



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. 125 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

AND

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE CHIEF MAGISTRATES COURT, MILIMANI LAW COURTS...3RD RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONs.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

AND

CHARLES OCHIENG WAMIYA.....EX PARTE APPLICANT

JUDGMENT

THE PARTIES

1. **Charles Ochieng Wamiya**, the applicant is a male adult of sound mind residing and working in Nairobi.
2. The first Respondent is the Inspector General of Police appointed pursuant to Article 245 (2) of the Constitution. He exercises independent command over the National Police Service, and performs any other functions prescribed by national legislation.
3. The second Respondent 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.^[1]
4. The third Respondent is the Chief Magistrates Court, Milimani, Nairobi, established under Article 169 (1) (a) of the Constitution.
5. The fourth Respondent is the Directorate of Criminal Investigations established pursuant to section 28 of the National Police Service Act^[2] 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 fifth Respondent is the Hon. Attorney General. Under Article 156(4) of the Constitution, the Attorney General is the principal legal adviser to the Government. He represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. He performs any other functions conferred on the office by an Act of Parliament or by the President.

Failure to implead the complainant in criminal case number 421 of 2019

7. Before I exit the description of the parties, I find it appropriate point out that even though the applicant seeks to quash the above criminal case, the complainant in the said case has not been impleaded in this case. I will later in this judgment address the question whether the complainant is a necessary party in these proceedings and whether the failure to implead him disentitles the applicant the prayers sought.

Factual Matrix

8. The applicant states that on 10th July 2018, he entered into an agreement with a one Eric Nyenze, the complainant in *Republic v Charles Ochieng' Wamiya, Criminal Case No. 421 of 2019*. He states that the terms of the agreement were *inter alia* that the he leased a truck registration number KCK 759Z from the complainant on a monthly fee of Ksh. 200,000/= and the complaint was to be responsible for its repairs.

9. He states that on a number of occasions, the complainant failed to discharge his contractual obligations of repairing the truck, but, on his part, he states that he discharged his obligations faithfully for two months, afterwhich he was unable to remit any additional payments to the complainant since he used the payments to repair the truck owing to the complainant's failure.

10. The applicant further states that after he failed to remit the said sums as aforesaid, he was warned of dire consequences, followed by his arrest and arraignment in court for the offence of stealing the vehicle KCK 759 Z. He states that he never stole the said truck, and, that, the dispute is merely contractual. He states that it is not the duty of the state to enforce private contracts. He also states that both the police and the complainant's family are aware that the truck is packed in Dar es salaam, Tanzania.

Legal foundation of the application

11. The applicant states that the police acted beyond their powers in arresting him, and, that, the criminal case is aimed at enforcing a private contract. He further states that he was arrested on 3rd March 2019 and entered his plea on 6th March 2019 contrary to Article 49 (f) of the Constitution.

12. He also states that the criminal charges constitute abuse of power by the Respondents, and, that, the investigating officer acted on ulterior motives and failed to carry out proper investigations. In addition, he states that the DPP acted unconstitutionally and failed to act independently as required under the law. He also states that the actions complained of violated his rights under Article 47 (1) (2) of the Constitution and his right to freedom and security.

13. He also states that the criminal court lacks jurisdiction to entertain civil disputes and that the first and fourth Respondents are obligated by law to uphold the highest respect of human rights, professionalism and discipline. He also states that the investigating officer and the DPP acted in bad faith.

