REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

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

CONSTITUTIONAL PETITION NO. E216 OF 2020

REUBEN MWANGI.....PETITIONER

-VERSUS-

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. DIRECTOR OF CRIMINAL INVESTIGATIONS

3. THE HON. ATTORNEY GENERAL.....RESPONDENTS

-AND-

1. UAP INSURANCE

2. INVESPOT INSURANCE INVESTIGATORS..INTERESTED PARTIES

JUDGMENT

Introduction:

1. The manner in which the *Director of Public Prosecutions*, the 1st Respondent herein, and the *Director of Criminal Investigations*, the 2nd Respondent herein, discharge their functions has, once again, been challenged in the Petition subject of this judgment.

2. *Robert Mwangi*, the Petitioner herein, is the subject in *Nairobi* (*Milimani*) *Chief Magistrates Court Criminal Case No. 535 of 2019 Republic v. Robert Mwangi* (hereinafter referred to as '***the Criminal Case***'). *Maurice Philemon Akatsa*, is the complainant in the criminal case.

3. It appears there are two charge sheets in the criminal case. This Court is unable to discern the two charge sheets due to inadequacy of the proceedings in the trial court before this Court.

4. One of the charge sheets contain two charges. The charges are *Forgery* contrary to Section 345 as read with Section 349 of the Penal Code and *Making a false document* contrary to Section 347(d) of the Penal Code respectively.

5. The second charge sheet has three charges. The first two charges are similar to the ones in the first charge sheet. The third charge is *Uttering a false document* contrary to Section 353 of the Penal Code.

6. The Petitioner denied the charges.

7. In the Petition before this Court, the Petitioner variously challenges the constitutionality of the criminal case.

8. The Petition is opposed.

The Petition:

9. The Petition is dated 13th July, 2020. It is supported by the Affidavits sworn by the Petitioner. They are a Supporting Affidavit sworn on 13th July, 2020 and a Supplementary Affidavit sworn on 18th March, 2021 respectively.

10. In further support to the Petition, the Petitioner filed written submissions dated 1st February, 2021, a List of Authorities dated 13th July, 2020.

11. In the main, the Petitioner prays for the following orders: -

a) A declaration that the actions of the Respondents to charge the Petitioner herein with the offences of obtaining money through false pretences is unconstitutional and in contravention of Articles 27(1) and 28 of the Constitution.

b) A declaration that the actions of the Respondents to charge the Petitioner herein are unconstitutional and ultravires the provisions of Sections 4 and 26 of the ODPP ACT, and Sections 76(1) and (2) of the Cooperative Societies Act.

c) An order of certiorari to be issued against the Respondents quashing/setting aside the decision of the Respondents to arrest and charge and/or prosecute the Petitioners.

d) An order of prohibition to be issued against the Respondents from charging the petitioner herein in relation to the facts surrounding the false insurance claim levelled by the complainant and as adjudged in Nairobi High Court Appeal No. 150 of 2012.

e) Costs of this petition.

The Responses:

12. The parties herein agreed that the 3rd Respondent, the Hon. Attorney General, was an unnecessary party in the proceedings. The 3rd Respondent was, therefore, struck out of the matter.

13. The Interested Parties did not take part in these proceedings.

14. The 1st and 2nd Respondents opposed the Petition. Through *No. 87413 PC Thomas Tanui*, the Respondents filed a Replying Affidavit sworn on 25th September, 2020. They also filed written submissions dated 14th April, 2021 and a List of Authorities.

15. The Respondents rooted for the position that the criminal case is constitutional and lawful and that the Petition is an afterthought aimed at misleading the Court and delaying the criminal case. They prayed that the Petition be dismissed with costs.

Issues for Determination:

16. I have carefully considered the Petition, the responses thereto, the parties' submissions and the decisions referred to. I find that the following two main issues arise for determination: -

(a) Whether the the Petitioner's rights as guaranteed by Articles 27(1), (2), 28, 29(a) and 50(2)(b), (j) & (n) of the Constitution stand violated in sustaining the criminal case;

(b) Whether the remedies sought do issue.

Analysis and Determination:

(a) Whether the the Petitioner's rights as guaranteed by Articles *27(1), (2), 28, 29(a) and 50(2)(b), (j) & (n)* of the Constitution stand violated in sustaining the criminal case:

17. The Petitioner's case is as follows: The Petitioner was employed by the 2nd Interested Party as an Insurance Claims Investigator. The 2nd Interested Party was regularly contracted by the 1st Interested Party to investigate the veracity of insurance claims lodged to them.

18. The Petitioner further pleads that the Complainant in the Criminal Case which necessitated these proceedings, one *Maurice Philemon Akasa* (hereinafter referred to as '***the complainant'***) was the owner of a motor vehicle registration number KAK 265D (hereinafter referred to as '***the motor vehicle'***). The motor vehicle was insured with the 1st Interested Party.

19. The Complainant lodged a claim with the 1st Interested Party claiming total loss of the said motor vehicle alleging that the said motor vehicle had been involved in an accident on 30th April, 2005.

20. The Petitioner was eventually assigned the duty of investigating the claim by the 2nd Interested Party. In the course of investigations, the Petitioner interviewed the Complainant and more than seven other persons. Upon completion of the investigations, the Petitioner formed an opinion that no accident took place either as alleged or otherwise and that the claim was fabricated. A Report to that effect was prepared and is dated 27th July, 2005. The Report included the statement of the Complainant dated 7th June, 2005 and also the statement of one *Dany Mukhwana Odera* dated 24th June, 2005.

