, actually received the money and then the investigator immediately arrested the victim and charged him.

26. Whereas there is ample evidence that Lydia intended to commit the crime of soliciting and receiving a bribe and that Lydia would nevertheless have committed the offences even without the involvement of the investigators, that is not the case with **Mohamed**. There was no evidence that without the involvement of the investigator still there was an opportunity and the intention for Mohammed to commit the crime. In the Mohammed case, the investigator was at the very centre of the matter and took an active role in inducing and luring the victim into committing the offence. That amounted to entrapment.

27. Before coming to an end of this discussion, I will briefly look at the effect of evidence obtained by entrapment in a trial. The above twin decisions were, rightly so, clear on the matter. There was concurrence that evidence obtained by entrapment amounts to an infringement of the victim's various rights and fundamental freedoms as guaranteed in the Constitution. It is, indeed, an affront of the Constitution on the part of the perpetrators.

28. The Court in the *Lydia Lubanga case* (supra) was categorical, and as follows: -

The constitutional issues raised by entrapment normally relate to various rights. The right to privacy is one of those right as entrapment would most probably also give rise to a criminal charge which exposes the person entrapped to unwarranted and undesirable publicity and societal ridicule. Another right normally affected is the right to personal liberty as entrapment entails either the coercion or inducement of an individual to a course of action he would not otherwise have chosen: the commission of an offence. The right to dignity is the third right that is affected by entrapment whereby the sole aim of entrapment is that of exposing an individual to the sanction of the criminal law and to societal shame and embarrassment that comes with a criminal conviction.

Lastly, since entrapment is an unfair method of police investigation, it is a violation of the right to fair trial because the entrapped accused ought not to have been prosecuted at all. In addition, conviction on the basis of evidence obtained through entrapment is a violation of an accused's right to have evidence obtained in violation of a constitutionally guaranteed right excluded because such evidence will render the trial unfair.

29. Therefore, a trial solely based on evidence obtained through entrapment is not sustainable in law. In such a case, entrapment is a complete defence.

(b) Whether the evidence in the criminal case was obtained by entrapment:

30. I will now deal with the facts in this case.

The Petitioners' case:

31. The 1st Petitioner herein, *Cyprian Nyakundi*, describes himself as a blogger with interest in politics, governance, corporate-fraud and human-interest stories.

32. In this matter, the 1st Petitioner describes his twin ordeals with the Respondents. The first encounter was how the police attempted to charge him over a complaint laid by one *Harish Mawjee* sometimes on 23rd November, 2019. The complaint was in respect of a blog the 1st Petitioner had published in his website.

33. Investigations were commenced and led by No. 85552 *Cpl. Charles Odhiambo*. The police wrote to the Communications Authority of Kenya for the preservation of the blog page. On 22nd November, 2019 the 1st Respondent herein, the Director of Criminal Investigations (hereinafter referred to as '**the DCI**'), prepared a charge sheet against the 1st Petitioner. The charges were *criminal defamation* under Section 194 of the Penal Code and *publication of false information* contrary to Section 23 of the Computer Misuse and Cybercrimes Act, 2018. The charges were presented to the 3rd Respondent herein, the Director of Public Prosecutions (hereinafter referred to as '**the DPP**').

34. The DPP however declined to approve of the charges pursuant to conservatory orders in **Nairobi High Court Constitutional Petition No. 206 of 2018 Bloggers Association of Kenya vs. The Hon. Attorney General** and the judgment in **Alai vs. The Hon. Attorney General (2016) eKLR**.

35. There was the second ordeal. The 1st Petitioner further deponed that he published a blog in his website concerning the Chief Executive

Officer to the Interested Party on 3rd January, 2020. As a result, the Chief Executive Officer to the Interested Party contacted one *Dharmesh Shah* about the blogs. Dharmesh then contacted one *Nuri Akasha* requesting him to establish contact with and to initiate a meeting with the 1st Petitioner.

