



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION**

JUDICIAL REVIEW MISC. CASE NO. 188 OF 2019

REPUBLIC.....APPLICANT

VERSUS

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

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT, MILIMANI.....3RD RESPONDENT

AND

ARSANAIDAH KERUBOH BUKARE.....INTERESTED PARTY

AND

PETER RONO & DICKSON AIKA.....EX PARTE APPLICANTS

CONSOLIDATED WITH

JUDICIAL REVIEW MISC. CASE NO. 210 OF 2019

REPUBLIC.....APPLICANT

VERSUS

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

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT, MILIMANI.....3RD RESPONDENT

AND

ARSANAIDAH KERUBOH BUKARE.....INTERESTED PARTY

AND

ERICK KINYUA MURIITHI & IRENE BETH NYAMBURA.....EX PARTE APPLICANTS

JUDGMENT

1. This judgment disposes two judicial review applications, namely JR No. 188 of 2019 and JR No. 201 of 2019. The common thread between the two consolidated juridical review applications is that the prosecution in the two criminal cases arise from the same set of facts and circumstances.

2. As was held in *Korean United Church of Kenya & 3 Others v Seng Ha Sang*^[1] consolidation of suits is done for the purposes of achieving the overriding objective of the Civil Procedure Act,^[2] that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The rationale behind consolidation of matters is to avoid conflicting judgments, save time and money by clubbing together matters involving common questions of fact and law.

The parties

3. The applicants in these consolidated judicial applications are all Kenyan Adults of sound minds residing and working for gain in Nairobi. They are all employees of Progressive Credit Limited (herein after referred to as the company).

4. The first Respondent in the two consolidated suits is the Director of Public Prosecutions (herein after referred to as the DPP), established under Article 157 of the Constitution with constitutional mandate to *inter alia* 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.^[3]

5. The second Respondent is the Directorate of Criminal Investigations established pursuant to section 28 of the National Police Service Act^[4] under the direction, command and control of the Inspector-General. Pursuant to section 29(8) of the act, the Director of Criminal Investigations in the performance of the functions and duties of office, is responsible to the Inspector-General. Under section 29 (9) of the act, the Director of Criminal Investigations is— (a) the chief executive officer of the Directorate; (b) responsible for— (i) implementing the decisions of the Inspector-General in respect of the Directorate; (ii) efficient administration of the Directorate; (iii) the day-to-day administration and management of the affairs of the Directorate; and (iv) the performance of such other duties as may be assigned by the Inspector General, the Commission, or as may be prescribed by this Act, or any other written law.

6. The third Respondent is the Chief Magistrates Court, Milimani, Nairobi, established under Article 169 (1) (a) of the Constitution.

The factual matrix

7. The applicants state that on 9th November 2018, the Interested Party in the two suits entered into a loan facility agreement with the said company pursuant to which the company granted the Interested Party a loan of Ksh. 250,000/=.

8. The applicants state that the repayment of the said loan was to commence on 30th of every month starting from November 2018. They state that the Interested Party defaulted in repaying the loan and as at 3rd January 2019 the loan stood at 285,000/= inclusive of accrued interests. They state that the company issued the Interested Party with a Notice to pay, and, on 17th January 2019, the company instructed Moran Auctioneers to attach the Interested Party's assets which was done in the presence of the applicants.

9. The applicants state after the said attachment, the applicants in JR N 188 of 2019 were charged with stealing the attached goods contrary to section 268 (1) of the Penal Code^[5] as read with section 268 (1) of the Penal Code^[6] in criminal case number 660 of 2019 while the applicants in JR No. 201 of 2019 were charged with a similar offence in Criminal case number 942 of 2019. The applicants state that the said charges relate to the said repossession after the Interested Party refused to repay the said loans.

Legal foundation of the applications

10. The applicants state that the criminal charges are meant to aid the Interested Party in a civil dispute in which they refused to repay the said loan, and, that the said charges were commenced maliciously to assist the Interested Party not to honour his financial obligations under legally binding agreements. The applicants also state that the first and second Respondents have acted outside their mandates and *ultra vires* the Constitution.