21. The 1st Interested Party adopted the Report and declined to pay the claim.

22. The Complainant then lodged a suit before the Milimani Chief Magistrates Commercial Court. It was *Civil Case No. 412 of 2006 Maurice Philemon Akasa & Another v. UAP Provincial Insurance Company* (hereinafter referred to as '***the suit'***). The suit was heard and allowed. The insurance company appealed the decision to the High Court. It was Nairobi High Court Civil Appeal No. 150 of 2012 *UAP Provincial Insurance Company v. Maurice Philemon Akasa & Another* (hereinafter referred to as '***the appeal'***).

23. The appeal was heard and dismissed *vide* a judgement of the High Court rendered on 13th October, 2014. In the judgment, the Court partly stated that: -

> ***…*** *due to the above inconsistencies, that it is most improbable that there was an accident on the alleged date involving motor vehicle KAK 256D, the accident if anything, was but a fake accident, an attempt to get compensation from the insurance, motivated by greed….*

24. The Petitioner avers that he was surprised to be summoned by officers of the 2nd Respondent sometimes in 2016. He was confronted with a complaint. The complaint was that he had forged the statement of Dany Mukhwana Odera dated 24th June, 2005 (hereinafter referred to as '***the impugned statement'***). To the Petitioner, that was 15 years after conducting the investigations aforesaid and 5 years after the High Court dismissed the appeal. The Petitioner was then charged in the criminal case.

25. The Petitioner contends that the impugned statement, which is the subject of the criminal case, was available and was relied upon both in the suit and the appeal. Further, the Complainant remained well aware of the existence and contents of the alleged impugned statement.

26. The Petitioner contends that he was not accorded any explanation as to justify the delay which, to him, is inordinate and occasioned immense prejudice.

27. It is contended that the institution of the criminal case is in bad faith and is intended to achieve other purposes apart from acting on a genuine complaint. According to the Petitioner, the criminal case was instituted by the complainant as a way of hitting back after losing the appeal more so given that the maker of the impugned statement is not even the complainant.

28. The Petitioner also takes issue with the manner in which he was charged. He avers that he was charged twice. That, on 25th March, 2019, he was charged on allegations of forgery and making of a false document. Later, he was again charged with three counts of forgery, making of a false document and uttering a false document.

29. It is vehemently posited that in the charge sheets it is alleged that the Petitioner forged, falsified or uttered the statement of Dany Mukhwana Odera (hereinafter referred to as '***Mr. Odera'***), but surprisingly the Complainant is *Maurice Philemon Akasa*. There is no mention of the Complainant in the particulars of all the charges. Though Mr. Odera is listed as one of the witnesses to be called, the Petitioner herein was not informed of any complaint by Mr. Odera against him before, during and after his arrest and he has never been supplied with the statement of Mr. Odera in support of the criminal proceedings against him.

30. The Petitioner avers that he was summoned to the 2nd Respondent's offices and asked to record a statement regarding the allegations that he had falsified the statement of Mr. Odera. That, he was not advised whether the statement was under caution or not. The interrogation was as brief as taking plea. Before the ink dried, he was arrested and informed that he could only be released on a police bond and would attend Court the next day to take plea. The Petitioner paid the police bond and was released.

31. It is submitted that from this flow of events, it is evident that the decision to arrest the Petitioner was premeditated and the act of summoning him to visit the 2nd Respondent's offices was only intended to arrest him. He further submits the complaint was never judiciously and diligently investigated by the Respondents as required by the law, that the Respondents never conducted clear and unbiased assessment of facts, that the Respondents never collected sufficient evidence to substantiate the charges preferred against the Petitioner, that the powers vested upon the Respondents were not exercised in a lawful manner and the hurried charges against the Petitioner are an abuse of the legal process.

32. The Petitioner further submits that *Rule 2(11)* of Chapter 22 of the **National Police Service Standing Orders** (hereinafter referred to as '***the Standing Orders'***) which is titled *'Conduct Interviews of Crime Victims, Suspects and Witnesses*' requires police officers to conduct clear and unbiased assessment of facts before arresting any suspects. In the instant case, the Respondents received a complaint by the complainant that the statement of Mr. Odera had been forged, uttered or was false. The 2nd Respondent then arrested and charged the Petitioner. The Petitioner further submits that he brought the history of the matter to the attention of the officers of the 2nd Respondent, but that was never considered, its veracity or otherwise was never investigated as expected of genuine investigations. Instead, the police proceeded to hurriedly arrest and charge the Petitioner.

33. The Petitioner submits that the officers of the 2nd Respondent are guilty of dereliction of duty, that they exercised the powers conferred upon them arbitrarily, whimsically and capriciously and as such their actions were unconstitutional and unlawful.

34. Under Sections 49 (4) and (10) of the *National Police Service Act* (hereinafter referred to as '***the NPS Act'***), the 2nd Respondent is required to conduct thorough investigations, compile all evidence and submit relevant information. The Petitioner, however, submits that investigations in this matter were shoddy, done as a matter of technicality and carelessly. Any reasonable man placed in the shoes of the investigating officers would have noted a desire to record a statement from Mr. Odera, a need to peruse the proceedings in the appeal and the need to have the 2nd Interested Party availed an opportunity to tender its records and answer to the allegations fronted. There is nothing in law that entitles police officers to arbitrary arrest and charge citizens simply because they will have an opportunity to defend themselves

during the trial, the Petitioner retorts.

