REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KILGORIS

CRIMINAL PETITION NO. 1 OF 2021

(FORMERLY NAROK HIGH COURT PETITION NO. 4 OF 2020)

(CORAM: F.M. GIKONYO J.)

BETWEEN

SAMUEL NG'OBOI KIRUSUA.....1ST PETITIONER

NICHOLAS TAJEWUO KIRUSUA.....2ND PETITIONER

AND

REPUBLIC THRO'

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

A. Introduction

[1]. On 28th July 2020, the Petitioners filed a Petition pursuant to the provisions of Articles 22, 23, and 165(3) of the Constitution, Section 39,123,124, and 125 of the Criminal Procedure Act. In the Petition, the Petitioners seek a number of prayers viz;

> **a. That the petitioners be arrested by this honourable court.**
>
> **b. That the petitioners be granted bond pending their arrest if any by the police and their subsequent arraignment in court.**
>
> **c. A declaration that the arrest and prosecution of the petitioners to promote the complainant's case is unconstitutional, null and void as it violates the constitution.**
>
> **d. A declaration that the use of criminal process in purely civil disputes is an abuse of the court process is unconstitutional, null and void as it violates the constitution.**

[2]. The petitioners and the complainant have been involved in a number of litigations which ended up in appeals and now this petition. The relevant litigation in so far as this petition is concerned is; **Kilgoris Principal Magistrate's Court** C**riminal cases numbers;** ***252 of 2017 Republic vs. Samuel Ng'oboi Kirusua;*** **424 Of 2020 Republic vs. Nicholas Tajewuo Kirusua; and 469 Of 2020 Republic vs. Nicholas Tajewuo Kirusua**

[3]. It also appears that, on 5th March 2015, one JOHN OLUKAYIA KAPIO filed a Plaint in **Kisii Environment and Land Case No. 89 of 2015** for an order of eviction against the Petitioners to remove and/ or demolish illegal structures, houses illegally constructed on land parcel Transmara/ Olomismis/981.

[4]. On 18th March 2015, the Petitioners filed their defence and counter –claim and the matter is pending in court as **Kilgoris PM'S Environment and Land Court No. 16 of 2018**. While this case is pending, the complainant has made allegations both civil and criminal against the petitioners.

[5]. When the petition came on 29/07/2020, the court made inter alia the following orders;

That the petitioners/applicants are hereby granted anticipatory bail on executing a bond in the sum of Kshs 5,000/= each until 28/09/2020 pending the hearing and determination of their petition.

D. PARTIES' SUBMISSIONS

The Petitioner's Submissions

[6]. The Petitioners submitted that the use of criminal process in settling a purely civil dispute must be frowned upon. They argued that, the action of the police in arresting, charging and prosecuting the petitioners is unconstitutional, null and void-it offends Article 22 and 23 of the constitution as further amplified in Rule 4 of the protection of rights and fundamental freedoms.

[7]. That upon obtaining this court's order on 29th July 2020 the same was served on the Kilgoris office of the director of public of prosecutions on 30/7/2020.

[8]. Despite service of the order, the police arrested the 2nd petitioner when he was attending a mention in court and arraigned him on the same 30/7/2020 and charged him with criminal case number **469 of 2020**

i. **Threatening to kill.**

ii. **Disobeying lawful order ELC 89 of 2015**

iii. **Forceful detainer of LR. Transmara/ Olomismis/981**

[9]. That all these arrests and charges are designed to steal a match. The police have absolutely no business in solving land matters. Land matters are left for the resolution of the land registrars under the various land acts and environment and land court.

[10]. All these complaints, arrests and arraignment relate to alleged disobedience of an order issued in the civil case **Kisii High Court ELC Number 89 of 2015.**

[11]. Besides these criminal proceedings at the instance of the same complainant being the plaintiff in the civil case, obtained an *ex parte* order from the principal magistrate at Kilgoris date 20/05/2020 and destroyed the Petitioners' fence. There is a Pending Matter **Narok High Court Elc No. 17of 2020** and an Application by the Petitioners for contempt directed at the complainant for knowingly and falsely obtaining an *ex parte* order and destroying their property while there was in existence an order for status quo.