The prayers sought

11. The applicants in the consolidated suits seeks the following orders: -

a. *An order of prohibition prohibiting the Chief Magistrates Court, Milimani from taking further proceedings and executing any further orders, decrees, warrants or any other kind of execution in Criminal Case No. 660 of 2019, Republic v Peter Rono and Dickson Aika and Criminal Case Number 942 of 2019, Republic v Erick Kinyua Muriithi and Irene Beth Nyambura.*

b. *An order of certiorari to quash Criminal Case No. 660 of 2019, Republic v Peter Rono and Dickson Aika and Criminal Case Number 942 of 2019, Republic v Erick Kinyua Muriithi and Irene Beth Nyambura.*

c. *That this honourable court be pleased to make further or such other orders as it may deem fair and just.*

d. *That the costs of this application be in the cause.*

First and second Respondents' Replying Affidavit

12. **Police Constable Bernard Amboko**, a DCI officer attached to Kilimani and mandated to investigate the case swore the Replying Affidavits dated 24th September 2019 filed in both suits. The two affidavits contain identical averments, hence it will suffice to summarize the contents herein as constituting the first and second Respondents response to the consolidated suits. In both affidavits, PC Amboko averred that on 9th November 2018, the Interested Party applied and was granted a loan of Ksh. 200,000/= by the above name company repayable in two months between November and December 2018. He averred that the Interested Party defaulted in the repayment and a one Jackline Ngugi, the Manager of the company tried to call her in vain.

13. He averred that on 29th January 2019, the said Jackline Ngugi together with the applicant's went to the Interested Party's place of business and demanded to be paid the total outstanding loan, but after the demand was not met, they started packing the Interested Party's stock including 216 pieces of jeggings, 24 pieces official suits, 138 pieces of small size dresses, 45 pieces of large size dresses, 32 pieces of hand bags, 33 pieces of hand bags, 75 pieces of jeans, 45 pieces of official dresses, 34 pieces of jackets, 20 pieces of chiffon, 18 pieces of dinner dress, 15 pieces of dinner dresses, 15 pieces of official trouser suits and Ksh.72,500/=. (In support of this averment, the deponent annexed a copy of the OB extract).

14. He averred that the employees of the said company who are the applicants herein did not follow due process, hence, the Interested Party's lodged a complaint at the Central Police Station and later at the Banking Fraud Unit and they were referred to the CCIO's Office, Nairobi.

15. He also averred that on 23rd March 2019 following investigations some items were recovered from a warehouse at Juja, namely, 43 pieces of skirts, 29 assorted dresses, 11 pieces of ladies suits, 8 pieces of ladies jackets and 70 ladies assorted hangers, and that, the applicants were charged with the offence of stealing. Lastly, Mr. Amboko averred that the applicants have not demonstrated that in undertaking the said investigations, the DPP or the police acted without or in excess of their powers and that the accuracy or otherwise of the evidence is a matter to be tested by the lower court.

Third Respondent's grounds of opposition

16. Even though during submissions Miss Chimau, counsel for the third Respondent stated that she filed grounds of opposition on 3rd October 2019, there is none in the court files.

Interested Party's Replying Affidavit

17. **Arsanaidah Keruboh Bukare**, the Interested Party in both suits swore the Relying Affidavits dated 24th June 2019 and 16th July 2019 respectively. The two affidavits contain substantially identical averments, hence, will suffice for me to highlight their salient contents.

18. She deposed that the proceedings in the criminal cases are *bona fide* actions falling within the Respondents' powers and duties. She averred that on 9th November 2018 she entered into a loan agreement with the said company for a sum of Ksh. 250,000/=: and, that, it was agreed that the loan would be repaid in two equal monthly instalments of Ksh. 140,000/= on 30th day of every month starting from 30th November 2018 and ending on 30th December 2018.

19. She averred that as at 10th June 2019, she had already deposited Ksh. 125,000/= towards the repayment of the loan and on 5th January 2019 she visited the company to request for extension of time to complete the loan repayment owing to the fact that he was experiencing business challenges and the company's Recovery Credit Manager, a one James allowed the request.