35. Relying on *Anthony Murimi Waigwe v Attorney General & 4 others [20201 eKLR*, the Petitioner argues that *"in a democratic society like ours no one should be charged without the authorities conducting proper investigation."* Further, the Court in *Bitange Ndemo v Director of Public Prosecutions & 4 others [20161 eKLR* held that statutory power donated to any organ is not to be exercised in an unreasonable manner. It relied on the case of *Republic V Commissioner of Co-operatives ex parte Kirinyaga Tea Growers Cooperative Savings & Credit Society Ltd CA 39/97 119991 EALR 245* where the Court of Appeal warned that:

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

36. The Petitioner also relied on Nairobi High Court Miscellaneous Application No. 1769 of 2003 *Republic vs. Ministry of Planning and Another ex-parte Professor Mwangi Kaimenyi*, where It was held:

> *So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power, The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner.*

37. On the aspect of passage of time, the Petitioner contends that he is now charged with falsifying documents that were prepared in 2005, a period of 15 years later. The Petitioner posits that the delay herein is inordinate, unreasonable and it jeopardizes the Petitioner's right to a fair hearing. Proceeding with the criminal charges will require that the Petitioner to vividly remember one of the statements he allegedly recorded in one of his lengthy career as an Investigator. Any inconsistency and/or lack of clarity will be prejudicial to the Petitioner's defence. Potential witnesses may have died or advanced in age or even forgotten. Further, it will be a crucial issue whether or not the Petitioner actually met and interviewed the said Mr. Odera, an act which the Petitioner may not recall vividly.

38. The Petitioner may not further recall details like the dress code, location, how he discovered the location and other fine details. The Petitioner posits further that it is humanly impossible to fairly remember events after a lapse of more than 15 years. The Petitioner also contends that the matter is further complicated in that he investigated more than 300 claims and interviewed more than 1,000 people in his illustrious career as an insurance claims investigator.

39. The Petitioner is apprehensive that his right to a fair hearing and fair administrative action under Articles 50(1) and 47 of the Constitution are severely and irretrievably threatened. He submits that the delay defeats equity and equity aids the vigilant. The Petitioner submits that no reason has been advanced to explain the delay in lodging the criminal complaint 15 years later. Notably, the complaint was not even made by Mr. Odera whose statement is in issue.

40. The Petitioner further submits that complainant in the criminal matter is litigious and an influential person in the society. He worked in the Office of the President. He had the resources and network to commence the criminal proceedings. He also had an Advocate who advised him all along. He was able to challenge the statement way back in 2005. He submits that the criminal complaint was an afterthought and as a vendetta after losing the appeal. He posits that the criminal proceedings were lodged as a means of revenge and/or retaliation for the loss in the appeal. The proceedings are thus an abuse of the court process.

41. It is submitted that the investigations were a mere sham, they were intended to harass the Petitioner and the decision to charge the Petitioner amounts to an abuse of the Court process. The Petitioner submits that Courts have been emphatic that the court process, including criminal proceedings should be used for the sole purpose of enforcing the law and doing otherwise amounts to an abuse of the Court process. The Petitioner relied on *Meme -vs- Republic & Another (2004) eKLR* where the Court of Appeal discussed abuse of the court process thus: -

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

42. The Petitioner also relied on *Peter George Anthony Costa v. Attorney General & Another Nairobi Petition No. 83/2010* where the Court quashed a criminal prosecution instituted against the petitioner and expressed itself thus:-

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

43. It is further submitted that the Court process should also not be used to settle personal scores. In *Rosemary Wanja Mwagiru & 2 Others V Attorney General & 2 Others*, Mumbi J (as she then was) stated that: -

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

44. Submitting that the 1st Respondent through its officers acted capriciously, recklessly and in utter abandon of their constitutional mandate in preferring the charges, the Petitioner relied on *Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others* where

the Court stated that: -

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

45. The Petitioner submits that where it is demonstrably clear that the powers vested upon the 1st Respondent were not exercised in accordance with the Constitution and the Office of the Director of Public Prosecution Act, then, the Court is entitled to intervene and quash the 1st Respondent's decision.

46. In *Anthony Murimi Waigwe v Attorney General & 4 others [2020) eKLR* the Court held that the Prosecutor has a duty to analyze the case before prosecuting it and it should let free those whom there is no prosecutable case against them. It expressed itself thus: -

> *48. It is no doubt dear that under Article 157 (1) of the Constitution the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article 159 (2) of the Constitution is crying loudly every day, every hour that "justice shall be done to all, irrespective of status". Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.*
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> *49. The Petitioner in support of interest of administration of justice dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction, In other words Public Prosecutors should ask themselves• would an impartial tribunal convict on the basis of the evidence available?*
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> *50. In the case of Republic v. Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No. 78 of 2015 while quoting the case of R vs. Attorney General ex Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001; the Court held;*
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> *A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper … there must be in existence material evidence on which the prosecution can say with certainty that the have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.*
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> *51. In a democratic society like ours, no one should be charged without the authorities conducting proper investigation. The prosecutor on the other hand is under duty to consider both incriminating and exculpating evidence, In the case of Republic v. Director of Public Prosecutions & Another ex parte Kaman/ Nairobi Judicial Review Application Nog 78 of2015 (supra), the court expressed itself as follows:*
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> *this court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of •justice is a hallowed lace and ought to be reserved for those mattes in which the protagonists have a conviction stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the Office of the Director of Public Prosecutions Act to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a catwalk.*

47. The Petitioner further submits that criminal case is intended to achieve an ulterior motive. He posits that the genesis of the criminal case is an insurance claim lodged by the complainant with the 1st Interested Party. The claim was rejected as false. The complainant then lodges the suit seeking compensation. He succeeds in the trial court. The matter is appealed to the High Court. The High Court allows the appeal and dismisses the complainant's claim. The High Court was largely influenced by the fact that the complainant could not even tell the date of the accident and as he gave two varying dates. Judgment was rendered in 2014. Several years later, the complainant emerges from the blues and lodges a complaint that one of the statements in the Investigation Report was forged. Notably, he had access and knowledge of the existence of the statement all along.

