



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 29 OF 2018**

**(AS CONSOLIDATED WITH PETITION NO. 28 OF 2018)**

**GRACE DOLA.....1<sup>ST</sup> PETITIONER**

**ANITA NJERI MWAKA.....2<sup>ND</sup> PETITIONER**

**-VERSUS-**

**THE DIRECTOR, DIRECTORATE**

**OF CRIMINAL INVESTIGATIONS.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

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

**JUDGEMENT**

1. The 1<sup>st</sup> Petitioner, Grace Dola, is a spouse to Enow Bisong one of the subjects of this petition. At the time of the institution of these proceedings their daughter was aged three years.
2. The 2<sup>nd</sup> Petitioner, Anita Njeri Mwaka, is a spouse to Etah Ako Fidel, another subject of these proceedings. When the petition was filed they had three children aged between 8 and 22 years.
3. The petitioners brought this petition on behalf of their spouses (Enow Bisong and Etah Ako Fidel) and Ethan Stanley Akomara, Eric Ouafo Tchunouneneu, Ateba Armand Mboge, Loha Nogha Serge and Emmanuel Abunaw Effiong pursuant to the authority donated by Article 258 of the Constitution as the subjects of the petitions were detained at the time of filing this petition.
4. The 1<sup>st</sup> Respondent is the Director of the Directorate of Criminal Investigations which derives its mandate from Article 247 of the Constitution and the National Police Service Act 2011 which establishes the Directorate as an organ of the National Police Service.
5. The 2<sup>nd</sup> Respondent, the Director of Public Prosecutions, exercises prosecutorial authority in line with Article 157 of the Constitution.
6. The 3<sup>rd</sup> Respondent is the Director of Immigration and is responsible for among other functions the entry of foreigners and their exit from Kenya as provided in the Kenya Citizenship and Immigration Act, 2011.
7. This judgement is in respect of two petitions both dated 25<sup>th</sup> January, 2018 and filed on 26<sup>th</sup> January, 2018. The petitions are supported by affidavits sworn on the date of the petitions by the respective petitioners. By an order issued on 26<sup>th</sup> January, 2018 by Mativo, J in Petition No. 28 of 2018, the two petitions were consolidated with Petition No. 29 of 2018 being designated the lead file. The 1<sup>st</sup> Petitioner amended her petition on 27<sup>th</sup> March, 2018.
8. Through the petition dated 25<sup>th</sup> January, 2018, the 1<sup>st</sup> Petitioner seeks the following reliefs:

a) A declaration that the arrest on 17<sup>th</sup> January 2018 and detention of the subjects, namely Ethan Stanley Akomara, Etah Ako Fidel, Eric Ouafu Tchunouneneu, Ateba Armand Mboge, Enow Bisong, Loha Nogha Serge and Emmanuel Abunaw Effiong was illegal, unlawful and unjustified;

b) A declaration that the said subjects are by law entitled to due process if any one or all of them are to be removed or deported from Kenya against their will;

c) An Order do issue to the Respondents by themselves or any other person or agency claiming authority under them restraining the removal or deportation of the subjects from Kenya without lawful and due process;

d) An Order to issue to the Respondents, jointly and severally or through their agents or officers claiming authority under them to release the passports or other identification documents to:- Etah Stanley Akomara (Ghanaian PP 0518792, Eta Ako Fidel (Ghanaian PP No. G1337171), Erick Ouafu Tchunouneneu (Kenya Alien ID No. 870370-Cameroonian), Ateba Armand Mbonge (Police Abstract following loss of PP-Cameroonian), Enow Bisong (Cameroonian PP No. 0398529), Loha Nogha Serge (Cameroonian) and Emmanuel Abunaw Effiong (Nigerian PP No.A06393249) or their Advocate on record;

e) An Order do issue that the Respondents, jointly and severally or their agents or officers claiming authority under them to return all the mobile phones and their sim cards, computers and all other documents taken away to the respective owners;

f) An Order that this Petition being brought in good faith and in favour of persons who couldn't bring it by themselves, the costs therefor be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally.

9. In the amended petition of the 1<sup>st</sup> Petitioner prayer (d) is amended to read as follows:

**An Order do issue declaring that the defacing of the subjects' passports inter alia; Etah Stanley Akomara (Ghanaian PP 0518792), Eta Ako Fidel (Ghanaian PP No. G1337171), Erick Ouafu Tchunouneneu a Cameroonian (Kenya Alien ID No. 870370-Cameroonian), Enow Bisong (Cameroonian PP No. 0398529), Loha Nogha Serge(Cameroonian) and Emmanuel Abunaw Effiong (Nigerian PP No. A06393249), through markings and/or stamping incomprehensible to the Petitioner or the subjects, and without any justifiable reason/cause is irregular and unlawful; thus ineffectual.**

An additional prayer seeking general/exemplary damages is also introduced.

