REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 275 OF 2017

HILLARY SIGEI.....1ST PETITIONER

SING'OEI MURKOMEN AND SIGEI ASSOCIATES.....2ND PETITIONER

VERSUS

THE SPEAKER OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

1. The petitioners, Hillary Sigei (1st Petitioner) and Sing'oei Murkomen and Sigei Associates (2nd Petitioner), filed the petition dated 6th June, 2017 which is supported by the affidavit sworn by the 1st Petitioner on the same date following investigations by the Auditor General and the Public Accounts Committee of the National Assembly which concluded *inter alia* that the petitioners had aided and abetted in money laundering, and that the 1st Petitioner had received funds stolen from the National Youth Service (NYS) for personal gain.

2. The petitioners pray for the following remedies:-

> **a. A declaration that paragraph 3.1.45, paragraph 4.3.2, part 5, paragraph 19, and recommendations 12 and 13 of part VI (Recommendations) of the Report of the Public Accounts Committee inquiring into the happenings at the National Youth Service violate the Petitioner's rights guaranteed by article 27, 31, and 47 of the Constitution of the Republic of Kenya;**
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> **b. An order of certiorari to bring into this court and quash paragraph 3.1.45, paragraph 4.3.2, part 5, paragraph 19, and recommendations 12 and 13 part VI (Recommendations) of the Report of the Public Accounts Committee inquiring into the happenings at the National Youth Service;**
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> **c. An order of prohibition directed at the 2nd, 3rd and 4th Respondents prohibiting them from taking any action against the Petitioners on the strength of the observations, findings and recommendations at paragraph 3.1.45, paragraph 4.3.2, part 5, paragraph 19, and recommendations 12 and 13 part VI (Recommendations) of the Report of the Public Accounts Committee inquiring into the happenings at the National Youth Service;**
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> **d. Costs of and incidental to this Petition;**
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> **e. Such other or further orders as the court may deem just and expedient to grant.**

3. In opposition to the petition the 1st Respondent, the Speaker of the National Assembly, filed a replying affidavit sworn on 17th July, 2017 by Jeremiah Ndombi, a Senior Deputy Clerk of the National Assembly. The 1st Respondent also filed grounds of opposition dated 30th June, 2019. The 1st Respondent contends that the court has no jurisdiction to interfere with the internal workings of Parliament and should adhere

to the principle of separation of powers between the arms of government. Further, that the petitioners refused to produce the requested documentation, even when compelled to do so within the powers granted to the National Assembly under Article 125 of the Constitution of Kenya, 2010.

4. The 1st Respondent further asserts that the allegation of the violation of the right to fair administrative action is misplaced and baseless as the 1st Petitioner was afforded an opportunity to be heard but failed to respond to questions put to him and to produce documents when demanded to do so by the Public Accounts Committee (PAC).

5. The 2nd Respondent, the Ethics and Anti-Corruption Commission (EACC), filed a replying affidavit sworn 24th July, 2017 by its investigator, Joyce Munene, in opposition to the petition. The 2nd Respondent contends that the sum of money received by Out of Box Limited and used towards the purchase of the plot of land in Eldoret was as a result of corrupt conduct which must be investigated to its conclusion. Furthermore, the 2nd Respondent reassures that the petitioners will be given an opportunity to defend themselves against the allegations. It is asserted that any orders granted would be futile as the EACC is entitled in law to investigate on the basis of complaints and information received from other sources other than the Public Accounts Committee of the National Assembly.

6. It is further averred that the National Assembly acted within its mandate to exercise oversight over the national revenue and its expenditure which means that it was well within its mandate to examine and exercise oversight over the accounts of the NYS and the Ministry of Devolution and Planning.

7. The 3rd Respondent, the Director of Public Prosecutions (DPP) and 4th Respondent, the Attorney General (AG), filed grounds of opposition dated 23rd May, 2018 and 3rd December, 2018 respectively in opposition to the petition.