48. There has to be an end to litigation, it is submitted. The law does not condone a scenario where one projects a civil dispute to criminal proceedings after exhausting all the available legal avenues. The Petitioner urges that the criminal proceedings filed years after the appeal are an abuse of the court process to the extent that they are aimed at settling personal scores, are predominantly influenced by personal vendetta and are only efforts by the complainant to flex his muscles upon the Petitioner herein.

49. It is further submitted that the delay in instituting the criminal case is prejudicial and adversely affects the Petitioner's fundamental rights and freedoms. The Petitioner urges the Court to find that the 1st and 2nd Respondents did not exercise their mandate judiciously, they abused the authority conferred upon them and as a result they infringed on the rights of the Petitioner.

50. The Petitioner asserts that the following rights are infringed: The right to a fair trial under Article 50, the right to a fair administrative action under Article 47, the right to access justice under Article 48, the right to dignity under Article 28, the right to the security of the person under Article 29 (a) and the right to an equal protection and benefit of the law under Article 27 of the Constitution.

51. The Petitioner prays that the Petition be allowed.

52. The Respondents posit that the investigations and prosecution of the criminal case are within the legal confines. The Respondents aver that on 15th July 2016, a complaint was lodged with the 2nd Respondent by the complainant requesting for examination of the written statement of Mr. Odera alleged to have been recorded by the Petitioner who at the time was acting in his capacity as an investigator with the 2nd Interested Party, whose services were enlisted by the 1st Interested Party.

53. It is further averred that on 12th August 2016, Mr. Odera swore an affidavit denying ever recording a statement with the 2nd Interested Party. It then prompted the 2nd Respondent to submit the statement of Mr. Odera containing the questioned signature as well as his known signature and specimen signatures to the Forensic Document Examiner for analysis. On 21st October 2016, the 2nd Respondent received the Forensic Document Examiner's Report indicating that after analysis, the conclusion was that the signatures were made by different authors. Based on the results of the examination, the 2nd Respondent sought the directions of the 1st Respondent on how to proceed with the matter.

54. On 19th February 2019, the 2nd Respondent received a letter from the 1st Respondent directing that the Petitioner be apprehended and be charged with the offences of forgery contrary to section 345 as read with section 349 of the Penal Code; making a false document contrary to Section 347 (d) of the Penal Code and uttering a false document contrary to section 353 of the Penal Code.

55. The Respondents submit that it is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been infringed. The principle is enunciated in *Anarita Karimi Njeru -vs- The Republic [1976-1980] KLR 1272* as thus:

- *Constitutional violations must be pleaded with a reasonable degree of precision;*
- *The Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and how one is entitled to the same;*
- *The violations must be particularized in a precise manner;*
- *The manner in which the alleged violations were committed and to what extent.*

56. It is submitted that Article 24 (1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and only to the extent that the limitation is *reasonable and justifiable* in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

57. In *Leonard Otieno vs Airtel Kenya Limited [2018] eKLR* the Court further rendered itself as follows: -

> *It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues.*
>
> *Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses. In any case, Article 24 (1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.*

58. The Respondents submit that the Petitioner has failed to discharge the burden of proof with regards to the alleged violations of his fundamental rights.

59. Arguing that the Judiciary is independent and decides matters on merit, the Respondents submit that the independence of the judiciary is a key tenet in the administration of justice. The Court is independent and impartial. Article 160 of the Constitution provides; *in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall not be subject to the control or direction of any person or authority.* It is, therefore, submitted that the Petitioner shall enjoy the right to equal protection in any Court of law and a fair administrative process as matters are decided on merit, hence no recourse to worries.

60. The Respondents further submit that the criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial as envisaged under Article 50 of our Constitution. In the instant case, the Petitioner will be granted an opportunity to defend himself in the criminal case in accordance with the law.

61. Courts have indeed held, it is submitted, the view that they ought not to usurp the constitutional mandate of the Respondents to investigate crimes and initiate criminal proceedings respectively provided the same is done in a justifiable manner. This position was

adopted in the case of *Michael Monari & Another vs Commissioner of Police & 3 Others, Misc. Application No. 68 of 2011*. The 1st and 2nd Respondents being independent institutions established under the Constitution, the Court can only interfere with or interrogate their actions where there is contravention of the Constitution. In *Paul Ng'ang'a Nyaga vs Attorney General & 3 Others (2013) eKLR***,** it was held that:

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

62. The Respondents argue that in exercising the constitutional and statutory mandates bestowed upon them, the 1st and 2nd Respondents cannot be said to be infringing the constitutional rights of any person. It is submitted that the Petitioner has failed to specifically demonstrate how each of the rights under Articles 27(1), (2), 28, 29(a) and 50(2)(b), (j) & (n) have been violated by the 1st and 2nd Respondents.