10. Through Petition No. 28 of 2018 dated 25<sup>th</sup> January, 2018, the 2<sup>nd</sup> Petitioner seeks the following reliefs:

a) **An Order of Certiorari to remove to this Honourable Court to be quashed the ruling/order of the 4<sup>th</sup> Respondent in Chief Magistrate's Court Miscellaneous Criminal Application No. 187 of 2018 dated 18<sup>th</sup> January, 2018 allowing the continued detention of the Interested Party upon the application of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents following the arbitrary arrest and detention of the Interested Party on 17<sup>th</sup> January, 2018 on unreasonable, unsubstantiated, unfounded and baseless claims/allegations on alleged dealings in the trade of gold.**

b) **An Order of Prohibition to prohibit the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acting either in person or through servants, agents, police officers, employees or anyone else claiming to derive such authority from the said Respondents, from arbitrarily arresting, detaining, harassing and/or deporting the Interested Party or in any manner whatsoever curtailing/impeding the Interested Party's liberty with regard to the matters herein;**

c) **An Order of Mandamus compelling the 2<sup>nd</sup> Respondent to forthwith release the Interested Party from continued detention;**

d) **An Order of Declaration declaring that the action of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in arbitrarily and discriminatorily arresting and detaining the Interested Party without any just, lawful and reasonable cause is in violation of the law and rights and fundamental freedoms of the Interested Party, his security of the person and protection accorded him by the law; and contrary to fair administrative action.**

11. The crux of the 1<sup>st</sup> Petitioner's case is that although she acknowledges the authority of the 1<sup>st</sup> Respondent to investigate the subjects, that power should be exercised within the law. Further, that the threat to deport the subjects without justifiable grounds amounts to abuse of the legal process and violation of their rights and fundamental freedoms under Article 50 of the Constitution.

12. The 1<sup>st</sup> Petitioner's case is that on 17<sup>th</sup> January, 2018 officers from the Nairobi County Criminal Investigations Directorate arrested her husband and the other subjects without informing them of the reason for their arrest which was in violation of Article 49 of the Constitution. The officers further violated the subjects' right to privacy and dignity by compelling them to disclose their Personal Identification Numbers (PIN).

13. It is the 1<sup>st</sup> Petitioner's averment that the subjects were presented before the Chief Magistrate's Court at Milimani on 18<sup>th</sup> January, 2018 vide **Miscellaneous Criminal Application No.187 of 2018**. The 1<sup>st</sup> Petitioner states that the application for the pre-trial detention orders, as supported by the affidavit of Police Constable Anthony Murigi, alleged that the subjects were being investigated for the offence of obtaining money by false pretenses. It is averred that although the application was allowed, the subjects were not given an opportunity to prepare their responses and get legal representation. It is thus the 1<sup>st</sup> Petitioner's case that the matter was not subjected to the provisions of Article 50(1)

of the Constitution.

14. The 1<sup>st</sup> Petitioner avers that on 25<sup>th</sup> January, 2018 she received information through the letter Ref CID/SEC/2/9/4/130 dated 22<sup>nd</sup> January, 2018 addressed to the Director of Immigration requesting for the deportation of the subjects to their home countries for allegedly operating cartels and conning people both locally and internationally. It is her case that the reasons presented in support of the request for deportation were different from those presented to the Court in support of the application for pre-trial detention orders. She therefore avers that the deportations were intended to be done without following due process as required by the Constitution and the relevant laws.

15. The 1<sup>st</sup> Petitioner avers that the power and mandate to order removal of an alien from Kenya under the Kenya Citizenship and Immigration Act, 2011 is bestowed upon the Cabinet Secretary who works through the Department of Immigration and not the National Police Service. It is her case that deportation of any of the subjects should be done in compliance with due process as they are lawfully in Kenya.

16. In support of her case, the 1<sup>st</sup> Petitioner exhibited the application dated 18<sup>th</sup> January, 2018 for pre-trial detention orders together with the affidavit sworn in support thereof by Police Constable Anthony Muriigi of Nairobi County Criminal Investigations Department, and the letter Ref. No. CID/SEC/2/9/4/130 dated 22<sup>nd</sup> January, 2018 addressed to the Director of the Department of Immigration by the Director of the Directorate of Criminal Investigations.

17. On her part, the 2<sup>nd</sup> Petitioner avers that Etah Ako Fidel is her husband and a foreign national who moved to Kenya in 1999. It is her case that her husband is a legitimate businessman with a valid work permit in the music industry in Kenya and also a director of Layoa Company Limited which he jointly owns with her. Additionally, that they operate another joint business called Melwood Group of Companies dealing with music production and related services.

18. The 2<sup>nd</sup> Petitioner avers that on 17<sup>th</sup> January, 2018 her husband was arrested by the 1<sup>st</sup> Respondent's officers on allegation that he was engaged in illegal gold trade. The police officers thereafter took him to Kileleshwa Police Station before proceeding to his offices which are located at Kileleshwa. They conducted a thorough search of the premises and arrested all the 16 occupants of the premises made up of 9 Kenyans and 7 foreign nationals. It is deposed that the Kenyans were released from custody on the same day but the foreigners remained in custody without any just cause. The 2<sup>nd</sup> Petitioner asserts that there was bias against the foreign nationals which was unlawful.