8. I have carefully considered the substance of the petition, the replying affidavits, the grounds of opposition and the submissions of the parties and I identify the issues for determination as follows:-

a. Whether the petitioners' constitutional rights were violated by the report of the National Assembly;

b. Whether this court can grant the orders sought; and

c. Which party should bear costs of this suit?

9. The petitioners in their submissions dated 10th May, 2018 argue that the finding in paragraph 3.1.45 of the report that the 1st Petitioner refused to state the purpose of the withdrawal of Kshs. 500 million from the 2nd Petitioner's client account was not supported by any evidence before the PAC and the 1st Petitioner was subsequently not given a chance to respond to the said finding hence breaching his right to fair administrative action under Article 47 of the Constitution. The Petitioner supports this argument with the cases of **Judicial Service Commission v Mutava Mbalu & another [2015] eKLR,** and **Kenya Anti-corruption Commission v Lands Limited and 7 others [2008] eKLR.**

10. The petitioners further contend that the said right to fair administrative action was violated as the figure of Kshs. 500 million was never quoted anywhere in the audit report and did not form part of the case that they were required to answer before the PAC. It is further asserted by the petitioners that the 1st Petitioner was not furnished with the reasons as to how the finding was arrived at.

11. Through the submissions dated 28th May 2018, the 1st Respondent responded that the fact that the petitioners were given an opportunity to be heard is evidenced by the letter dated 21st November, 2016 at page 75 of the petition written by the Clerk of the National Assembly to the petitioners requesting them to appear before the PAC to provide information. Further, that the 1st Petitioner appeared before the PAC on two occasions, to wit 8th December, 2016 and 15th December, 2016 as shown in the Hansard of the National Assembly. It is submitted that the 1st Petitioner cannot claim that he was not afforded a fair hearing on the basis that the figure quoted is not mentioned in the Auditor General's report. Further, that the petitioners have failed to show how they were not afforded an opportunity to be heard.

12. Additionally, it is submitted that the petitioners have not established that they were denied reasons by the PAC thus violating Article 47(2) of the Constitution. The 1st Respondent proffers that reasons were provided in the Hansard reports at pages 171 and 172. It is further stated that the 1st Petitioner when questioned as to the purpose of the money transferred to 2nd Petitioner's client account from M/s Out of the Box Solutions Limited declined to answer citing advocate-client privilege. Additionally, that when he was specifically questioned on the purpose of some Kshs. 500,000/- which he withdrew from the client's account, the 1st Petitioner declined to provide an answer. The PAC subsequently found the 1st Petitioner culpable based on the fact that the petitioners had been adversely mentioned by other witnesses and recommended for further investigations to be conducted.

13. The petitioners complain that paragraph 3.1.45 of the Hansard makes reference to an amount of Kshs. 500 million which was not supported by evidence. The 1st Respondent in the replying affidavit clarifies that the same was a typographical error. I have perused the Hansard and find that the first and only mention of the amount of Kshs. 500 million was in this particular paragraph. In all other parts of the Hansard including Recommendation 13 at page 369, the petitioners are found culpable for the amount of Kshs. 500,000.00 which the 1st Petitioner did not contest but refused to state the purpose of the withdrawal. I therefore agree with the 1st Respondent that the mention of Kshs. 500 million was not deliberate but an error on the part of the transcriber.

14. In the circumstances, the argument that the petitioners' right to fair administrative action was violated as the 1st Petitioner was not afforded a fair trial does not stand. The argument is based on a typographical error, yet according to the Hansard the 1st Petitioner was

questioned on the proper amount and was provided with an opportunity to respond to the same but declined to do so. Additionally, and for the reason already stated, the argument that the petitioners were not provided with the reasons to how the finding of the Kshs. 500 million was arrived at does not stand.