63. On the prosecutorial powers of the 1st Respondent, it is submitted that the 1st Respondent is mandated under Article 157 of the Constitution and Section 6 of the Office of the Director of Public Prosecutions Act to institute and undertake criminal proceedings against any person before any Court of law. By dint of Article 157(10) of the Constitution, the 1st Respondent shall not require the consent of any person or authority for commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority. The decision in *Hon. James Ondicho Gesami vs The Attorney General & Others, Petition No. 376 of 2011*, is referred to in which it was held that: -

> ***…****The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges…In my view, requiring that the petitioner subjects himself to the normal criminal prosecution process mandated by law where he has all the safeguards guaranteed by the Constitution does not in any way amount to an attack on his human dignity in violation of his constitutional rights.*

64. It is further submitted that the 1st Respondent made a decision to charge the Petitioner upon conclusion of investigations by the 2nd Respondent and upon receipt of an inquiry file. According to the inquiry file and the witness statements therein, the 1st Respondent found that there was sufficient evidence with a realistic prospect of conviction hence the decision made. It is also submitted that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges. Therefore, the accuracy and correctness of evidence gathered against the Petitioner can be tested in the criminal case.

65. The Respondents also submit that the prosecution of the Petitioner was instituted with reasonable and probable cause and was not actuated by any malice from the 1st Respondent who independently reviewed the evidence gathered by the 2nd Respondent and made a decision to charge. The decision was made based on the fact that there was incriminating evidence connecting the Petitioner to the offences he was charged with. Further, the evidence gathered supported the ingredients of the charges and there was an indication that a crime had indeed been committed. The 1st Respondent cannot, therefore, be said to have violated the Petitioners' constitutional rights in any way. The allegation that the prosecution was influenced by malice, vendetta and ulterior motive is baseless.

66. Upon conclusion of the investigations by the 2nd Respondents, the 1st Respondent made a decision to charge the Petitioner having due regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process in line with Article 157(11) of the Constitution. The Respondents assert that the proceedings in the criminal case were instituted with reasonable and probable cause and not actuated by malice.

67. The definition of *reasonable and probable cause* was made in ***Glinsk v Mclver [1962] AC 726*** where Lord Devlin held that: -

> ***….****.. reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction….*

68. In applying the evidential test, the 1st Respondent, in line with the National Prosecution Policy, objectively assessed the totality of the evidence both for and against the suspect at that time of making a decision to charge and satisfied themselves that it established a realistic prospect of conviction, it is submitted.

69. The Respondent emphasized that in instituting criminal charges against the Petitioner, the 1st Respondent neither acted maliciously nor did they act without reasonable or probable cause. That it did not abrogate, breach, infringe or violate any provision of the Constitution or any human and fundamental rights of the Petitioner or any other written law or regulations made thereunder.

70. On the investigative and apprehension powers of the 2nd Respondent, it is submitted that the National Police Service draws its authority to investigate from Article 245 of the Constitution and Section 35 of the NPS Act. According to Section 35 of the National Police Service Act, 2013, the functions of the 2nd Respondent include undertaking investigations, apprehending offenders as well as detecting and preventing crime. In the exercise of its powers of investigation and arrest, the 2nd Respondent is functionally independent and can only take directions to investigate from the 1st Respondent. With regards to the 1st Respondent's directions, the Constitution requires the directives to be in writing for the 2nd Respondent to give effect to the same.

71. The Respondents deny that they violated the Petitioner's fundamental rights in any way in the course of the investigations. They rely on *Republic vs The Commissioner of Police & the Director of Public Prosecution ex parte Michael Monari & Another Misc. Application No. 68 of 2011, Nairobi*, where the Court stated thus: -

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

72. On the alleged lapse of time, it is submitted that it is the responsibility of the 2nd Respondent to act on any complaint made regardless of the period it has taken the complainant to lodge a complaint. Further, Section 42(1) (a) of the Limitation of Actions Act, Chapter 22, Laws of Kenya precludes criminal proceedings from the limitation of actions. In lodging a complaint, the complainant exercised his right and was not acting out of vengeance against the Petitioner. Similarly, in acting on the complaint made, the 2nd Respondent also acted within the law.

73. It is further submitted that the 2nd Respondent heard all the necessary parties before making the decision to charge the Petitioner. The 2nd Respondent, subject to Section 52(1) of the NPS Act summoned witnesses including Mr. Odera. It is Mr. Odera who denied ever having recorded the impugned statement with the Petitioner and by extension the 2nd Interested Party and recorded a statement to that effect. The statement Mr. Odera made to the 2nd Respondent is annexed and marked as '*TT-7*' in the Respondents' Replying Affidavit.

74. The 2nd Respondent posits that it also summoned the Petitioner on 25th March 2019 with regards to the complaint and the Petitioner was cautioned as provided by Section 52(4) of the NPS Act before being charged. The charges were based on a report by a Forensic Document Examiner dated 21st October 2016 and annexed as well as marked *'TT9'* in the 1st and 2nd Respondents' Replying Affidavit.

75. It is contended that the said Report revealed incriminating evidence against the Petitioner. There was hence a proper factual foundation that led to the Petitioner's arrest and subsequent prosecution. The Respondents argued that whereas the law contemplates a scenario where litigation must come to an end, Courts ought not to turn a blind eye where there is incriminating evidence against a suspect with a realistic prospect of conviction.

76. The Respondents further argue that the 2nd Respondent exercised its investigative and powers of arrest in a procedural manner and in accordance with the law. Further, the Petitioner was arrested and charged based on the outcome of thorough investigations. The allegation, therefore, that the acts of the 2nd Respondent were arbitrary, whimsical, capricious, unlawful and unconstitutional is without basis. As well, the allegation that 2nd Respondent used trickery to summon the Petitioner and subsequently record his statement and arrest him is in bad taste.