19. According to the 2<sup>nd</sup> Petitioner, on 18<sup>th</sup> January, 2018 her husband and the other foreign nationals were arraigned in the Chief Magistrate's Court at Milimani without any information and opportunity to have legal representation. It was alleged that they had obtained money by false pretenses contrary to what her husband was told during his arrest. Following the arraignment, the 1<sup>st</sup> Respondent was granted permission to detain the subjects for ten days to enable the investigators conclude investigations.

20. Additionally, the 2<sup>nd</sup> Petitioner states that her husband may be maliciously subjected to unwarranted prosecution or unlawful deportation to Ghana which will result in irreparable consequences to his businesses, health and family. Likewise, the threatened deportation if actualized will deny her husband entry back into the country without any just cause in violation of the law, his rights and fundamental freedoms, and contrary to fair administrative action.

21. In support of the petition, the 2<sup>nd</sup> Petitioner exhibited copies of the 1<sup>st</sup> Respondent's application dated 18<sup>th</sup> January, 2018 for the pre-trial detention order, her national identity card, her husband's passport, their marriage certificate, their children's birth certificates, and the registration certificate for Layoa Company Limited.

22. In their amended petition dated 27<sup>th</sup> March, 2018 the petitioners reiterated the contents of their individual petitions. In addition, they aver that they were apprehensive that the subjects upon release from custody could still be subjected to unwarranted and malicious prosecution or unlawful and arbitrary deportation from Kenya due to the fact that their passports, which were released on 27<sup>th</sup> February, 2018, had, without any justifiable cause, been defaced with markings and stampings that were incomprehensible to them and the subjects. According to the petitioners, the respondents' objective was capricious, discriminatory, in bad faith and only intended to harass, intimidate and interfere with the subjects' peaceful enjoyment of their rights.

23. The record reflects that the only pleadings filed by the respondents in this suit in response to the petition are the 2<sup>nd</sup> Respondent's grounds of opposition dated 4<sup>th</sup> April, 2018. It is necessary to note that the respondents were served severally as evidenced by the numerous affidavits of service on record. They were also directed by the Court on several occasions to respond to the petitioners' pleadings.

24. The 2<sup>nd</sup> Respondent's grounds of opposition are:

**1) Under Article 157(10) of the Constitution and Section 6 of the Office of the Director of Public Prosecutions Act (2013) the 2<sup>nd</sup> Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.**

**2) The orders sought are not tenable against the 2<sup>nd</sup> Respondent as the Applicant does not show how the 2<sup>nd</sup> Respondent has a duty in the matter raised. The 2<sup>nd</sup> Respondent additionally was within the law when they sought for detention orders in Chief Magistrate's Court Miscellaneous Criminal Application No.187 of 2018 in order for the 1<sup>st</sup> Respondent to complete investigations. When investigations did not reveal an offence against the Petitioner, the application was withdrawn.**

**3) Section 24 of the Police Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.**

4) Investigations were being carried out in good faith without violating any rights and as such the Petitioners have failed to demonstrate that the 2<sup>nd</sup> Respondent has violated any of his rights as enshrined in the Constitution while in fact they took all steps to ensure that the administration of justice has been served.

5) That the Petitioner has not demonstrated that in making the application for detention orders in the subordinate court either the Director of Public Prosecutions or any member of staff of the Office of the Director of Public Prosecutions acted without or in excess of the powers conferred upon them by the law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the forgoing provisions of the Constitution of Kenya 2010 or any other provision thereof.

6) The Amended Petition is misconceived, frivolous, vexatious as the Petitioners have not demonstrated how the 2<sup>nd</sup> Respondent acted illegally, unreasonably, ultra vires and/or contrary to natural justice.

7) It is in public interest and the interest of justice that perpetrators of crimes are investigated and/or prosecuted.

8) The Amended Petition is without merit.

25. The petitioners filed joint written submissions dated 11<sup>th</sup> March, 2019. The first issue identified by the petitioners is whether they have *locus standi* to bring this petition. It is the petitioners' case that they have the necessary *locus standi* to file this suit by virtue of Article 3 of the Constitution which enjoins all persons to respect and uphold the Constitution. Additionally, that Articles 22 and 258 of the Constitution entitles everyone to institute court proceedings claiming the Constitution has been contravened or threatened with violation.

26. The next issue identified for the determination of the Court by the petitioners is whether the respondents violated and continue to violate the petitioners' and the subjects' rights as a result of the arrest and detention of the subjects on 17<sup>th</sup> January, 2018. On this issue, it is the petitioners' submission that the Bill of Rights applies to all persons including foreign nationals and any decision that is bound to affect rights must be made in conformity with the constitutionally guaranteed right to fair process. Further, that all persons are entitled to basic human rights which are also protected by the human rights treaties ratified by Kenya.