[12]. The police have actively assisted the complainant in the arrest and prosecution of the petitioners.

[13]. That in paragraph 3 of the replying affidavit the prosecution counsel depones that the 2nd petitioner has been in hiding since 10th march 2017 till June 19th 2020. No evidence is placed before court to that effect.

[14]. That at paragraph 5, the prosecution counsel states that the charge sheet in **Kilgoris PM Criminal 424 of 2020** related to the 1st petitioner that cannot be so as the 1st Petitioners' case had been concluded.

[15]. At paragraph 7 the prosecution counsel averred that the defense counsel did not raise any objection while indeed the order of the court dated 29/7/2020 was served both on the director of public prosecutions and the court for plea.

[16]. That the court record in the trial proves that the order of this court was brought to the attention of the prosecuting counsel and the court before the 2nd Petitioner took plea on 30/07/2020.

[17]. That in all the circumstances of this case, the prosecution has not challenged the constitutionality of the police action. The Petitioners therefore pray for declaration that;

i. The prosecution of the Petitioners with a view to promoting the complainants case is unconstitutional, null and void as it violates the constitution and;

ii. A declaration that the use of the criminal process in purely civil despites is an abuse of the court process is unconstitutional, null and void.

[18]. That pending cases, **Kilgoris Principal Magistrates Criminal Case Number 424** and **469 of 2020** be terminated and an order of mandamus issued.

[19]. They therefore urge the court to find that the conduct of the police in prosecuting the petitioners is unconstitutional null and void.

[20]. The petitioners urged the court to make a reference to ***Nairobi Constitutional Petition No. 3 Of 2019 Moses Namayi Ayungu Vs The OCS Butere Police Station and 3 Others and Molyn Credit Ltd and Another*** and the judgement of **Odunga J** in ***Machakos High Court Criminal Misc Cause No. 88 of 2018 Stella Richard & 13 Other Vs DPP & 2 Others.***

The Respondents' Submissions

[21]. The prosecution submitted that **PC Wycliffe Nyongesa** was conducting his duty as an investigating officer after he was minuted by the OCS Kilgoris Police Station to look into a complaint filed vide OB 32/02/06/2020.John Kapio had made a complaint. The OCS then proceeded to summon the two petitioners through the office of the assistant chief of Olomismis Location. They were summoned to appear on 19th June 2020.

[22]. That the OCS would have opted to send his officers and arrest the two Petitioners which he can legally do in the performance of his duties in enforcing the law. He however opted to summon the Petitioners to the station. That the OCS in summoning the Petitioners and assigning an investigations officer was only fulfilling his mandate as provided by Article 245(4) (a) (b) of the Constitution.

[23]. That the police should be allowed to lay down their evidence before the trial magistrate will then weigh the evidence and make determination. The prosecution counsel relied in the case of ***Republic V Director of Public Prosecutions &2 Others Ex Parte Stephen Mwangi Macharia [2014] eKLR***.

[24].That the Petitioners have not shown in what way their constitutional rights under article 22, 23 and 165(3) of the constitution have been infringed upon by the Respondents. The 1st Petitioner was charged in **Criminal Case No. 252 of 2017**. The matter proceeded to full hearing and the accused person was convicted on 25th November 2019. The 1st Petitioner was afforded a full trial and evidence was considered that lead to his conviction and he has appeal against the said judgment. The 1st Petitioner was charged jointly with others not before court. The investigating officer set out his reasons in paragraph 3 of the replying affidavit as to why the 2nd petitioner who was the intended co accused was never charge with the 1st petitioner.

[25]. That in both **Criminal Case No 424 and 469 of 2020** the 2nd Petitioner's rights were not violated in anyway because in both cases he was admitted by the trial court.

[26]. The 2nd Petitioner was charged with the offence of threatening to kill contrary to Section 233(1) of the Penal Code. It related to the complainant and the OCS Kilgoris had a mandate to investigate such offence.