20. She further deposed that she managed to deposit Ksh. 5,000/=daily and at times Ksh. 10,000/=: and, that on the day before her brothers' motor vehicle valued approximately at Ksh. 300,000/= was repossessed she had deposited Ksh. 50,000/=. She averred that the company acted contrary to the loan agreement by instructing Moran Auctioneers to attach her assets. She deposed that the value of the said vehicle is sufficient to cover the said loan. In addition, she averred that the company through the applicants herein raided his shop and appropriated assorted stock valued at Ksh. 3,773,000/= and she lost Ksh. 72,600/= during the commotion. She averred that the applicants actions are illegal and that she never received Notice of Default, Proclamation and inventory of the said items.

The Applicants' Advocates' submissions

21. Mr. Ondabu, counsel for the applicants submitted that the first and second Respondents acted *ultra vires* their mandate by aiding a party to gain an advantage in a commercial transaction. He cited *Republic v Director of Public Prosecutions and 2 Others, Evanson Muriuki (Interested Party), ex parte James M. Kahumbura*[7] for the proposition that it is not the purpose of a criminal investigation or a criminal charge to help individuals in the advancement of frustrations of their civil cases, and, that, criminal charges should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. He referred to the documents presented in this case and argued that they disclose a civil dispute. In addition counsel relied on *Stella Richard and 13 others v DPP & 2 others*[8] in which the court held that the police and the DPP ought not to conduct themselves as if they are an appendage of the complainants.

22. In his oral highlights, Mr. Ondabu stated that the dispute herein relates to attachment of goods following default in repayment of a loan advanced to the Interested Party. He referred to the agreements signed by the parties, and, in particular the default clause in the agreement. He submitted that the auctioneers were instructed following the default in conformity with the agreement. He also referred to a letter written by the Interested Party's advocate after the attachment complaining about the interest and the manner the attachment was effected, citing failure to serve a Notice. He argued that a complaint was lodged to the police who asked for the goods to be forwarded to them. Counsel submitted that the applicants were not challenging the DPP's powers but the use of the DPP's powers to aid a party in a civil dispute.

23. He referred to the Interested Party's affidavit admitting the goods were attached and argued that the issue of stealing came from the DPP. He also referred to the Respondent's Replying Affidavit and pointed out that the deponent did not mention stealing. He placed reliance on *Republic v Director of Public Prosecutions & 2 Others ex parte Pius Kiprop Chelimo & Another*. [9]

First and second Respondents' advocates' submissions

24. Miss Mwenda, counsel for the first and second Respondents highlighting her written submissions submitted that the DPP acted within his powers as provided under Articles 156(6), 157(10) (11) of the Constitution. She relied on *Matululu v DPP*[10] which enumerated the grounds upon which the powers of the DPP can be challenged. The grounds as laid down in the said case are acting in excess of constitutional powers, acting contrary to the Constitution, acting under the direction of another person, acting in bad faith, acting in abuse of process or where the DPP has fettered his discretion by a rigid policy. She argued that the applicants failed to demonstrate that the DPP acted without authority or in excess of jurisdiction or departed from the rules of natural justice.

25. She submitted that prohibition can issue where a public body acts without or in excess of jurisdiction or in abuse of court process and relied on *Stephen Oyugi Okero v Milimanu Chief Magistrates Court & DCI*[11] which defined abuse of court process as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with the prosecution.

26. In addition, counsel submitted that there is no evidence of misuse of power or breach of the Rules of Natural justice. She cited *Republic v Inspector General of Police, Director of Public Prosecutions & three others*[12] for the proposition that the power to stay or prohibit criminal proceedings is meant to advance the Rule of Law and not to frustrate it. Further, she submitted that the decision to prosecute is consistent with Article 157 of the Constitution and the Office of the Director of Prosecutions Act[13] citing *Republic v Director of Public Prosecutions & 2 others*. [14]

The third Respondent's Advocate's submissions

27. Miss Chimau, the third Respondent's counsel did not submit, instead she said she would adopt grounds of opposition filed on 3rd October 2019, but the said grounds are not in the court file.

The Interested Party's Advocate's submissions

28. Counsel for Interested Party invoked section 67 (1) of the Movable Property Security Rights Act. [15] With tremendous respect, the said argument is totally irrelevant to the instant case. It can only be relevant in a civil dispute but not in proceedings seeking to prohibit or quash criminal prosecution. It is useful to observe that the said argument and indeed the substance of the Interested Party's submission do confirm that the dispute between the parties herein is civil in nature.