27. The petitioners submit that even though one of the subjects, Ateba Armand Mboge, was charged with a criminal offence in **Miscellaneous Criminal Application No.187 of 2018**, he is entitled to a fair trial process and that the criminal charges should not be a reason for deportation as he is innocent until proven guilty.

28. The petitioners contend that the intended deportation of the subjects from Kenya by 3<sup>rd</sup> Respondent, with the assistance of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, disregards the laid down procedure under Section 49(8) of the Kenya Citizenship and Immigration Act, 2011. This, they aver, is unlawful and will violate the subjects' rights. The argument is supported by the decision in **Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others [2017] eKLR**.

29. The petitioners argue that Article 13 of the International Covenant on Civil and Political Rights (ICCPR) and Article 12(4) of the African Charter on Human and Peoples' Rights (ACHPR), which are operational in Kenya by virtue of Article 2(6) of the Constitution, give a right of entry to aliens. It is acknowledged that although State Parties have the right to remove any alien for compelling reasons for national security such removal should be done in accordance with the law.

30. The petitioners further submit that Article 47 of the Constitution guarantees every person the right to fair administrative action with Article 2(1) binding all persons, including State organs, to perform their mandate in accordance with the Constitution. They contend that failure to observe these principles undermines the rule of law and the Bill of Rights. It is accordingly their contention that failure by the respondents to observe due process in the intended deportation and manner in which they arrested, detained and presented the subjects in court violated Article 47 of the Constitution. The case of **Judicial Service Commission v Mbalu Mutava & another [2014] eKLR** was cited as affirming the right to fair administrative action.

31. The petitioners further assert that the intended deportation threatens their right to family under Article 45 of the Constitution which provides that a family is the fundamental unit in a society and the necessary basis for social order and shall enjoy the recognition and protection of the State. It is additionally urged that such deportation would deprive the subjects' children of their right to parental care and protection by both their parents as provided in Article 53 of the Constitution.

32. The third issue the petitioners identified for the decision of the Court is whether the prayers sought should be granted. The petitioners submit that based on their arguments, it is clear that the respondents have an obligation to obey constitutional provisions and where they fall short their actions should be declared unconstitutional. Further, that Article 23 of the Constitution empowers this Court to grant appropriate reliefs in protection of the Bill of Rights while being guided by Articles 259 and 159(2)(e) of the Constitution.

33. Finally, on the issue of costs, the petitioners submit that Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 provides that the award of costs is at the discretion of the Court. It is their submission the costs in these proceedings should be borne by the respondents.

34. The respondents did not file any submissions in respect of the petitions.

35. I now proceed to make my determination. The petitioners allege violation of the subjects' constitutional rights under Articles 45, 47, 49, 50(1) and 53(e) of the Constitution. They contend that due process was not adhered to by the respondents in handling the subjects' case resulting in violation of their rights and fundamental freedoms as provided by the Constitution and international law.

36. The question is whether the petitioners have established violation of their rights and that of the subjects. It will also be necessary to determine whether the respondents or any one of them exceeded their constitutional and statutory powers in handling the subjects.

37. There is no doubt that the petitioners have *locus standi* by virtue of Articles 22 and 258 of the Constitution.

38. That said, I have perused the pleadings and submissions of the parties herein and I find that the global issue for the determination of this Court is whether the respondents violated the constitutional rights and fundamental freedoms of the petitioners and the subjects.

39. The National Police Service, which is established under Article 243, is, according to Article 239(1), one of the national security organs. The National Police Service is commanded by the Inspector-General as provided in Article 245(1)(b). Article 245(4)(a) mandates the Inspector-General to investigate any particular offence or offences.

40. The National Police Service Act, 2011 which operationalizes the National Police Service provides at Section 24(e) that the investigation of crimes is among the functions of the police. Further, Section 28 of the Act establishes the Directorate of Criminal Investigations which is under the direction, command and control of the Inspector-General.

41. The functions of the Directorate of Criminal Investigations as provided under Section 35 of the Act are to:

**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**

**k) perform any other function conferred on it by any other written law.**

42. Turning to the prosecution of crimes in Kenya, it is observed that the Director of Public Prosecutions derives his powers from Article 157 of the Constitution. Article 157(4), (6), (10) & (11) of the Constitution provides as follows:

**(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.**

**(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—**

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

**(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and**

**(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).**

**(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.**

43. This Article is operationalized by the Office of the Director of Public Prosecutions Act, 2013. Section 5(1) of the Act states, *inter alia*:

**Pursuant to Article 157 of the Constitution the Director shall—**

**(a) have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction;**

**(b) exercise State powers of prosecution;**

44. In order to be able to discharge its mandate the Office of the Director of Public Prosecutions enjoys independence as seen in Section 6 which states that:

**Pursuant to Article 157(10) of the Constitution, the Director shall—**

**(a) not require the consent of any person or authority for the commencement of criminal proceedings;**

**(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and**

**(c) be subject only to the Constitution and the law.**

45. From the foregoing, it is clear that the Directorate of Criminal Investigations is constitutionally mandated to investigate any crimes and offenses suspected to have been committed by any person. Likewise, the Director of Public Prosecutions is empowered to prosecute any person suspected of committing an offence known to the law.