36. On 9th January, 2020 Nuri contacted the same Cpl. Charles Odhiambo who had investigated the first complaint '*seeking advice on the way to go about the whole issue*'. The DCI advised Nuri to get the 1st Petitioner on board so as to know the rationale behind the continued blogging on issues which were not factual.

37. On 10th January, 2020 the DCI contacted a Standard Group journalist one *Nicholas Asego* whom the 1st Petitioner knew so as to get the 1st Petitioner '*on the table*'. The said Asego was to introduce the 1st Petitioner to the officials of the Interested Party. The DCI informed Asego that they had planned a discreet operation and that the DCI would not like to get involved.

38. The Petitioners aver that the DCI then obtained number 0719 117 815 from the said Asego as the number that should be used to contact the 1st Petitioner. The DCI later had a meeting with Nuri and shared the number. In the meeting, it was agreed that one Sammy should be the only one to talk to the 1st Petitioner throughout the operation.

39. On 12th January, 2020 Nuri and Sammy invited the 1st Petitioner to a meeting with Dharmesh. The meeting was held. At the meeting the 1st Petitioner was informed that Dharmesh had been sent to represent the officials of the Interested Party. Dharmesh told the 1st Petitioner that he had been requested by the Interested Party to appeal to him to stop blogging about the Interested Party. Dharmesh also told the 1st Petitioner that he had been sent to know how much money he needed to pull down the publications on the Interested Party and to stop any such further publications. The 1st Petitioner was to pass his response to Nuri.

40. Nuri and Sammy then engaged the 1st Petitioner on the amount of money the 1st Petitioner needed to pull the blog down. The 1st Petitioner intended to pull out of the discussion. He gave them an astronomical figure of Kshs. 30,000,000/=. Nuri and Sammy then haggled the 1st Petitioner with a view to make the 1st Petitioner believe that it was a genuine transaction.

41. The 1st Petitioner then gave the figure of Kshs. 20,000,000/= which on further negotiations he lowered to Kshs. 17,500,000/=. There was, however, a condition that the 1st Petitioner was to meet the Directors of the Interested Party so that the 1st Petitioner would believe that Nuri and Sammy were dealing on behalf of the Directors of the Interested Party.

42. The Petitioners further deponed that after Nuri and Sammy pleaded with him to pay the Kshs. 17,500,000/= another meeting was scheduled for 13th January, 2020. The meeting did not materialize. On 15th January, 2020 the 1st Petitioner, in his usual duties, published another blog on the Interested Party.

43. After a lot of effort, it is deponed, the DCI through Sammy set up another meeting for 16th January, 2020. The 1st Petitioner accepted to meet the Directors at the Interested Party's Westlands Branch at Fortis Towers.

44. There was another such meeting which was scheduled for 17th January, 2020 at the same venue. The 1st Petitioner attended.

45. The 1st Petitioner avers that he attended the meeting and later knew that the DCI had set up the boardroom with secret cameras. At the meeting the 1st Petitioner declined to negotiate the figure downwards. A Director of the Interested Party then informed the 1st Petitioner that the amount would be staggered as it was big. Payment was to be made on 20th January, 2020 by the Chief Executive Officer of the Interested Party.

46. The 1st Petitioner further aver that the DCI through its agents asked the Interested Party to prepare and serialize an amount of Kshs. 1,000,000/= for the operation. The instructions were complied with.

47. On 20th January, 2020 Nuri and Sammy laid an ambush and had the CEO one Yogesh Pattni deliver the cash contained in a small black shopping bag to the 1st Petitioner on the 3rd Floor of Westgate Shopping Mall immediately before the Petitioners were arrested.

The Respondents' case:

48. The Respondents opposed the Petition. They relied on a Replying Affidavit sworn by one No. 85552 Cpl. Charles Odhiambo (hereinafter referred to as '**Cpl. Odhiambo**'), the Investigating Officer in the criminal case. He is attached to the DCI at Gigiri in Nairobi. The affidavit was sworn on 12th October, 2020 and it was in response to both the application and the Petition.