29. In addition, counsel relied on *Hassan Ali Joho v Inspector General of Police & 3 others*[16] which reiterated the functions of the office of the DPP and argued that the applicants have failed to demonstrate that the first and second Respondents abused their powers. Counsel submitted that the arrest and prosecution of the applicants is in line with the constitutional authority bestowed upon the first and second Respondents.

30. He cited the value of the attached goods and submitted that the applicants' conduct is highly suspicious and devoid of legality, hence, it amounts to stealing. In addition, counsel cited *Republic v Attorney General & 4 others ex parte Kenneth Kariuki Githii*[17] for the holding that the effect of criminal prosecution on the accused is adverse, but so also are their purposes in the society, hence, the need for the court to balance the considerations.

Determination

31. Upon carefully analysing the opposing positions presented by the parties as enumerated above, I find that only one issue falls for determination, namely, whether the impugned prosecution is unfair, malicious and or is without any factual basis.

32. A reading of the factual chronology of the events which triggered the criminal prosecution and ultimately these proceedings leave me with no doubt that the facts are essentially common ground. It is clear that the genesis and the history of the dispute is uncontroverted. Most of the facts are conceded. Notably, it is admitted that the Interested Party borrowed money from Progressive Credit Limited (the company). The existence of the signed loan agreement is not disputed. The terms of the agreement are not contested. The repayment terms are stipulated in the agreement. The Interested Party concedes having encountered difficulties in repaying the loan and even admits visiting the company's Credit Manager to plead for time to pay. The Interested Party states that her request was granted.

33. The point of departure set its ugly face after the company pursuant to the loan agreement instructed auctioneers to attach the Interested Party's goods to recover the outstanding loan. Aggrieved by the attachment, the Interested Party lodged a complaint with the police. Acting on the complaint, the police charged the applicants herein who are employees of the said company, and who happened to be present during the attachment.

34. The first and second Respondents' Replying Affidavit sworn by the Investigating Officer enumerates the same facts. He deposed that the Interested Party borrowed money from the company and defaulted in repayment. He averred that the company proceeded to attach the goods, and that, the goods were recovered from a go-down at Juja. There is no mention that the goods were recovered from any of the complainants' houses. The police and the DPP premised the criminal charges on the above facts.

35. Simply put, the company attached the goods to recover the unpaid loan pursuant to a default clause in a loan agreement signed by the parties. From the first and second Respondents' Replying Affidavits and the Interested Party's Replying Affidavit, there is no mention of stealing. The foregoing being the undisputed facts presented by the parties, one wonders how the police and the DPP arrived at the offence of "stealing." It's baffling how the police and the DPP properly construed the law and the facts in this case could arrive at a conclusion that the facts disclose an offence of stealing. It simply beats logic.

36. I have in numerous decisions pronounced myself on the constitutional mandate of the DPP and what constitutes abuse of prosecution powers and grounds for quashing a criminal prosecution. I had the opportunity to address similar issues in *Republic v Director of Public Prosecutions and 2 Others, Evanson Muriuki (Interested Party), ex parte James M. Kahumbura*^[18] cited by Mr. Ondabu whose facts and circumstances are on all fours to this case. Inevitably, I will borrow heavily from the said decision.

37. In the said case, I observed that the process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. The DPP must consider whether to— request the police to investigate the case further; or, whether to institute a prosecution; or, whether to decline to prosecute; or terminate a criminal trial.

38. In the same decision, I stated that the decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole. The prosecutor should remain fiercely independent, fair and courageous. The responsibilities entrusted to the DPP and police demand nothing less. D.A. Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor in his often quoted passage when he said: -

“It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense.”^[19]

39. In the same decision I stated that in order to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, the DPP (and the Police) must be independent. The constitutional provision in Article 157 (10) of the Constitution ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. In the words of John Kelly TD, the prosecution system *“should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so.”*^[20] I went on to state:-

“...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice—impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one.”^[21]

40. The role of the prosecutor excludes any notion of winning or losing or pleasing a complainant; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.^[22] It is said that the prosecutor acts in the general public interest and so it must be. That is where the prosecutor's ultimate loyalty and responsibility lie. It does not lie in acting at the behest of an overzealous complainant. Mere or reasonable suspicion that the DPP did not act independently, would be sufficient to taint the criminal proceedings.