46. In the case of **Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others [2019] eKLR**, the Court while discussing whether the investigative powers of the Inspector-General of Police and the Director of Criminal Investigations can be interfered with held that:

**“The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.**

51. **Odunga J. in Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR**, said with regard to the power of the police to investigate:

**“42. It is however my view that 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 are 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.”**

In **Pauline Adhiambo Raget v. DPP & 5 Ors., (2016) eKLR**, a case where breach of right to equality was alleged to have been violated by investigations of an offence, **Onguto J. held, and I agree, that-**

**“I have also been unable to see how in investigating an alleged criminal conduct or activity there could be discrimination or a practice of inequality before the law. The respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the interested party in this case. In so doing, it is a legal mandate they would be undertaking.”**

52. Regarding prosecution **Odunga J in Agnes Ngenesi Kinyua aka Agnes Kinywa vs. Director of Public Prosecution (supra)** held as follows:

**“it must be emphasized that a constitutional petition challenging prosecution does not deal with the merits of the case but only with the process. The Court in such proceedings is mainly concerned with the question of fairness to the petitioner in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution’s evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.”**

47. In **Justus Mwenda Kathenge v Director of Public Prosecutions & 2 Others [2014] eKLR**, the Court discussed the prosecutorial

power bestowed upon the Director of Public Prosecutions by 157 of the Constitution and concluded that:

**“It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11):**

**(i) he has acted without due regard to public interest,**

**(ii) he has acted against the interests of the administration of justice,**

**(iii) he has not taken account of the need to prevent and avoid abuse of Court process.**

**These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st Respondent.”**

48. It is reasonable to infer therefore that the courts will not be quick to interfere with the mandates of the 1<sup>st</sup> and 2<sup>nd</sup> respondents unless it is clearly demonstrated that they have breached their constitutional and statutory boundaries. The main contention in this matter is whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted within their constitutional mandates by arresting and detaining the subjects on 17<sup>th</sup> January, 2018 and presenting them in court. The petitioners assert that the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ actions violated their and the subjects’ rights to be informed of the actions taken and given an opportunity to be heard which was contrary to due process.

49. This allegation has been denied by the 2<sup>nd</sup> Respondent who asserts that under Article 157(10) of the Constitution and Section 6 of the Office of the Director of Public Prosecutions Act, 2013, he does not require the consent of any person or authority for the commencement of criminal proceedings. It is further the 2<sup>nd</sup> Respondent’s contention that in the exercise of his powers or functions he shall not be under the direction or control of any person or authority. He adds that Section 24 of the Police Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.

50. The prosecutorial authority bestowed upon the 2<sup>nd</sup> Respondent is not however limitless. In the case of **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR** the Court of Appeal while acknowledging the prosecutorial power of the 2<sup>nd</sup> Respondent observed its limitation as follows:

**“[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in Mohit v Director of Public Prosecutions of Mauritius [2006] 5LRC 234:**

**“these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP’s decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...”**

**In Regina v. Director of Public Prosecutions ex-parte Manning and Another [2001] QB 330, the English High Court said partly at para 23 page 344:**

**“At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.”**

**Although the standard of review is exceptionally high, the court’s discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.**

**[42] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”**

51. Similarly, in the case of **Philomena Mbete Mwilu vs Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** the importance of legitimate use of prosecutorial power was noted as follows:

**“...Should there be credible evidence that the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, then a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled.**

**244. To be underscored is that judicial review of the foundational basis of a charge should only be undertaken when an applicant has first established that there are reasonable grounds that the challenged proceedings are a vehicle for a purpose other than a true pursuit of criminal justice. To allow a willy-nilly and casual review of the foundational basis of criminal charges would be to turn judicial review proceedings into criminal mini-trials, a prospect that anyone keen to stop a criminal trial would relish.”**

52. From the facts of this case, it is not disputed that a police officer by the name Anthony Murigi made an application dated 18<sup>th</sup> January, 2018 in the Chief Magistrate's Court at Milimani Chief Magistrate's Court in which he averred that on 17<sup>th</sup> January, 2018 he received information that there were foreigners who were fraudulently acquiring money from members of the public within Kileleshwa and Kilimani area.

53. The officer averred that they had arrested the suspects and searched their premises. He further disclosed that they had received information that some of the suspects had earlier been deported and they wished to forward their passports to the Immigration Department to verify if the passports were genuine. It was on this premise that he sought custodial orders to detain the suspects for ten days in order to conclude investigations into the matter. The application was allowed by the magistrate.

54. As discussed in the preceding paragraphs one of the roles of the police is to undertake investigations of crimes and prevent crimes. Police officers are, in certain circumstances and in respect of particular offences, empowered to arrest persons suspected of having committed crime without a warrant.

55. Article 49(1)(f)(i) of the Constitution requires that arrested persons be taken to court as soon as reasonably possible but not later than 24 hours. The subjects were duly presented before the Court within the required timeframe and informed of the reason for their arrest.