[27]. That there is an existing civil dispute between the complainant and the Petitioners. Existence of such dispute does not bar the institution of criminal charges even where the subject matter is similar in both instance. The prosecution cited Section 193 A of the Criminal Procedure Code.

[28]. That no evidence was laid down to show that the complainant, the police or the DPP had instituted the criminal proceedings to pressurize the petitioners to compromise the civil suit. That the said allegations are mere innuendos, aspersions without tangible evidence and the same should not move this court. The Respondent's counsel cited the case of ***Stephen Mburu Ndiba V Ethics & Anti-Corruption Commission & Another [2015] eKLR***

[29]. That the Petitioners' petition does not disclose any form of abuse of the court process by the police and the DPP nor any violation of the petitioners rights under the constitution. The prosecution counsel concluded by urging the court to consider the prosecutions counsel dated 24th September 2020 on the issue of contempt and dismiss both petitions.

D. ANALYSIS AND DETERMINATION

[30]. I have considered this petition; responses thereto, submissions by counsel for the parties and authorities relied on. The main issue for determination is whether the Petitioners' rights have been infringed and whether the DPP and the police abused the state powers of prosecution and investigations, respectively. Ultimately, I will establishe whether the orders sought are deserved.

Anticipatory bail

[1]. I do note that the judge granted anticipatory bail to the petitioners. I wish to express a point or two on this relief.

[2]. In jurisdictions where anticipatory bail is practiced, it is expressly provided. And, it emerges that anticipatory bail is a direction issued by the court to release a person on bail, even before the person is arrested. In other jurisdictions, anticipatory bail is granted to a person who has been arrested by the court.

[3]. Anticipatory bail is, therefore, a special relief in criminal law. However, the core, character and scope of anticipatory bail may be problematic, requiring clear and careful stitching of the relief. Some jurisdictions have gone round this dilemma by expressly and specifically providing for anticipatory bail in the law; and its nature, core and effect is regulated in the statute and regulations or rules thereunder. For instance, **Indian** criminal law has a specific provision for **anticipatory bail** under Section 438(1) of the Criminal Procedure Code. It is also expressly provided that anticipatory bail in India is issued only by the Sessions Court and High Court. This kind of hemming of anticipatory bail becomes necessary due to the very nature of anticipatory bail to become potentially inhibitive of investigative mandate of the police and other investigative organs of the state. A case is, therefore, made out that, prescription of the core, content and scope of anticipatory bail or whatever other order granted in that genre should be properly set out in law or in the jurisprudence creating or adopting it.

[4]. In Kenya, there is no express provision in law or the Constitution. The Constitution of Kenya, 2010, provides for; (a) bail of arrested person under article 49(1)(h); and (b) appropriate reliefs under article 23(3) for breach or threat of breach of the Bill of Rights. I am acutely aware that arguments have been made that anticipatory bail could be and have been tailored and granted by the court as an appropriate relief under article 23(3) of the Constitution. Thus, anticipatory bail is a creature of judicial craft in Kenya- but as the order is granted by different

courts so does the relief of anticipatory bail remain at large; increasing the danger of having a relief without specific genre, character, scope, core and content.

[5]. I am nevertheless, aware that where anticipatory bail has been considered, courts have applied the threshold for an application for violation or threatened violation of right under article 23 and 165(3) of the Constitution. As we engage with this phenomenon, I only find it instructive that the core of orders under article 23 and 165(3) should be properly-fashioned as to be in accord with the Constitution of Kenya, 2010 as redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights should be ascertained. Thus, care should be taken not to adopt an amorphous practice in the name of anticipatory bail which may be a less austere approach for redress for violation or threatened violation of the Bill of Rights and fundamental freedoms intended in the Constitution, and perhaps make it a toll to place unnecessary impediment upon constitutional function and mandate of other state organs.

Impeding constitutional mandate of investigation

[6]. Odunga J. appreciated this novel philosophy and the standard required in evaluation of application for anticipatory bail when he stated in the case of **Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others [2013] eKLR** as follows: -

> ***"However before going to the merits of the instant application it is important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well as civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so."***

[7]. I will therefore apply the test of whether the rights and fundamental freedom of the petitioners have been infringed or threatened with infringement as to warrant this court's intervention?