41. Also, one key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.

42. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receives careful consideration.

43. Perhaps I should add that in *Republic v Director of Public Prosecutions and 2 Others, Evanson Muriuki (Interested Party), ex parte James M. Kahumbura*^[23] stated that the discretion vested upon the DPP by the law must be properly exercised. But the *grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed*. Exercise of the discretion will be clearly unlawful *if the DPP knowingly invokes the power to arrest and prosecute for a purpose not contemplated by the law*. The decision to prosecute must be based on the intention to bring the arrested person to justice. The decision to terminate pending proceedings must be undertaken in order to advance the administration of justice.

44. The constitutional approach to the nature of a discretion and how it should be exercised must of necessity take cognizance of the provisions of the fundamental right to the freedom and the dignity of the individual.^[24] This includes the rights of the accused and the complainant. It must be borne in mind that the Bill of Rights is a cornerstone of democracy in Kenya.^[25] It enshrines the rights of all people in our country and affirms the democratic values of *human dignity, equality and freedom*. The constitution directs the State and all persons to *“... respect, protect, promote and fulfill the rights in the Bill of Rights; “The Bill of Rights applies to all law, and bindsall organs of state.”*^[26]

45. It is an established position that a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose.^[27] Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious

and actionable.

46. In the institution of criminal proceedings, the DPP will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence.^[28] It has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. There must be sufficient evidence to mount a prosecution. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. It is for the DPP to determine that the evidence presented is sufficient to justify a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused.

47. It is also true that the decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence.

48. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the accused and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.

49. In the above cited case, I observed that resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution. In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide **a reasonable prospect of a successful prosecution.**^[29] There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued. This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. The review of a case is a continuing process.^[30] Prosecutors must take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute or not to prosecute has been made.^[31] This may occur after having heard and considered the version of the accused person and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused person has pleaded or in the course of the trial in spite of an initial decision to institute a prosecution.^[32]

50. When evaluating the evidence regard should be had to the following matters:- **(a) Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute? (b) If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused? (c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable? (d) Does a witness have a motive for telling less than the whole truth? (e) Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute. (f) whether the alleged offence is of considerable public concern and (g) the necessity to maintain public confidence. As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution.**

51. I am alive to the fact that it is not for this court to assess the sufficiency of the evidence. That is a function of the trial court. However, I find myself in agreement with the decision in *Republic vs Attorney General ex-parte Arap Ngeny*^[33] where the court stated that “*a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.*”

52. The courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of a citizens fundamental rights.

53. Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.^[34] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am aware that the inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.^[35] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution.

54. Additionally, a criminal prosecution or police investigations can also be stopped if it was commenced in the absence of proper factual foundation. The Constitution contains, in material respects, a fundamental commitment to human rights. The enquiry is whether there has been an irregularity or an illegality that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.^[36] The prosecution of an accused person must be conducted with due regard to traditional considerations of candour, fairness, and justice. Where a trial is conducted in a manner different from what is prescribed under the law, the trial is bad.^[37]

55. Fundamentally, a fair and impartial trial or investigation has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial or an investigation is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism. And again decidedly, there has to be a fair investigation process and a fair trial and no miscarriage of

justice and under no circumstances, prejudice should be caused to the accused.^[38]

56. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).^[39] The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article 25 (c) of our constitution, it is among the fundamental rights and freedoms that may not be limited. A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would in my view open the door to an unfair trial.

57. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, mandamus or permanent stay of proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceeding ought to be quashed.

58. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice.

59. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction.^[40] The inherent power is to be exercised *ex debito justitiae*, to do real and substantial justice, for administration of which alone courts exist. Wherever any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent the abuse. It is, however, not necessary that at this stage there should be a meticulous analysis of the case before the trial to find out whether the case ends in conviction or acquittal.^[41]

60. Perhaps, the position I am advancing was best expressed in *Kuria & 3 Others vs Attorney General*^[42] where the High Court stated:-

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and or where the proceedings are oppressive or vexatious.. The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the court's) independence and impartiality...The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped...It would be a travesty to justice, a sad day for justice should the procedures or the process of the court be allowed to be manipulated, abused and or misused, all in the name that the court simply has no say in the matter because the decision to so utilize the procedure has been made. It has never been argued that because a decision has already been made to charge the accused person, the court should simply as it were fold its arms and stare at the squabbling litigants/disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review proceedings in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law....In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and or prohibiting prosecutions brought to not only for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its process and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilized. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus, where the court cannot order that the prosecution be not commenced, because already it has, it can order that the continued implementation of that decision be stayed... There is nothing which can stop the Court from prohibiting further hearings and or prosecution of a criminal case, where the decision to charge and or admit the charges as they were have already been made...”

61. The High Court has inherent powers to quash, stay or prohibit criminal proceedings. These powers are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India^[43] revisited the law on the issue and held that ‘these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.’ The said court delineated the law in the following terms: -

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the 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 on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it ‘soft-pedal the course of justice’ at a crucial stage of proceedings...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 the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers”^[44]

62. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*.^[45] The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

- i. *Where it would be impossible to give the accused a fair trial; or;*
- ii. *Where it would amount to a misuse/manipulation of process because it offends the court’s sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.*

63. The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances. **Chris Corns**^[46] argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories:

- i. *When the continuation of the proceedings would constitute an ‘abuse of process,’*
- ii. *When any resultant trial would be ‘unfair’ to the accused, and*
- iii. *When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.*

64. The latter ground is not limited to abuse of the trial court procedures and processes but extends more generally to abuse of the administration of criminal justice process as a whole. Clearly, there can be significant overlap between these various grounds for the stay; an unfair trial, for example would tend to bring the administration of justice into disrepute. Conversely, in some circumstances the holding of a trial may not be technically unfair to the accused yet still undermine the integrity of the legal system because of some impropriety in the investigation or prosecution of the case. The justification for granting a stay extends beyond any abuse of process and includes circumstances where it would be ‘unfair’ to the accused for the proceedings to continue.^[47]

65. Also relevant to this case is the holding in *Republic vs Chief Magistrate’s Court at Mombasa ex-parte Ganjee & Another*^[48] that:-

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use a criminal proceeding to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and or certiorari will issue and go forth....When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement...If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the desire of the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further the ulterior motive and that is when the High Court steps in...”

66. Criminal proceedings commenced to advance other gains other than promotion of public good are in my view vexatious and ought not to be allowed to stand. The word “vexatious” means “harassment by the process of law,” “lacking justification” or with “intention to harass.” It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

67. I now proceed to apply the law enunciated above to the facts of this case. It is common ground that the Interested Party borrowed money from the company on the strength of a voluntary signed agreement. The Interested Party defaulted in repayment and even pleaded for time. The agreement had a default cause pursuant to which the company instructed auctioneers who attached the Interested Party’s goods. Curiously, the police and the Interest Party admit these facts. There is no mention of stealing. The facts of this case as presented by both parties and the police disclose a civil dispute. The Interested Party’s advocate’s submissions substantially addressed a civil dispute. This is a clear case of gross abuse of police and powers of the DPP. The facts as presented not only disclose a civil dispute, but present a prosecution without factual basis and abuse of prosecutorial powers. One wonders how a charge of stealing can arise in such circumstances.

68. Had the police and the DPP cared to interrogate all the facts properly, they would have concluded that the complaint had no basis. Earlier in this judgment I evaluated the steps the DPP is required to take while evaluating evidence so as to make a decision whether to prosecute or not. Had the DPP carefully followed the steps enumerated earlier and applied his mind properly to the facts and the law, he would have certainly arrived at the firm conclusion that the prosecution lacked proper factual basis. This is a clear case of a prosecution aimed at advancing private interests as opposed to public interest.