56. Upon completion of investigations by the 1<sup>st</sup> Respondent, six out of the seven subjects were absolved and discharged by the magistrate on 26<sup>th</sup> January, 2018. There is therefore no reason for finding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not act in conformity with the law.

57. In view of the facts presented to the Court, I find that the petitioners have not discharged the burden, which rests on them, of proving the allegation that the conduct of the respondents was contrary to the law. They have not adduced evidence to show that police and prosecutorial powers were deployed for ulterior or collateral motives other than for advancing the ends of justice.

58. The arrest, detention and investigation of the subjects by the 1<sup>st</sup> Respondent cannot therefore be condemned as the 1<sup>st</sup> Respondent acted procedurally and lawfully. In fact, failure by the 1<sup>st</sup> Respondent to carry out the investigations would have amounted to violation of the constitutional mandate bestowed upon the police under Article 245 of the Constitution and Section 35 of the National Police Service Act.

59. The petitioners allege that the respondents violated the right to family under Article 45, the right to fair administrative action under Article 47, the rights of arrested persons under Article 49, the right to have a dispute resolved by the application of the law in a fair and public hearing under Article 50(1), and the right to parental care accorded to children under Article 53(e).

60. Article 19 (1) of the Constitution provides that:

**The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.**

61. The Bill of Rights applies to every person as provided in Article 20(2). The rights which are also recognized by international instruments, most of which Kenya is a signatory, are applicable to every human being including the subjects who are said to be foreign nationals. Additionally, Article 2(5) and (6) of the Constitution states that the general rules of international law and treaties or conventions ratified by Kenya form part of Kenyan law.

62. There are a number of international laws that provide for the rights of foreign nationals and migrants in member states. In principle, states are free to exercise their territorial sovereignty in regulating the entry, residency, and departure of people from its territory. The right to freedom of movement and freedom to choose one's residence is applicable not only to nationals of the country concerned, but also to everyone lawfully within the territory of that nation. Foreign nationals who meet the legal requirements pertaining to entry, stay and exit of a given country are therefore protected. This is provided in Article 12 of the *International Covenant on Civil and Political Rights (ICCPR)* which reads as follows:

**1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.**

**2. Everyone shall be free to leave any country, including his own.**

**3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.**

**4. No one shall be arbitrarily deprived of the right to enter his own country.**

63. The same *Covenant* at Article 13 provides that:

**An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.**

64. As noted by the petitioners, foreign nationals also have rights enshrined in the *International Convention on the Protection of the Rights of*

*All Migrant Workers and Members of Their Families (1990)*. In a nutshell the international laws protect the rights of foreigners to security of person, to communicate with one's family or lawyer upon detention, to dignity and respectful treatment, to access justice through due process of law before deportation or imprisonment, to humane treatment during detention, to equality before the law, to non-discrimination and to hold documentation such as passports and identity documents among other rights. The foreign nationals or migrants are in turn obligated to comply with the laws and regulations of the host country.

65. The petitioners' second issue of contention in this suit is the alleged intended deportation of the subjects by the 3<sup>rd</sup> Respondent without following due process. To begin this discussion, it should be appreciated that it is the sovereign prerogative of States to regulate the presence of foreigners in their territory. This prerogative is not unlimited as already discussed. This is because international human rights law places some restrictions on when and how to exercise this power.

66. With regard to expulsion of foreign nationals or migrants in international human rights law, *OHCHR Discussion paper on the Expulsions of aliens in international human rights law, Geneva, September 2006* notes that procedural guarantees do not protect the aliens from expulsion as such, but they help to ensure that substantive protection against expulsion is provided and that no arbitrary expulsion decisions are taken. The paper continues to state that with regard to procedures of expulsion, these are not specifically mentioned in the international conventions but there is no doubt that the general provisions of human rights on cruel, inhuman or degrading treatment apply in this respect and that no one should be expelled in a manner that would put his life or physical integrity at risk.

67. That said, international law provisions on expulsion of foreign nationals in member States do concur that removal, in our case deportation of any foreign national or migrant, should be lawful and in accordance with the law. This is highlighted in a number of conventions. The already cited Article 13 of the ICCPR is one such instrument.

68. Additionally, Article 22 of the *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* provides as follows:

**1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.**

**2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.**

69. Article 12(4) of the *African Charter on Human and Peoples' Rights* provides that:

**A non-national legally admitted in a territory of a State party to the Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.**

70. The *Kenya Citizenship and Immigration Act, 2011* provides for matters relating to citizenship; issuance of travel documents; immigration and for connected purposes. Section 2 of the Act defines "**deportation**" as **the action or procedure aimed at causing an illegal foreign national to leave the country either voluntarily or compulsorily, or under detention in terms of this Act.**

71. Section 43 of the Act provides as follows:

**Power to remove persons unlawfully present in Kenya**

**(1) The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in respect of whom a recommendation has been made to him or her under section 26A of the Penal Code (Cap. 63), shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.**

**(2) A person against whom an order has been made under this section shall—**

**(a) be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or**

**(b) if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunals decision until the suit is finally disposed of.**

**(3) Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to the Constitution and related laws.**

72. The High Court has supervisory jurisdiction under Article 165(6) of the Constitution and is empowered by Article 165(3)(b) to determine questions of violation of a right or fundamental freedom. The Court has on numerous occasions reviewed decisions undertaken by the Immigration Department to ascertain whether the rights of the individuals were infringed and to confirm that due process as provided in the Constitution has been adhered to.