Reliefs sought

14. The applicant prays for:-

a. An order of Mandamus to remove into this honourable court for the purpose of quashing the illegal decision made by the Inspector General of Police and the Director of Criminal Investigations to arrest and recommend criminal proceedings against the ex parte applicant from actions ensuing from a purely private contractual agreement entered into between the ex parte applicant and a one Erick Nyenze.

b. An order of certiorari to remove into this honourable court for the purposes of quashing the illegal decision made by the Director of Public Prosecutions, the second Respondent herein, to prefer criminal charges against the ex parte applicant in criminal case number 421 of 2019.

c. An order of prohibition directed to the Director of Public Prosecutions, the second Respondent herein, prohibiting the second Respondent, his agents, employees and servants from proceeding with the prosecution of the ex parte applicant in criminal case number 421 of 2019 which, in fact involves the enforcement of a contractual agreement which is not within the domain of public law, hence, warranting to be enforced through the criminal justice system by the Respondents, whether directly or indirectly.

d. An order of prohibition directed to the Chief Magistrate Milimani Law Court, the third Respondent herein, prohibiting him, his agents, employees and servants from proceeding with criminal case number 421 of 2019 which, in fact, involves the enforcement of a private contractual agreement which is not within the domain of public law, hence, warranting to be enforced through the criminal justice system by the Respondents, whether directly or indirectly.

e. An order for the award of damages be granted to the ex parte applicant over his arrest and the subsequent illegal detention by the National Police Service, for the period stretching beyond the constitutionally permissible 24 hour period.

f. That costs of this application be provided for.

g. That the honourable court be pleased to grant any such other or further orders and reliefs as it may deem fit, just and expedient in the circumstances.

The first, second and fourth Respondents' grounds of opposition

15. The first, second and fourth Respondents filed grounds of opposition stating that:-

i. That the application is misconceived, frivolous, vexatious, incompetent, improperly before court and an open abuse of the court process, and, that, section 193A of the Criminal Procedure Code[3] permits parallel civil proceedings.

ii. That the second Respondent has the mandate under Article 157 of the Constitution to institute prosecutions nor has the applicant demonstrated that he has an arguable case.

iii. That under Article 157 (10) of the Constitution, the Director of Public Prosecutions does not require the consent of any person or authority for commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.

iv. That the issues raised by the applicant are issues of evidence that should be raised before the trial court that is seized with the matter.

v. That it is in public interest that perpetrators of crime are prosecuted.

vi. That the applicant has not demonstrated that he has a prima facie case and, that, this application is intended to delay the hearing of the criminal case.

vii. That the application is without merit and should be dismissed.

The first, second and fourth Respondents' Replying Affidavit

16. CPL Lilian Muthama, attached to the Criminal Investigations swore the Replying Affidavit dated 25th June 2019 in opposition to the application. She averred that she is one of the investigating officers investigating the offence of stealing. She further averred that they received a complaint from the complainant who stated that he entered into an agreement with the applicant who hired his vehicle, but, the applicant purporting to be the owner of the vehicle entered into another contract in Tanzania to transport goods from Dar es Salaam to Lusaka and Kampala without the complainant's knowledge. She averred that the applicant has not demonstrated that the Respondents exceeded their powers and that the issues raised by the applicant ought to be canvassed in the criminal case.

Third and fifth Respondents' grounds of opposition

17. The third and fifth Respondents filed grounds of opposition on 2nd October 2019 stating that:-

a. That the application is unmerited and therefore an abuse of due process.

b. That the application is intended to curtail the statutory obligations and duties of the Respondents.

c. That the applicant has the opportunity before the trial court to prove his innocence.

d. That the ex parte applicant has not demonstrated any prejudice and that the applicant seeks to this court to direct a public officer to act in a particular manner.

Applicant's advocates submissions

18. The applicant's counsel submitted that the decision to charge the applicant is tainted with an illegality. For this proposition he relied on the holding in *Republic v Public Administrative Review Board & 2 Others ex parte Rongo University*. [4] He argued that the applicant was held by the police for a longer period before being charged in court contrary to Article 49(f) of the Constitution, and, that, the police acted on ulterior motives. He placed reliance on section 7(2) (e) of the Fair Administrative Action Act [5] (herein after referred to as the FAA Act).

19. He also argued that the decision to charge him is unreasonable and irrational. He invoked section 7 (2) (l) of the FAA Act and added that the charges have no factual basis. He referred to the definition of stealing in section 268 (1) of the Penal Code [6] and argued that the complainant knows where the vehicle is, hence, the facts do not disclose any offence.