49. Cpl. Odhiambo deponed that he was instructed by his seniors to investigate a complaint against the 1st Petitioner over stories he had published in a blog in his website. That was in October 2019. He confirmed the existence of the said stories. He initiated investigations into the complaint. The officer then recorded statements from potential witnesses. The witnesses informed him that the stories were malicious, false and defamatory and were solely intended at tarnishing their image and that of the Interested Party.

50. The officer successfully sought the preservation of the stories on the blog from the Communications Authority of Kenya. He also sought for a forensic report on the concerned website.

51. It is further deponed that the investigations partially revealed an intricate web of rivalries and resulted to one Harish Ramniklal being

charged with threatening to kill the father of the Chief Executive Officer of the Interested Party. The investigations further revealed a connection between the said Harish Ramniklal and the Petitioners as some photographs of one Azmina Pattni, the wife of the said Chief Executive Officer of the Interested Party, which were taken by the said Harish Ramniklal at a private function without the consent of Azmina Pattni found their way to the 1st Petitioner's impugned blog. On further investigations Cpl. Odhiambo was satisfied that there was a defined connection between the Petitioners and the said Harish Ramniklal. He then sought warrants of arrest against the three. Cpl. Odhiambo however dropped the intended charges on advise of the DPP.

52. On 9th January, 2020 Cpl Odhiambo was called by one Nuri Akasha (hereinafter referred to as '*Nuri*') whom he had previously dealt with when he was investigating the first complaint. He was informed that other ill-intended blogs had been published on the same website about the Chief Executive Officer of and the Interested Party. He was further informed that one Dharmesh Shah, the Interested Party's Liaison Officer, had advised Nuri Akasha to establish contact with the 1st Petitioner and organize for a meeting with a view of amicably settling the matter.

53. Cpl. Odhiambo vouched the proposed amicable resolve of the matter. He advised Nuri that the best way out was '*for the 1st Petitioner to be brought to the table.*' Cpl. Odhiambo then introduced Nuri to a journalist, one Asego, who worked with the Standard Group in a bid to get the parties together. Asego was a friend to Cpl. Odhiambo.

54. Asego then gave Cpl. Odhiambo a Cell number 0719 117 815 as the number to be used to contact the 1st Petitioner. The number belonged to the 2nd Petitioner who was the 1st Petitioner's personal assistant. Cpl. Odhiambo relayed the number to Nuri.

55. Cpl. Odhiambo then informed those whom he then dealt with that he was not going to be involved in any other way in the discussions over the matter. He also deponed that by then he never foresaw the possibility of demand for money by any of the parties. He was also not sure if the parties will eventually meet and discuss the matter.

56. It is further deponed that the police were updated of the progress of the discussions. The discussions later settled on a demand by the 1st Petitioner that unless he was paid Kshs. 17,500,000/= he was not ready to in any way stop his publications on the Interested Party.

57. Cpl. Odhiambo then deponed that on receipt of the said information and on the basis of the complaint which had been made by the Chief Executive Officer of the Interested Party on the 1st Petitioner's extortionist attempts, the investigators had to pursue the matter in view of the criminal intent on the part of the Petitioners. The police were only involved from such a time and to that extent.

58. The police advised the complainant on how to handle the aspect of the money which was to be handed over to the Petitioners as a down-payment. The amount was Kshs. 1,000,000/=. The police also set up secret cameras at the venue where the parties were to meet and the payment effected. The parties then availed themselves at the venue. The Petitioners, after receiving the money, were arrested and subsequently charged.

59. According to the Respondents, they acted within the law in discharging their duties in the matter. They denied any wrong-doing and deponed that the investigations followed due process as the police were duty-bound to protect the rights of the complainants and uphold the rule of law. The Respondents described the issue of entrapment as '*far-fetched and have no basis*'.