69. It is my finding that the prosecution in the two criminal cases lacks a proper factual basis. The two cases are simply an abuse of the law

and the criminal process. The said cases cannot be allowed to stand. Consequently, I find and hold that the applicants' applications in these consolidated proceedings dated 6th June 2019 and 10th June 2019 succeed. Accordingly, I make the following orders: -

a) *An order of prohibition be and is hereby issued prohibiting the Chief Magistrates Court, Milimani from further proceeding with Criminal Case No. 660 of 2019, Republic v Peter Rono and Dickson Aika and Criminal Case Number 942 of 2019, Republic v Erick Kinyua Muriithi and Irene Beth Nyambura.*

b) *An order of prohibition be and is hereby issued prohibiting the Director of Public Prosecutions and the Director of Criminal Investigations or any other person acting for and on their behalf from arresting, prosecuting or charging the applicants herein at the Chief Magistrates, Milimani, or any other court in the Republic of Kenya with criminal offences arising from or related to the facts upon which the charges in Criminal Case No. 660 of 2019, Republic v Peter Rono and Dickson Aika and Criminal Case Number 942 of 2019, Republic v Erick Kinyua Muriithi and Irene Beth Nyambura were founded.*

c) *An order of certiorari be and is hereby issued quashing Criminal Case No. 660 of 2019, Republic v Peter Rono and Dickson Aika and Criminal Case Number 942 of 2019, Republic v Erick Kinyua Muriithi and Irene Beth Nyambura.*

d) *That a copy of this judgment be forwarded to the DPP.*

e) *No orders as to costs.*

Signed, Delivered and Dated at Nairobi this 17th day of **January 2020.**

John M. Mativo

Judge

[1] {2014} eKLR.

[2] Cap 21, Laws of Kenya.

[3] Article 157 (6) of the Constitution.

[4] Act No. 11A of 2011.

[5] Cap 63, Laws of Kenya.

[6] Ibid.

[7] {2019} e KLR

[8] {2019} e KLR.

[9] {2017} e KLR.

[10] {2003} 4 LRC 712.

[11] High Court Petition No. 537 of 2017.

[12] JR No. 621 of 2017.

[13] Act No. 2 of 2013.

[14] Criminal Application No. 20 of 2017.

[15] Act No. 13 of 2017.

[16]{2017}e KLR.

[17] {2014} e KLR.

[18] {2019} e KLR

[19] Infra.

[20] <http://www.paclii.org/fj/other/prosecutors-handbook.pdf>.

[21] Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007. (Now the Hon. Anna Katzmann, Judge of the Federal Court of Australia).

[22] (see *Boucher v the Queen* (1954) 110 CCC 263, 270).

[23] {2019} e KLR

[24] Article 19 (2)

[25] Article 19 (1)

[26] Article 20(1)

[27] *Republic vs Attorney General ex-parte Arap Ngeny* HCC APP NO. 406 of 2001

[28] ***Van der Westhuizen v S* (266/10) [2011] ZASCA 36; 2011 (2) SACR 26 (SCA) (28 March 2011).**

[29] Prosecution Policy, (Revised June 2013), available at <https://www.npa.gov.za/sites/default/files/Library/Prosecution Policy>.

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*

[33] HCC APP NO. 406 of 2001.

[34] *Hui Chi-Ming v R* [1992] 1 A.C. 34, PC

[35] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[36] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94

[37] Indian Case of *Pulukiri Kotayya vs Emperor* L.R. 74 Ind App 65

[38] The Supreme Court of India in *Rattiram v. State of M.P.* [38], a three-Judge Bench

[39] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[40] See *Kafrnatakavs L. Muniswamy & Others* SAIR 1977 SC 21489.

[41] *Mrs. Dhanalakshmi vs R. Prasanna Kumar & Others* AIR 1990 SC 494.

[42] {2002} 2KLR 69.

[43] See *Maharashtra vs Arun Gulab Gawali*

[44] See *State of West Bengal & Others vs Swapan Kumar Guha & Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. ugar Suri & Ano vs State of U.P & Others*, AIR 2000 Sc 754

[45] {1993} All E.R 138, 151, House of Lords.

[46] Chris Corns, *Judicial Termination of Defective Criminal Prosecutions: Stay Applications*, 76 *University of Tasmania Law Review*, Vol 16 No. 1, 1977

[47] *Ibid*

[48] {200} 2KLR 703.