The test

[8]. A person who seeks redress for breach of the Constitution or violation or threatened violation of the Bill of Rights and Fundamental Freedoms should provide reasonable detail which will enable the court properly applying its mind, make a finding of violation or threatened violation of the Constitution or right or fundamental freedom. See the case of ***Trusted Society of Human Rights Alliance v AG. & 2 others [2012] eKLR*** the court re-stated the principle in ***Anarita Karimi Njeru*** which predated it in the following terms:

> ***"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.***
>
> ***(a) The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."***

[9]. In ***Mumo Matemu v Trusted Society of Human Rights Alliance and others[2013] eKLR,*** the Court of Appeal re-affirmed the test in ***Anarita Karimi Njeru*** when it stated:

> ***"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."***

[10]. The Petitioners have alleged violation of Articles 22,23 and 165(3) of the Constitution of Kenya 2010. That this court has jurisdiction to protect them pursuant to Sections 39, 123, 124 and 125 of the Criminal Procedure Code.

[11].The Petitioners have asked this court to declare that their arrest and prosecution to promote the complainants case is unconstitutional, null and void. They have also sought a declaration that the use of criminal process in purely civil disputes is an abuse of the court process, thus, unconstitutional, null and void.

[12]. In light of the foregoing complaints, relevant to this case are two articles. Article 165(3) (d) (ii) of the Constitution confers on this court jurisdiction to determine the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the constitution. Article 23(1) confer jurisdiction to hear and determine applications for *redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights.*

Stopping investigation, prosecution and trial

[1]. Investigation of crime is constitutionally-backed. Similarly, institution of criminal proceedings as well as conducting a criminal trial in court are constitutionally underpinned. These processes are for purposes of; (i) bringing the culprit to justice; (ii)soothing the wound inflicted on the society by the crime; (iii) and reparation to victims of crime. Therefore, undertaking investigations or prosecution or criminal trial *per se* is not harassment or unconstitutional or violation of a right or fundamental freedom. However, to avert these processes from operating as the ancient bill of attainder, the law has provided staple criminal protections to ensure the rights of the suspect are not infringed during these processes.

[2]. To impugn an investigation, a prosecution or a trial, the applicant must show that the investigations, prosecution and trial have been undertaken for purposes other than bringing the applicant to justice; it is for ulterior or collateral purpose, say, to settle scores or debt, or political persecution or malice; or it is oppressive. I will point out some important aspects of this debate specifically to do with investigation and prosecution. An investigation will ensue if there are reasonable grounds to suspect that an offence has been committed. And, a prosecution will be mounted where the DPP is satisfied and honestly believes that, on the basis of the evidence provided and the requirement of the law, the suspect committed the crime as the principal offender or an abettor or an accessory.

[3]. The National Prosecution Policy, 2015. Part 4B of the Policy identifies two basic components that should inform the decision to prosecute. The first is that the evidence available is admissible and sufficient, while the second is that the public interest requires that where evidence discloses a criminal act, a prosecution be conducted. The former is the evidential test while the latter is the public interest test. On the evidential test, the Policy states:

> ***"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? To make this determination, Public Prosecutors should therefore consider the following:***
>
> ***a) If the identity of the accused is clearly established through admissible evidence.***
>
> ***b) The strength of the rebuttal evidence.***
>
> ***c) Would the evidence be excluded on the basis of its inadmissibility, for instance under the hearsay and the bad character rules?***
>
> ***d) Reliability of the evidence considering; whether there would be concern about accuracy, credibility or motivation of the witnesses? What is the suspect`s explanation?***
>
> ***Is the confession believable? How was evidence obtained?***
>
> ***I. Is there further evidence which would be required? The standard of evidence required under the Evidentiary Test is less than the Court`s "beyond reasonable doubt" standard for conviction.***
>
> ***ii. In some cases the available evidence at the time may not be sufficient to determine the Evidential Test, that is, "realistic prospect of conviction". In such circumstances, Public Prosecutors should apply the "Threshold Test" in order to make the decision whether or not to charge.***
>
> ***iii. For example, relevant expert evidence or evidence required to determine bail risk may not be available within the limited time of arraignment of a suspect before court. Such are the instances that necessitate the application of the Threshold Test.***
>
> ***iv. A prosecutor shall consider the following conditions in applying the Threshold Test:***
>
> ***(i)The evidence available is insufficient to apply the Evidential Test.***
>
> ***(ii) There are reasonable grounds to believe that evidence will become available in good time.***
>
> ***(iii) The seriousness of the matter and the circumstances of the case justify the making of an immediate decision to charge***
>
> ***v. The obtaining circumstances necessitate the making of an application for the denial of grant of bail.***
>
> ***vi. If the obtaining circumstances do not fall within the conditions above a decision to charge should not be made.***
>
> ***vii. Where the case does not pass the Evidential Test it must not go ahead, no matter how serious it may be. Public Prosecutors can only apply the Public Interest Test when the Evidential Test is satisfied."***