15. Relying on the cases of **Andrews v Law Society of British Columbia [1989] I SCR 143,** and **Peter K. Waweru v Republic [2006] eKLR** the petitioners submit the finding by the 1st Respondent that the 2nd Petitioner was used to launder irregularly acquired public funds without obtaining the documentation and information sought from the petitioners, violated the petitioners' right to freedom from discrimination. It is further contended that the 1st Respondent erred in: failing to make reference to the actual bank transactions to Kigen & Company Advocates; finding that a title deed had not been supplied when the same was supplied; and making an adverse finding regarding the withdrawal by the 1st Petitioner from the 2nd Petitioner's account without a corresponding finding that the said funds came from specific money received on account of Out of Box Solutions Limited or that the money from the client was the only money in the said firm's account. It is submitted that the PAC violated the petitioners' rights to equal protection of the law as guaranteed under Articles 27 and 47 of the Constitution.

16. The 1st Respondent submits that the petitioners were not discriminated against but rather failed to provide the information contrary to Article 125 of the Constitution. It is therefore urged that the petitioners cannot claim that their rights under the Constitution were infringed after failing to honour the provisions of Article 125 of the Constitution.

17. In the case of **Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR,** the Court at paragraph 27 referred to the decision in **Peter K Waweru v Republic [2006] eKLR** where it was held that:-

> **"Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to … restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description… Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex … a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."**

18. From the above it can be gathered that for discrimination to occur, there must be different treatment of persons where there is clear and prohibited distinction or where persons in similar situations are accorded different treatment. The petitioners have failed to show how they were treated differently either to other witnesses or advocates in order to support a finding that Article 27 of the Constitution was violated. An adverse finding against an individual or entity by a public authority does not constitute discrimination in and of itself. The party who alleges discrimination needs to demonstrate that the decision would not have been reached had the party been different. The petitioners have not shown that there were other lawyers and law firms alleged to have laundered public funds from the NYS but were treated differently from them. It is my conclusion that the petitioners have not proved that their right to freedom from discrimination was violated by the recommendations made by the National Assembly.

19. The petitioners also argue that the right to privacy under Article 31 of the Constitution has been breached on account of the releasing of their bank details hence breaching the principle of confidentiality between them and their bank. The petitioners rely on decisions in **Berstein v Bester NO [1996] (2) SA 751; O' Keeffe v Argus Printing and Publishing Co Ltd 1954 (3) SA 244 (C);** and **CORD and others v Republic of Kenya and others, Petition No. 628 of 2014**.

20. It is also submitted that the cash transactions and incidental services between the petitioners and Out of Box Solutions Limited are protected by the principle of advocate-client confidentiality and any information concerning the client can only be released with their consent. Further, that the same protection is encompassed under sections 13(1), 134, and 137 of the Evidence Act, Cap. 80. Further reliance is placed on **Conlons v Conlons [1952] 2 ALL ER 462; King Woolen Mills Ltd & another v Kaplan & Stratton Advocates [1990-1994] E.A 224;** and **Nelson O Kadison v Advocates Complaint Commission & another, Petition No. 549 of 2013.** It is submitted that the 1st Respondent by requiring the petitioners to disclose the information without the consent of the client violated their right to privacy.

21. The 1st Respondent relies on the decision in **Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption & 5 others [2016] eKLR** and submits that the petitioners have failed to prove that their client, Out of Box Solutions Ltd, had instructed the petitioners not to disclose the details of the transaction without their express authority. Additionally, that the client had readily presented itself before the Committee and provided information. It is submitted that the petitioners have no reason to benefit from the privilege which their client has waived.

22. It is further contended that the PAC is mandated under Article 125 (b) of the Constitution to compel any person to produce documents, and the same cannot be overridden by any Act of Parliament. This is supported by reference to Erskine May's "**Parliamentary Practice**" 24th Edition at page 823 where it is stated among other things, that where a Committee asks questions to a witness, they cannot excuse themselves on the grounds that the information is privileged communication to him. An example being where an advocate is called upon to disclose the secrets of his client. Further, that a witness cannot refuse to produce documents in his possession on the grounds that he required permission from his client.