73. In *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another [2013] eKLR*, it was stated in paragraph 27 as follows:

“...The requirement in removing an alien from a state’s territory, as provided under the above conventions and in accordance with the constitutional provisions contained in Article 47, is that such removal should be ‘in accordance with the law’, that due process should be followed. This, I believe, is also the essence of the decision in the case of *Samuel Murial Mohochi –vs- The Attorney General of Uganda*, though distinguishable from this case to the extent that the court found that the provisions of the Uganda Citizenship and Immigration Act were modified by the Treaty for the Establishment of the East African Community and the East African Common Market Protocol. The question then is whether the petitioner was accorded due process.”

74. In the case of *Leonard Sitamze v The Minister for Home Affairs & 2 Others*, HC. Misc. Civil Application No. 330 of 2004 ((unreported)) it was observed as follows:

“...It is clear, in my interpretation of the law, that I have preferred the more expansive approach which requires decisions by the Executive, which expose the individual to loss of his fundamental rights, to be subjected to the test of legality as superintended and enforced by the High Court... I must take judicial notice that the precious ingenuity of the common law and its jurisprudence and philosophy, where matters of public law are concerned, is that good governance has judicialism as its partner, and that there are to be no decisions taken by public bodies which derogate from the private rights of individuals where the views of such individuals are entirely disregarded. The richness of the safeguards of a written Constitution, such as that of Kenya, is assured by the philosophy and practices of the common law as maintained by the Judiciary.... I would hold that it is contrary to law that the Minister should have the Applicant, a family man living in Kenya as his domicile, doing normal business and possessed of relevant certificates of legitimate presence, arrested and detained without any hearing at all, deprived of his own properties, extracted from his family environment, detained for long, and then deported. Such actions are tell-tale instances of violation of the fundamental rights of the individual as set out in detail in Chapter V of the Constitution. They also bespeak a failure to observe human rights obligations which Kenya assumed under international law.”

75. Further in *Republic v Minister of State for Immigration and Registration of Persons Ex-Parte* C.O. [2013] eKLR, the Court opined at paragraph 33 of the judgment that:

“To hold that the Minister is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. It must always be remembered that under Article 25 of the Constitution one of the rights and fundamental freedoms which cannot be limited is the right to a fair trial. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion. This is in tandem with the holding in *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43 that judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.”

76. In the case of *Oumarou Moumouni Ali v Director General Kenya Citizens and Foreign Nationals Management Services & 3 others* [2020] eKLR, the Court in finding that due process had not been followed by the respondents in the deportation of the petitioner therein noted as follows:

“27. The Respondents in exercise of their functions as state officers are bound by provisions of Article 10 of the Constitution thus the National Values and Principles of Governance which includes the rule of law, democracy, human dignity, equity, social justice, human rights, non-discrimination and protection of the marginalized, transparency and accountability. It is not for them to urge that they should be accorded the anatomy vested in them by statute without unnecessary intervention of the Court when it is clear such autonomy has been abused by issuing deportation order, failing to serve the same and failing to accord the Petitioner the right to be heard. In view of the above, I find that the due process was not followed in the Petitioner’s deportation. I find that it would be contrary to law, that the Respondents should have the Petitioner, who has been residing in Kenya for 10 years, a family man with Kenyan wife and 2 Kenyan children, doing business in this country and a consul of Niger and an employer of over 100 people be deported without being served with deportation order and being given an opportunity to be heard. This very act goes against the dictates of our constitution and International Law and should not be allowed at all.”

77. It is clear from the analysis of the law and authorities that following due process under the law before deporting a foreign national or immigrant is paramount in our legal system. It follows accordingly that a decision taken contrary and in violation of the Constitution, international instruments and the law will automatically be interfered with on review by courts.

78. The petitioners’ pleadings reveal that the 1<sup>st</sup> Respondent while carrying out their investigations wrote to the 3<sup>rd</sup> Respondent vide a letter ref: CID/SEC/2/9/4/130 dated 22<sup>nd</sup> January, 2018 requesting for the subjects to be deported back to their home countries. Eventually after the investigations the subjects were discharged with no charges preferred against them except one. Despite this, the petitioners have remained apprehensive of possible deportation of the subjects by the 3<sup>rd</sup> Respondent.