77. The Respondents vehemently argue that unless the Petitioner establishes that the 2nd Respondent acted *ultra-vires* their powers, the Court should not grant the Petitioner the orders sought as against the 2nd Respondent. It is also argued that as long as the enabling statute is yet to be declared unconstitutional, it must be adhered to. The case of *Cascade Company Limited vs Kenya Association of Music Production (KAMP) & Others, Petition No. 7 of 2014 High Court, Murang'a* is illustrative of this point and states thus:

> ***….*** *In my view, as long as the enabling legislation is constitutional, the respondent's actions ensuing therefrom are lawful unless, of course, it can be demonstrated that the respondents have in their actions, breached those very provisions or have acted ultra vires to the act. Simply put, the respondents should not be inhibited unnecessarily from exercising their constitutional and statutory mandates….*

78. Going by the aforesaid, the Respondents submits that the Petitioner was arrested and charged in accordance with the law and the Petition has been filed in bad faith.

79. On the reliefs sought, the Respondents submit that the Petitioner having failed to demonstrate particulars of any violation of his constitutional rights as enshrined under the Constitution, has failed to prove any commission of illegality, irrationality, impropriety or unreasonable acts against the Respondents in carrying out their respective mandates. Further, they have not proved that the prosecution of the Petitioner is unreasonable, malicious or was instituted for a collateral purpose.

80. As such, the Respondents posit that the Petition be dismissed with costs.

81. From the foregoing, the parties have adequately and correctly stated the governing constitutional and statutory provisions on challenging criminal prosecutions. They have also referred to several relevant decisions. They have, to a large extent, made the work of this Court lighter. This Court highly appreciates the immense input of all Counsel.

82. Having said so, given that the Petitioner principally seeks the termination of the criminal case, this Court will briefly add its voice to the matter.

83. The starting point is the Constitution. The Petitioner is entitled to the rights and fundamental freedoms provided for in the Bill of Rights among others which are either recognized or conferred by law. Such rights and fundamental freedoms are an integral part of Kenya as a democracy and are the cornerstone of our social, economic and cultural policies. As such they must be recognized and protected.

84. In the wording of Article 19(2) of the Constitution '*the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings'*. It is, therefore, for such reasons that the rights and fundamental freedoms are inherent, to the extent that they are not granted by the State, and can only be limited as provided for by the Constitution.

85. The Respondents are either State organs, state officers and/or public officers. They all discharge various mandates under the Constitution and the law. As such they are bound by the national values and principles of governance enumerated in Article 10(2) of the Constitution which include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability and sustainable development.

86. Article 157 of the Constitution establishes the Office of the Director of Public Prosecutions. It also stipulates the scope of the mandate as follows in sub-articles (4), (6), (10) and (11) 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 clauses (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.*

87. Article 245(4)(a) of the Constitution further provides that: -

> *The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to-*
>
> > *a) the investigation of any particular offence or offences.*

88. The institution which is vested with the mandate to carry out investigations is the National Police Service. Articles 243 to 245 of the Constitution provide for the establishment of, the objects and functions and the command of the National Police Service. The legislation contemplated under Article 243(4) of the Constitution is the now National Police Service Act, No. 11A of 2011.

89. As creatures of the Constitution, the Respondents can only perform their duties within the confines of the Constitution and the law.

90. Courts have, many a times, dealt with the manner in which the investigative and prosecutorial agents are to discharge their mandates. I will, further to what the parties have already submitted on, consider just a few of such decisions.

91. Regarding the exercise of prosecutorial discretion by the Director of Public Prosecutions, the Court of Appeal in ***Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR*** stated as follows: -

> ***[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in Mohit v Director of Public Prosecutions of Mauritius [2006] 5LRC 234****:*
>
> *these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all…*
>
> *In **Regina v. Director of Public Prosecutions ex-parte Manning and Another** [2001] QB 330, the English High Court said partly at para 23 **page 344:***
>
> *At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.*
>
> ***Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.***
>
> ***[42] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.***

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

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

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

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

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

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

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

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

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

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

The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

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

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

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

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

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

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

The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated…

99. In ***Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR*** the Court held that:

… *the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene....*

100. Recently, the High Court in ***Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties) [2021] eKLR*** dealt with several instances where a Court may intervene and stop a prosecution. They include where: -

(i) There is no ostensible complainant in respect to the complaint;

(ii) The prosecution fails to avail witness statements and exhibits without any justification;

(iii) There is selective charging of suspects; or

(iv) An Advocate is unfairly targeted for rendering professional services in a matter.

101. It is, hence, a settled legal principle and position that whenever a Petitioner sufficiently demonstrates the stifling of or threats of infringement of rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies, a Court should not hesitate to intervene and stop such a prosecution. Such intervention by the Courts should, however, be in clearest of the cases.

102. Drawing from the foregoing, for the Petitioner to succeed in his claim in this case, he must demonstrate the stifling of or threats of infringement of his rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies. The Petitioner may also demonstrate that the prosecution of the criminal case is not in public interest or is not in the interests of the administration of justice or that the prosecution is in abuse of the legal process. Likewise, the Petition may succeed if the Petitioner proves that the investigations were undertaken contrary to Article 244 of the Constitution, the National Police Service Act and the law in general.

103. One of the grievances by the Petitioner is that there is inordinate and unexplained delay in instituting the criminal case. He asserts that due to the passage of time, being around 15 years, he is not likely to vividly recall the events in issue, that he has lost contact with witnesses since he is no longer employed by the 2nd Interested Party and that the 2nd Interested Party destroyed its records 8 years after handing over the investigation report to the 1st Interested Party.

104. The Respondents did not respond to the issue in their joint Replying Affidavit. Instead, an attempt to explain the lapse of time was briefly made in the course of submissions, and as follows: -

Your Lordship we humbly submit that it is the responsibility of the 2nd Respondent to act on any complaint made regardless of the period it has taken the complainant to do so after the occurrence of the alleged offence. Indeed, Section 42(1) (a) of the Limitation of Actions Act, Chapter 22, Laws of Kenya precludes criminal proceedings from the limitation of actions. In lodging a complaint, the complainant exercised his right and was not acting out of vengeance against the Petitioner. Similarly, in acting on the complaint made, the 2nd Respondent also acted within the law.