The Interested Party's case:

60. The Interested Party joined hands with the Respondents in opposing the Petition. It relied on a Replying Affidavit sworn by *Yogesh Pattni*, the Chief Executive Officer of the Interested Party, on 7th October, 2020.

61. *Yogesh Pattni* deponed in detail how he dealt with the Petitioners in their extortion plot against the Interested Party and himself. He was categorical that the Petitioners were out to extort from him and that he made a complaint to the police. He was accordingly guided by the police on the issue of how the amount of Kshs. 1,000,000/= was to be handed over to the Petitioners. He, instead, expounded that the dealings between the Petitioners and the Interested Party did not involve the police until when the extortion scam arose.

62. It is deponed further that the police undertook independent investigations and recorded statements from witnesses. *Yogesh* wondered how the allegation of entrapment came about. He also deponed that the right of the Petitioners to fairly defend themselves in the criminal case had never been infringed in anyway.

Is entrapment demonstrated?

63. The facts and events in this matter are largely not disputed. I shall, hence, juxtapose the facts against *the test of timing, nature and extent* of involvement by the investigators.

64. Cpl Odhiambo was the investigating officer in respect of the two complaints laid against the Petitioners. Both complaints were in respect of the 1st Petitioner's blog.

65. Cpl Odhiambo admits to have been called by Nuri and was informed about the blogging by the 1st Petitioner about the Interested Party. Nuri sought the advice of Cpl. Odhiambo on how to handle the whole issue. According to the record, by then, no formal complaint had been made to the police about the blogging by the Interested Party or its Chief Executive Officer.

66. It is Cpl. Odhiambo who gave the advice. To him, the 1st Petitioner was to be '*brought to the table.*' Cpl. Odhiambo then came up with

the way forward. It was him who linked up the Interested Party and the Petitioners through his friend Asego. He got in touch with Asego and obtained a cellphone number which he transmitted to Nuri for the purposes of Nuri getting in touch with the 1st Petitioner.

67. Cpl Odhiambo was emphatic that after the link up, he did not want to get involved in the matter further. (See paragraph 21 of the Replying Affidavit). However, from the reading of the Replying Affidavit of Cpl. Odhiambo, it seems there were sustained and active interactions between Cpl. Odhiambo and Nuri, and the rest. I say so because, the record does not state when the complaint was made to the police and, more seriously, how the police knew about the meetings between the parties leading them to set up the secret cameras. Cpl. Odhiambo conveniently avoids such crucial details in his response under oath.

68. It must not be lost that Cpl. Odhiambo was the same investigator in respect of the first complaint. He had made up his mind to charge the Petitioners. It was only the DPP who objected to the charges. The same Cpl. Odhiambo took up the matter involving the Interested Party and the Petitioners even before a formal complaint was made to the police. He advised Nuri 'to avail the 1st Petitioner to a table'. He went further and organized for how the 1st Petitioner will be 'brought to the table'. There is no doubt that Cpl. Odhiambo, being an experienced officer, foresaw the possibility and the opportunity to eventually arrest and charge the Petitioners. He utilized it.

69. The question which now begs an answer is whether the Petitioners would still have committed the offence had it not been the intervention of the police. To answer this question, I will look at the conduct of the Petitioners and the other players right from the first encounter with the police.

70. The first time the Petitioners encountered Cpl. Odhiambo is clear. It was after a complaint had been lodged to the police and the matter formally assigned to Cpl. Odhiambo to carry out investigations. The officer carried out the investigations until he made up his mind to prefer some charges against the Petitioners. There is no evidence that Cpl. Odhiambo had prior dealings with the complainants in respect of the first complaint. There is, as well, no evidence that the Petitioners in any way attempted to extort the complainant. The 1st Petitioner is the same person who put up the blog which resulted to the first complaint. The Petitioners did not make any attempts whatsoever to reach out to the complainants with a view of discussing the matter in any way.