20. Counsel cited section 7 (2) (h) of the FAA Act and argued that the charges are brought in bad faith. He relied on *Republic v Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A V. Bhatt & Company* [7] for the holding that discretion must be properly exercised. In addition, counsel relied on *Republic v University of Nairobi ex parte Lazarus Wakoli Kunani & 2 Others* [8] for the holding that failure to give reasons is sufficient for the court to infer bad faith. He also argued that the Respondents acted in excess of jurisdiction and in violation of the applicant's right to legitimate expectation.

First, second and third Respondents submissions

21. Counsel for the first, second and third Respondent argued that *certiorari* only issues to quash a decision issued without jurisdiction or in violation of the rules of natural justice. He submitted that Article 157 of the Constitution mandates the DPP to prosecute, while Article 244

confers powers to investigate on the police. He argued that only the trial court can make a finding whether or not an offence has been committed.

22. He cited *Republic v Chief Magistrate Milimani & Another ex parte Tusker Mattresses Ltd & 3 Others*^[9] for the holding that the court must take care not to trespass into the jurisdiction of investigators or the court which may eventually be called upon to determine the issues. He argued that the police have a duty to investigate crime.^[10]

The third and fifth Respondent's Advocates' submissions

23. Counsel submitted that the police have a duty to investigate crime and that the grounds cited in the application do not show that the applicant will not get justice in the lower court.

Determination

24. Upon carefully analysing the facts presented by the parties and their respective submissions, I find that two core issues stand out in this case. *First*, whether the failure to implead the complainant in this case disentitles the applicant the orders sought. *Second*, whether the applicant has established any grounds to qualify for the orders sought.

25. Regarding the first issue, it is common ground that the criminal prosecution was triggered by a complaint lodged by the complainant, a one Erick Nyenze Mwanzia. The applicant did not implead him in this case, yet, he seeks to quash the prosecution. This raises a fundamental legal question, that is, whether the complainant is a necessary party in these proceedings. It also raises a question whether, the orders sought, if granted will affect the complainant. Differently put, can the orders sought be allowed without affording the complainant a hearing?

26. What comes to mind is the question of triangular of rights in the criminal justice system. The right to the accused person, the right to the prosecution and the rights of the complainant. At the centre of all these rights is the need to balance, protect and uphold public interest. It is in public interest that an innocent citizen ought not to be paraded in court. It is also in public interest that the guilty be punished. In addition, it is in public interest that the complainant of a crime be afforded justice. This court is now being asked to terminate the criminal case without hearing the complainant.

27. In my view, the complainant is a necessary party in proceedings of this nature. He has a right to be heard in this case. To me, such a scenario poses a danger of granting orders affecting other persons without giving them the benefit of a hearing. The principle that comes out is that a person or a body becomes a necessary party if he is entitled in law to defend the orders sought. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. The principle of *audi alteram partem* has its own sanctity. That apart, a person or an authority must have a legal right or right in law to defend or assail.

28. I may first clarify that as a proposition of law it is not in dispute that natural justice is not an unruly horse. Its applicability has to be adjudged regard being had to the effect and impact of the order and the person who claims to be affected; and that is where the concept of necessary party became significant. I find it appropriate to refer to the principle of natural justice as enunciated by the Supreme Court of India in *Canara Bank vs. Debasis Das*.^[11] I may profitably reproduce the same here below:-

"Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

And again:-

"Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance...."

29. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

30. Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body.

31. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.^[12]

32. Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.^[13]

33. I have referred to the above passages as they state the basic principle behind the doctrine of natural justice, that is, no order should be passed behind the back of a person who is to be adversely affected by the order. A complainant in a criminal case is entitled to be heard in proceedings seeking to terminate the prosecution. This is because the triangular of rights discussed earlier confer upon him the right to be heard in the proceedings because the decision to be made is likely to impact on his rights. The Supreme Court of India put it succinctly in *J.S. Yadav vs State of U.P. & Anr*^[14] in Paragraph 31 held thus:-

“No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the... Code of Civil Procedure, ... provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person are terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the petitioner-plaintiff succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by the petitioner-plaintiff....More so, the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post...”