105. The above response elicits two issues. *One*, the justification is not grounded in the Respondent's response. Instead, it was made from the bar, during submissions and by Counsel. It is apparent that both the investigator and the prosecutor never considered the issue.

8. It is a well settled legal principle that parties are bound by their pleadings and that any evidence which does not support the pleadings is for rejection. The position was reiterated by the Supreme Court in its ruling in ***Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR*** where the Court held that: -

[52] Further, the Court went on and observed that: -

… In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings….

106. The Court of Appeal in ***Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR*** which decision cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where *Sylvester Umaru Onu, JSC* stated that: -

It is settled law that parties are bound by their pleadings……the court below was in error when it raised the issue contrary to the pleadings of the parties.

107. *Adereji, JSC* in the same case expressed himself thus on the importance and place of pleadings: -

…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

108. The Supreme Court of Kenya as well agreed with the above legal position in a ruling in ***Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR.***

109. Further, the Supreme Court in ***Gideon Sitelu Konchellah v Julius Lekakeny ole Sunkuli & 2 Others [2018] eKLR*** spoke to the essence of a Replying Affidavit in a matter, and as follows: -

[9] A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence of this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect…...

110. On the basis of the foregoing, suffice to say that the explanation tendered by the Counsel, in attempting to justify the delay of 15 years before prosecuting the Petitioner, in the submissions, does not, therefore, aid the Respondents. The submission is for rejection.

111. The *second* issue which arises from the Respondents' submission on the lapse of time is that the concerns raised by the Petitioner cannot be ignored and that there must be a justification for the delay especially in instances where a Petitioner raises a red flag that the delay is prejudicial to his/her/its rights and fundamental freedoms.

112. Whereas this Court agrees with the Respondents that criminal proceedings are not time bound, in instances where such proceedings are initiated after such a long period of time, justice and fair play demands that the delay be explained and justified. Courts are called upon to intently look into the effects of the delay.

113. Given the failure by the Respondents to offer any explanation and justification in this case, the Petitioner's concerns cannot be wished away. It is a reasonable assertion that one is likely to suffer faded memory on an issue 15 years post the event. Further, the fact that the Petitioner is unable to adequately prepare his defence due to the inability to secure witnesses after such a time cannot be far-fetched. It is also not controverted that the records on the matter at hand which were held by the Petitioner's employer were destroyed 8 years after the 2nd Interested Party submitted its report to the 1st Interested Party.

114. The Court of Appeal in ***Wycliffe Oparanya Ambetsa v. Director of Public Prosecutions (2016) eKLR*** re-emphasized the position in law that: -

> ***21.*** *……. delay to prosecute a case cannot, in itself be taken to be a basis of stopping a prosecution case,* ***it is the effect of the delay that had to be considered….***

115. The Petitioner is charged with serious offences. In such a case the Petitioner ought to be accorded reasonable opportunity to adequately prepare his defence and meet his accusers in Court. The offences relate to allegations that the Petitioner unlawfully authored the impugned statement. The Petitioner contends that he cannot properly recall how he dealt with the matter and in any event the records were destroyed. The prospects of getting witnesses are also very minimal, if any.

116. The effects of the delay raised by the Petitioner in this case are reasonable and realistic. The passage of time has adverse effects on the Petitioner's ability to adequately prepare his defence in the criminal case. Such state of affairs directly infringes the Petitioner's right under Article 50(2)(c) of the Constitution to have adequate facilities to prepare a defence and the right to adduce and challenge evidence under Article 50(2)(k) of the Constitution.

117. The other ground raised by the Petitioner relates to who the ostensible complainant is in the criminal case. Whereas the State appears in a criminal matter as the complainant, the State *per se* does not ordinarily lodge complaints to the investigative agencies. In the ordinary order of affairs, complaints are lodged by either natural persons or legal entities. Therefore, whereas the State appears to be the complainant in the fore, there is the real person who or entity which initiates the investigations by lodging of a complaint, in the background. That is the person who or the entity which appears in the body of a charge sheet under the column of ***'Complainant and Address***'.

118. In this case, the charge sheets indicate the complainant as Maurice Philemon Akatsa. It is him who wrote a letter to the 2nd Respondent. The letter is dated 15th July, 2016.

119. Due to the centrality of the letter, I will reproduce the body thereof, and as under: -

> ***RE: REQUEST FOR EXAMINATION OF QUESTIONED DOCUMENTS:***
>
> *Mr. Danny Mukhwana Odera denied knowledge of a signature on a document uttered as evidence in Civil Case CMCC No 412 of 2006; Self and Anor vs UAP Provincial Insurance Co. Ltd. by Invespot Insurance Investigators purported to his (Odera's).*
>
> ***Questioned statement****:*
>
> *Insurance Investigator's statement containing questioned signatures is hereto attached.*
>
> ***Known document****:*
>
> *The affidavit marked "B" containing Mr. Odera's known signature is hereto attached.*
>
> ***It is desired to ascertain:***
>
> *1/ Whether or not the questioned signature pointed by arrows in red ink on A was made by the same author as known signature on B pointed by red ink.*
>
> ***M.P. Akasa.***

120. *What did the complainant vide the above letter request the 2nd Respondent to do?* In its plain meaning, and simply put, the letter requested the 2nd Respondent to ascertain whether the impugned statement was authored by Mr. Odera. The complainant further informed the 2nd Respondent that the impugned statement had been used as evidence in the suit. And, that was all.