[4]. This Policy is in accord with the constitutional imperative set out in Article 157(11) of the Constitution.

[5]. In determining whether or not to stop prosecution the court should examine whether there was a foundation or basis for the case without undertaking such analysis of the evidence as to usurp the function of the trial court.

[6]. Does whether the material placed before the court demonstrate; (i) the alleged violation of fundamental rights guaranteed under the cited Articles; and (ii) contravention or abuse of the state powers of investigations and prosecution.

Factual or legal foundation of the charges

[7]. This petition is challenging the exercise of DPP's constitutional power to mount a criminal prosecution. According to article 157(10) of the Constitution: -

> ***(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.***

[8] Except, however, the exercise of the state power of prosecution is subject to the power of judicial review bestowed upon the High Court under article 165 of the Constitution to determine whether the prosecution was done in accordance with the Constitution. The DPP in mounting a prosecution is guided by article 157(11) of the Constitution which provides that: -

> ***(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.***

[1]. Have the petitioners satisfied the threshold for orders?

[2]. In such case, it bears repeating that, the court is concerned with the legal and factual foundation of charges without engaging such evaluation of evidence which is the role of the trial court. Courts should therefore, be careful not to succumb to any invitation to usurp the function of the trial court.

[3]. The petitioners have invited the court to carry out evidence audit. The DPP calls for a more restrained approach which recognizes that the DPP and the police were discharging their constitutional mandate.

[4]. In ***Diamond Hasham Lalji*** which the Court of Appeal cited in ***Njuguna S. Ndung'u,*** the Court held:

> ***"[45] In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative. State of Maharashtra Ors v Arun Gulab Gawall & Ors – Supreme Court of India – Criminal Appeal No. 590 of 2007 para 18 and 24, Meixner & Another v Attorney General [2005] 2 KLR 189."***

[5]. Whereas, there is a real danger of overreaching if in a constitutional petition a more intrusive approach is used to evaluate the merit of the DPP's decisions, there are circumstances where the type of scrutiny set out in the majority decision of **Njuguna S. Ndungu** (supra) is merited such as; where credible evidence is adduced that criminal 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.

[6]. At the very heart of this Petition is the allegation that the charges against the Petitioners fall into a pattern of retaliatory action by the complainant due to an existing civil dispute.

[7]. As I indicated at the start of this analysis, the Petitioners have a duty to demonstrate the alleged violations and contraventions of the Constitution.

[8]. I find no evidence which show that the charges herein were so wanting that no reasonable prosecutor, having proper regard to the prosecutorial powers donated by the Constitution and guided by the National Prosecution Policy, could possibly mount a prosecution. No deficiency that is readily apparent and which reveals itself without a detailed examination of the evidence available. In fact, some cases are concluded with a conviction. For instance, the 1st Petitioner was charged in **Criminal Case No. 252 of 2017**. The matter proceeded to full hearing and the accused person was convicted on 25th November 2019.