79. The petitioners further allege that the 3<sup>rd</sup> Respondent defaced the passports of the subjects, particularized in the pleadings, through markings or stampings incomprehensible to them or the subjects. The proper office to respond to this averment was the 3<sup>rd</sup> Respondent. However, the 3<sup>rd</sup> Respondent did not participate in these proceedings despite being served. The petitioners’ averment that the travel and identification documents of the subjects were defaced by the 3<sup>rd</sup> Respondent therefore remains un rebutted and thus proved.

80. Turning over to the claim by the petitioners that the 1<sup>st</sup> Respondent sought to direct the 3<sup>rd</sup> Respondent by the letter dated 22<sup>nd</sup> January, 2018 to deport them, I find that Section 43(1) Kenya Citizenship and Immigration Act, 2011 allows the Cabinet Secretary to issue an order directing the removal of any person from Kenya. That power belongs not to the 1<sup>st</sup> Respondent but to the Cabinet Secretary responsible for matters relating to citizenship and the management of foreign nationals.

81. My interpretation of Section 43(1) is that the 3<sup>rd</sup> Respondent is not obligated to act on the recommendation of the 1<sup>st</sup> Respondent. It is also important to note that while considering such a recommendation the 3<sup>rd</sup> Respondent's determination should be guided by Article 47 of the Constitution before making such an adverse decision.

82. From the record there is no evidence that the 3<sup>rd</sup> Respondent took any further action towards the implementation of the recommendation of the 1<sup>st</sup> Respondent. Whether the deportation is to be carried out and whether due process will be adhered to are speculative issues upon which this Court cannot make any useful finding.

83. The petitioners' case is founded on the apprehension that the 3<sup>rd</sup> Respondent will violate their rights and fundamental freedoms by not following due process during the deportation of the subjects. It should be appreciated that the 3<sup>rd</sup> Respondent may as well have good reasons for taking such a decision. Unfortunately, no such decision has been provided to the Court by the petitioners so that it can be interrogated as to whether it met the statutory requirements.

84. I therefore find that at this stage the petitioners' case as regard deportation of the subjects is merely speculative as the 3<sup>rd</sup> Respondent has not made any decision to deport the subjects. It is therefore difficult for this Court to make an anticipatory decision that the 3<sup>rd</sup> Respondent will deport the subjects in violation of the Constitution hence infringing the petitioners' rights.

85. Be that as it may, the 3<sup>rd</sup> Respondent as a State office is bound by the national values and principles, which includes the rule of law, democracy, human dignity, equity, social justice, human rights, non-discrimination and protection of the marginalized, transparency and accountability. As expected, every State officer or public officer is required by Article 47 of the Constitution to protect the right to fair administrative action of every person to be affected by their action or decision while carrying out any administrative procedures. Every administrator should familiarize himself or herself with the Fair Administrative Action Act, 2015 for any action taken or decision made in contravention of the provisions of the Act is zero work.

86. In conclusion, I must state that it is rational to infer from the material placed before me that the petitioners have not sufficiently demonstrated and proved violation or threatened violation of their stated rights and fundamental freedoms by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. As already stated in this judgement, these respondents did not contravene their constitutional mandates but acted within the confines of the law.

87. The petitioners have, however, established that the travel and identity documents of the subjects were defaced by the 3<sup>rd</sup> Respondent without any justifiable cause. The failure by the 3<sup>rd</sup> Respondent to participate in the proceedings means that no explanation was given to the Court for the action. There is no evidence that the 3<sup>rd</sup> Respondent gave an opportunity to the subjects to defend their papers and neither was any reason advanced to justify the actions of the 3<sup>rd</sup> Respondent. The only logical conclusion to be reached in the circumstances is that the 3<sup>rd</sup> Respondent violated the subjects' right to fair administrative action.

88. Although it was disclosed, in some of the pleadings filed in Court by the 1<sup>st</sup> and 2<sup>nd</sup> respondents subsequent to the amendment of the petition, that the Cabinet Secretary had declared Enow Bisong a prohibited immigrant, the petitioners did not seek any orders in regard to that decision. I therefore have no useful comment in respect to that aspect of the case.

89. The petitioners have partially succeeded. They are therefore entitled to an appropriate order. An order will issue in the terms of the prayer in the amended petition as follows:

An Order do issue declaring that the defacing of the passports of Etah Stanley Akomara (Ghanaian PP 0518792), Eta Ako Fidel (Ghanaian PP No. G1337171), Erick Ouafo Tchunouneneu a Cameroonian (Kenya Alien ID No. 870370-Cameroonian), Enow Bisong (Cameroonian PP No. 0398529), Loha Nogha Serge (Cameroonian) and Emmanuel Abunaw Effiong (Nigerian PP No. A06393249), through markings and/or stamping incomprehensible to the Petitioner or the subjects, and without any justifiable reason/cause is irregular and unlawful and thus ineffectual. The petitioners have not demonstrated that they are entitled to any other relief.

90. On the issue of costs, I rely on the principle that costs should follow the event and award costs to the petitioners against the 3<sup>rd</sup> Respondent.

**DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF JULY, 2021.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF JULY, 2021.**

**J.A. MAKAU,**

**JUDGE OF THE HIGH COURT**