71. The second encounter is a complete converse. Cpl. Odhiambo took it upon himself to deal with the matter long before a formal complaint was laid to the police. He gave out advice on how to 'get the 1st Petitioner to the table'. When the 1st Petitioner availed himself as foreplanned, it was not the 1st Petitioner who sought for money from the agents of the complainants. The evidence is clear that the offer was made by the agents of the complainants. They are the ones who offered to give the 1st Petitioner money to pull down the blog. The 1st Petitioner gave them an outrageous figure just to put them off. The complainants haggled to make the matter appear genuine. There is no evidence that the Petitioners sought for the agents of the complainants even after their first meeting. All further and sustained efforts to get to the Petitioners were undertaken by the agents of the police and the complainants.

72. There is, therefore, no evidence suggesting that the Petitioners would still have committed the offence had it not been the enormous effort of the police and their agents which agents were also the agents of the complainants. In essence, had it not been Cpl. Odhiambo advising, linking up Nuri with the Petitioners and being firmly behind the whole encounter, there is no evidence that the Petitioners would have nevertheless taken any steps to commit the offence. The whole ordeal was masterminded by Cpl. Odhiambo.

73. The upshot is that the DCI was at the centre of the whole matter. It took an active role from the inception to the arrest of the Petitioners. It is clear that the DCI intended to entrap the Petitioners right from the time Cpl. Odhiambo got involved in the matter long before a formal complaint was laid to the police. What other interest did Cpl. Odhiambo have in the matter apart from fixing the Petitioners? Why is it that Cpl. Odhiambo did not advise Nuri to first formally report the matter to the police before he got himself involved? And, many other questions go unanswered.

74. The conduct of the police, therefore, variously infringes **Article 10** of the Constitution (to the extent that they contravened the rule of law), **Article 157(11)** (for disregarding public interest, acting against the interests of the administration of justice and failure to prevent and avoid abuse of Court process) and **Article 244** of the Constitution (to the extent of failing to uphold the objects of the National Police Service).

75. In this case, the involvement of the police went far beyond the **limits of acceptable police conduct and investigations and right into the realm of entrapment.**

Conclusion:

76. I have gone through the investigation diary and the witness statements in this matter. All the evidence intended to be relied on by the prosecution in the criminal case is on the entrapment. Without such evidence, there is no other evidence to support the charge preferred against the Petitioners.

77. In the circumstances of this matter, the entrapment is a complete defence.

Disposition:

78. From the foregoing discussion and conclusions, the upshot is that the Petition dated 17th September, 2020 is determined as follows: -

(a) A declaration hereby issue that any evidence obtained through entrapment violates Article 50(4) of the Constitution.

(b) A declaration hereby issue that the evidence intended to be adduced in Milimani Chief Magistrates Court Criminal Case

No. 144 of 2020 (Republic vs. Cyprian Andama & Another) was obtained through entrapment and as such that evidence violates Article 50(4) of the Constitution.

(c) An order of *Certiorari* be and hereby issue quashing the decision by the Respondents to charge the Petitioners in Milimani Chief Magistrates Court Criminal Case No. 144 of 2020 (Republic vs. Cyprian Andama & Another) on the basis of the evidence obtained through entrapment.

(d) An order of *Prohibition* be and hereby issue prohibiting the prosecution of the Petitioners in Milimani Chief Magistrates Court Criminal Case No. 144 of 2020 (Republic vs. Cyprian Andama & Another) on the basis of the evidence having been obtained through entrapment.

(e) There shall be no order as to costs.

DELIVERED, DATED and SIGNED at NAIROBI this 11th day of March, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Ochiel Dudley, Counsel for the Petitioner.

Miss. Marinda, Counsel for the Respondents.

Mr. Koech, Counsel for the Interested Party,

Elizabeth Wambui – Court Assistant