121. The complainant did not tell the 2nd Respondent what he wanted to do with the outcome of the request made. There being a nexus between the impugned statement and the suit, chances were high that the complainant may have wanted to use the results, if favourable to him, in the suit, say for review or setting aside of the judgment on account of new evidence.

122. I have carefully perused through the record. I did not come across any request either by the complainant or Mr. Odera to the 2nd Respondent to file criminal charges against anyone who may be implicated in any fraud, if revealed. Therefore, the institution of the criminal case was, in the circumstances of this case, at the sole instance of the 1st and 2nd Respondents. That being the case, the inevitable question which arises is the interest the 1st and 2nd Respondents had in the matter.

123. Arising from the foregoing is the issue as to whether Maurice Philemon Akasa is a complainant *stricto sensu* in the criminal case. *Section 2* of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya defines a '***complaint***' as follows: -

> *an allegation that some person known or unknown has committed or is guilty of an offence;*

124. An '***offence'*** is defined under the Office of the Director of Public Prosecutions Act, No. 2 of 2013 to mean: -

> *an act, attempt or omission punishable by law;*

125. In this matter, Maurice Philemon Akasa did not at any time lay a report to the 2nd Respondent that the Petitioner or someone else had committed or was guilty of an offence. Maurice Philemon Akasa was, hence, not a complainant in the criminal case. There is no one who laid any complaint to the 2nd Respondent over the Petitioner. Not even Mr. Odera. As a result, there is no complainant in the criminal case. The scenario further compounds the 1st and 2nd Respondents' interest in the matter.

126. The above issue is intertwined with the nature and extent of the investigations carried out by the 2nd Respondent. Subject to proof, it may be the case that Mr. Odera is not the author of the impugned statement. The Petitioner denied the charges in the criminal case. However, from the record before this Court, the 2nd Respondent did not avail any shred of evidence implicating the Petitioner in any way. First, the Petitioner's hand writing samples were not taken and subject to forensic examination. Second, Mr. Odera denied knowing or ever meeting the Petitioner. Third, no member of the 2nd Interested Party was ever interviewed by the 2nd Respondent despite there being correspondences between the 2nd Interested Party and the 2nd Respondent. Fourth, the author of the impugned statement is unknown. Fifth, the one who uttered the impugned statement is also unknown.

127. Surprisingly, the 2nd Respondent went to the full length in attempting to demonstrate that the impugned statement was not authored by Mr. Odera. The 2nd Respondent did not, however, see the need to take steps towards connecting the Petitioner with the impugned statement. It is clear that the investigations, so to say, by the 2nd Respondent were not on a balanced scale. They were also not comprehensive. The investigations were inclined towards a premeditated goal. The goal was to, at all costs, implicate the Petitioner. The 2nd Respondent's suspect interest in the matter is further illuminated.

128. Going by the evidence on record, the prosecution is not likely to secure any conviction on any of the charges against the Petitioner in the criminal case. The criminal case is likely, therefore, to have been initiated for undisclosed collateral purpose. That lends credence to the Petitioner's contention that the charges amount to an abuse of the Court process.

129. On a wholesome consideration of this matter, there is no doubt that the conduct of the 1st and 2nd Respondents is questionable. It cannot be the case that they acted in public interest or in the interest of administration of justice. They jointly acted for an otherwise cause.

130. Whereas the investigations undertaken by the 2nd Respondent are highly suspect, the decision to charge the Petitioner made by the 1st Respondent is equally questionable. A decision to prefer charges against a party must be made within the confines of public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. That was not the case in this matter.

131. In sum, the Petitioner's rights under Article 50(2)(c) and (k) of the Constitution were variously infringed by the 1st and 2nd Respondents. Further, the 1st Respondent acted contrary to Article 157(11) of the Constitution and Sections 4 and 26 of the Office of the Director of Public Prosecutions Act whereas the 2nd Respondent acted in contravention of Article 244(a) and (c) of the Constitution and Sections 49(4) and (10) of the NPS Act.

(b) <u>Whether the remedies sought do issue:</u>

132. The Petition has succeeded.

133. The Petitioner is entitled to appropriate reliefs.

<u>Disposition:</u>

134. Deriving from the above, the following final orders hereby issue: -

> **(a) A declaration hereby issues that the prosecution of Reuben Mwangi in Milimani Chief Magistrates Court Criminal Case No. 535 of 2019 is unconstitutional, unlawful, irregular and unfair.**
>
> **(b) An order of *Certiorari* hereby issues calling, removing, delivering up to this Honourable Court and quashing or revoking the decisions to charge and prosecute Reuben Mwangi in Milimani Chief Magistrates Court Criminal Case No. 535 of 2019.**
>
> **(c) An Order of Prohibition hereby issues prohibiting the 1st and 2nd Respondents, that is, The Director of Public Prosecutions (DPP), Directorate of Criminal Investigations and the Chief Magistrate's Court Nairobi from prosecuting, trying, hearing, or taking any further proceedings whatsoever in Milimani Chief Magistrates Court Criminal Case No. 535 of 2019.**
>
> **(d) Costs of the Petition to the Petitioner to be jointly and severally borne by the 1st and 2nd Respondents.**

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF JULY, 2021

A. C. MRIMA

<u>JUDGE</u>

Judgment virtually delivered in the presence of:

Mr. Karanja, Learned Counsel for the Petitioner.

Miss. Arunga, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the 1st and 2nd Respondents.

Elizabeth Wambui – Court Assistant