[31]. The petitioners claimed that despite service of the anticipatory order, the police arrested the 2nd petitioner when he was attending a mention in court and arraigned him on the same 30/7/2020 and charged him with criminal case number **469 of 2020**

iv. Threatening to kill.

v. Disobeying lawful order ELC 89 of 2015

vi. Forceful detainer of LR. Transmara/ Olomismis/981

[9]. The foregoing charges would legally lie and may not be said to be in violation of the order. It is my finding that the petitioners did not also show that the Respondent took them through criminal processes so as to achieve settlement of a civil claim pending court. Needless to state, however that mere pendency of a civil case is not a bar to the institution of a criminal prosecution arising out of facts in issue in the civil claim. See section 193A of the CPC which provides that: -

> ***193A. Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.***

[10]. The complaints in this petition are apt defenses and objections to the charges which should be raised in the trial rather than package them in a constitutional petition. I, therefore, find, no abuse of legal process or statutory and constitutional state prosecution powers by the DPP or investigative mandate by police.

[11]. Of greater value to this petition should have been evidence by the Petitioner to show that these events were either instigated, orchestrated or coordinated by the complainant. Further, no evidence has been presented to show a connection between the desire by the complainant to harass the petitioners and the decisions taken by the DPP to charge the petitioners with criminal offences.

[12]. The DPP says that in the matter before court, he acted independently and without internal or external directions. Further, there is no evidence to suggest a conspiracy or connivance between the DPP and or police on the one hand, and any other person on the other in the cases complained about.

[13]. That said, the commencement of the prosecution was against the backdrop of a valid complaint by the complainant.

[14]. The upshot, I find with respect to the charges against the Petitioners is that I am not satisfied with their claim that there was no legal or factual foundation to the charges against them.

[15]. I now turn to consider the question whether it was proper for the police to investigate the offences alleged against the Petitioners.

Police powers to investigate

[16]. After a complaint has been made to the police, they are required to carry out investigation and upon conclusion, they may make recommendations to the DPP who determines whether to prefer charges or not. Nothing shows the investigation was malicious or aimed at assisting the settlement of a civil case herein. The investigations are on a complaint duly presented to the police. However, I must sound a warning that police officers should never set out on an ominous mission to use criminal process to harass or intimidate or to settle scores or political persecution or assist settlement of a civil claim.

Conclusions on alleged infringements of Constitution or bill of rights

[17]. At the commencement of my analysis, I indicated the Articles of the Constitution that the Petitioners alleged infringement or contravention of. These are Articles22, 23, and 165(3) of the Constitution, as well as Section 39,123,124, and 125 of the Criminal Procedure Act. The infringements and or contraventions were alleged to have been occasioned by the initiation of the investigations, the manner in which the investigations were carried out, and the decision to prosecute. It has been argued that the entire process from investigation, decision to prosecute, arrest and arraignment violated the Petitioners' constitutional rights as enumerated above.

[18]. However, as it emerges from the analysis above, I have found that there was a factual and legal basis for the prosecution of charges the petitioners faced. There is therefore no abuse of prosecution powers by DPP or investigative mandate by the police.

[19]. Given the above findings, the decision of the DPP to prosecute and to direct for the arrest and arraignment of the Petitioners in court was not in contravention of cited Articles of the Constitution.

[20]. The decision was based on the factual and legal basis informing the charges and was in accordance with both the Constitution and the National Prosecution Policy. I am unable to find any irrationality or unreasonableness in the decision of the DPP to prefer charges against the Petitioners,

[21]. In the upshot, I have come to the following conclusions:

> ***(i) There is no violation of Articles Articles22, 23, and 165(3) of the Constitution, as well as Section 39,123,124, and 125 of the Criminal Procedure Act. with respect to the decision to prosecute the Petitioners;***
>
> ***(ii) There was a factual and legal basis for the initiation of the charges against the Petitioners;***
>
> ***(iii) The decision of the DPP to prosecute the Petitioners was not taken in contravention of Article 157(11) and was not tainted by any irrationality or unreasonableness;***

[22]. For the reasons stated in this judgement, the petition fails and is dismissed. All orders issued on interim basis fall by the way side. It is so ordered.

[23]. Each party shall bear its own costs of the Petition.

DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6TH DAY OF JULY, 2021

F. GIKONYO M.

JUDGE