34. It is not in doubt that the prosecution triggered by the complainant is under challenge, but the complainant was not impleaded in this case. There can be no shadow of doubt that he is a necessary party. In my view, the first defect in this application is that of non-joinder of the complainant who is a necessary party.^[15] A Court ought not to decide a case without the persons who would be vitally affected by its judgment being before it either as respondents or an interested party. I find that allowing this application seeking reliefs directly affecting a person who is not a party before the court would amount to condemning him without affording him the opportunity to be heard. On this ground alone this application fails.

35. The second issue is whether the applicant has established any grounds to warrant the orders sought. Our jurisprudence is awash with decisions stating the grounds upon which a criminal prosecution can be terminated. The tests are well stated. I have carefully read the decisions relied upon by the applicants counsel. Not even a single one related to criminal prosecution. They largely dealt with the normal tests in judicial review of administrative action cases as opposed to grounds upon which the High Court can terminate a criminal trial. Cases are context sensitive and a decision is an authority for what it decides, not what logically flows from it.

36. The starting point is that a special feature of the Constitution of Kenya, 2010 is the establishment of an independent office of the DPP whose independence is provided under Article 157 (10) of the Constitution which declares that the DPP shall not require the consent of any person or authority for the 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.

37. The above position is replicated in Section 6 of the Office of the Director of Public Prosecutions Act^[16] which provides that pursuant to Article 157 (10) of the Constitution, the DPP shall- (a) not require the consent of any person or authority for the commencement of criminal proceedings; (b) not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and (c) be subject only to the Constitution and the law.

38. The decision to institute or not institute criminal proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. The prosecutor is required to act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the accused, victims, and witnesses. Where the decision is surrounded by doubt or even mere reasonable suspicion that an interested party has a hand in the prosecution, such a decision cannot be allowed to stand.

39. Article 157 of the Constitution leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. Article 245 (4) (a) of the Constitution provides that “no person may give a direction to the Inspector General with respect to the investigation of any offence or offences.” This provision is aimed at ensuring that investigations are undertaken independently.

40. The core issue here is for this court to determine the circumstances under which the High Court in exercise of its vast jurisdiction can halt, stop, prohibit or quash a criminal prosecution. The Constitution vests the DPP with the sole Authority, power and responsibility to exercise control over the prosecution of all criminal matters except the institution of cases at the Court Martial.^[17] A fair and effective prosecution is essential to a properly functioning criminal justice system and to the maintenance of law and order. Individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution. In short the proper and effective administration of the criminal justice system is a matter of great public interest.

41. There are general principles which should underlie the approach to prosecution. The DPP must at all times uphold the rule of law, the integrity of the criminal justice system and the right to a fair trial and respect the fundamental rights of all human beings to be held equal before the law, and abstain from any wrongful discrimination.

42. Fundamentally, the primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to seek conviction. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion not to pursue criminal charges in appropriate circumstances. The DPP is required to protect the innocent and to seek conviction of the guilty, and also to consider the interests of victims and witnesses. The DPP has an obligation to respect the constitutional and legal rights of all persons, including suspects and accused persons and should avoid any appearance of impropriety in performing the prosecution function.

43. 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.

44. 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.

45. 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. 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. [18] 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.

46. Before the court is the version presented by the applicant. As stated in the earlier issue, the applicant failed to implead the complainant in this case. With only one version before this court, it is not possible for this court to decide whether the prosecution is based on a factual basis.

47. In any event, it is not for this court to determine the veracity or to weigh the strength of the evidence or accused persons defence. That is a function for the trial court hearing the criminal trial. This court can only intervene if there are cogent allegations of violation of constitutional Rights or threat to violation of the Rights or in clear circumstances where it is evident that the accused will not be afforded a fair trial or the right to a Fair Trial has been infringed or threatened or where the prosecution is commenced without a factual basis. The allegation that the applicant was held for a longer period prior to being arraigned in court is not a ground to invalidate the proceedings. Our superior courts have consistently held that the said complaint can be a ground for suit for damages.

48. 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. It is therefore essential that the prosecution decision receives careful consideration in a case seeking to prohibit the trial. 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. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused. [19]

49. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances. [20] 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. The high court will only prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or 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. [21]

50. It is in public interest that prosecutions be mounted to uphold law and order and justice for the victims of crime. A criminal prosecution can be stopped if it was commenced in the absence of proper factual foundation. 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. [22]

51. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to a fair trial be jeopardized. [23]

52. 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. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, Judicial review, 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 proceedings ought to be quashed.

53. The saving 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.

54. The High Court's inherent powers to quash, stay or prohibit criminal proceedings 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^[24] 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.'

55. The Supreme Court of India in the above case 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."^[25]

56. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*.^[26] 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.

57. 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**^[27] 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.

58. Criminal proceedings commenced to advance other gains other than promotion of public good are 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.

59. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. As stated earlier, the power to quash proceedings is immense since it amounts to exonerating a suspect before trial. Such power must be exercised with extreme care and caution. It is a power which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution.

60. The applicant seeks an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

61. The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. This is a decision constitutionally vested on the DPP. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.^[28] One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

62. The DPP is mandated to independently evaluate the evidence and make the decision to prosecute independently. 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.

63. 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. It has not been demonstrated that the decision to prosecute was influenced by irrelevant or extraneous considerations. Further, it has not been established that the DPP did not act independently in arriving at the decision to prosecute.

64. It is my view that the applicant has not presented any material to demonstrate that there was no sufficient evidence or factual basis to justify a prosecution. It is not the function of this court to weigh the veracity of the evidence. In my view, a prosecution should be instituted or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. It has not been established that the facts presented in this case do not disclose an offence known to the law.

65. The Constitutional provision in Article **157 (10)** of the Constitution ensures that the DPP has complete independence in his decision making processes, which 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. This court respects this Constitutional imperative and will hesitate to interfere with the functions of the DPP unless there is clear evidence of breach of the Constitution or abuse of discretion to prosecute. The court is inclined to respect the decision by the DPP not to prosecute for two reasons, **(a)** it is a constitutional imperative that the Constitutional independence of the independence of the DPP must be respected, **(b)** for the court to intervene, there must be clear evidence of breach of the Constitutional duty to act on the part of the DPP or abuse of discretion.

66. Applying the legal tests discussed above to the facts of this case, I find that there is nothing to show that the prosecution is unfair or an abuse of court process or abuse of police powers or judicial process. There is no material before me to demonstrate that the prosecution was undertaken without a proper factual foundation.^[29] It has not been demonstrated that the prosecution was conducted or is being undertaken without due regard to traditional considerations of candour, fairness, and justice, nor has it been shown that the trial is being conducted in a manner different from what is prescribed under the law, or that the trial is bad in law.^[30] The investigation was commenced after a complaint was lodged. The DPP independently evaluated the evidence. The allegations raised by the applicant are in my view matters to be dealt with by the trial Court.

67. In view of my above reasoning, the conclusion becomes irresistible that the applicant's Notice of Motion dated **13th** May 2019 does not satisfy the threshold to warrant the orders sought.

68. Accordingly, I hereby dismiss the applicant's Notice of Motion dated **13th** May 2019 with no orders as to costs and direct that **Nairobi Chief Magistrates Criminal Case number 421 of 2019, Republic vs Charles Ochieng' Wamiya** proceeds to hearing and determination.

Orders accordingly

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

JOHN M. MATIVO

JUDGE