23. On the right to privacy, the 1st Respondent asserts that the allegation by the 1st Petitioner that the release of his bank statements amounted to violation of his right to privacy had not factual basis, is baseless and frivolous. It is submitted that the 1st Respondent had established a factual basis which warranted the request for production. The same was supported by the determination of Justice Lenaola in the **Tom Ojienda** case.

24. Section 134 of the Evidence Act provides for the advocate-client privilege as follows:-

"134. (1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(a) any communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

(2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased."

25. From the foregoing it is evident that indeed there exists privilege of the communications between an advocate and their client, however this privilege cannot extend to communications which are made for illegal purposes or in furtherance of the commission of a crime. This is the argument brought forward by the 3rd Respondent in his grounds of opposition.

26. As such, where the advocate is reasonably suspected of having engaged with their client for purposes of committing a crime, the advocate-client privilege ceases to exist. In the case before this court it is not in contention that the 2nd Petitioner's client, Out of Box Solutions Ltd, was suspected of being involved in the alleged theft of public money from the NYS. In pursuance of an investigation against the 2nd Petitioner's client, the 1st Petitioner was questioned as to a transaction involving money which was reasonably believed to be stolen.

27. The 1st Respondent has put forward an argument that the petitioners' client gave evidence to the PAC concerning the land transactions and that this is indicative that the privilege was waived. This is a misinterpretation of the advocate-client privilege, particularly Section 136(1) of the Evidence Act which needs no interpretation and clearly provides that:-

"(1) If any party to a suit or proceeding gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 134(1) of this Act."

28. The question is whether the National Assembly can compel an advocate to breach the confidentiality of his or her communication with a client. Article 125 of the Constitution grants the two Houses of Parliament or their committees, power to compel the production of evidence.

29. In the case of **Wycliffe Ambetsa Oparanya & 3 others v Director of Public Prosecutions & another [2017] eKLR** Odunga, J held that:-

"143. Since in our jurisdiction the Senate does not have the powers impose fines what then are the options available to the Senate where its summons are not honoured? Section 23(a) of the National Assembly (Powers and Privileges) Act provides as follows:

Any person who—

(a) disobeys any order made by the Assembly or a committee for attendance or for production of papers, books, documents or records, unless his attendance or production is excused under section 17;

shall be guilty of an offence and liable, on conviction before a subordinate court of the first class, to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment."

30. It was further elucidated in the case of **Judicial Service Commission v Speaker of the National Assembly & 8 others [2014] eKLR** that:-

"147. In exercising its mandate under Article 251, the Committee performs a quasi-judicial function, and has powers to summon any person to tender evidence or provide information, and enforce attendance of witnesses and compel production of documents. In doing so, in accordance with Article 125, it has, as a Committee of Parliament, the same powers as those of the High Court. It follows therefore that in the same manner that Courts have inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, the Committee in exercising its mandate, acquires the power to enlarge time within which to adjudicate over a matter before it. The reliance on Standing Order 230 which the AG contended imposed strict timelines could not override the requirements of substantive justice under the Constitution."

31. It is indeed correct from the cited authorities that the Constitution and the laws of the land grant Parliament the powers of the High Court in respect of the proceedings of the committees and any witness who does not cooperate can indeed be prosecuted. Erskine May (supra) at page 823 of his treatise appears to suggest that the strictures applicable to evidence of witnesses testifying in a court case are not applicable to parliamentary hearings. In that regard he states that:-

"A witness is bound to answer all questions which the committee sees fit to put to him, and cannot excuse himself, for example, on the ground that he may thereby subject himself to a civil action, or because he has taken an oath not to disclose the matter about which he is required to testify, or because the matter was a privileged communication to him, as where a solicitor is called upon to disclose the secrets of his clients; or on the ground that he is advised by counsel that he cannot do so without incurring the risk of incriminating himself or exposing himself to a civil suit, or that it would prejudice him in litigation which is pending, some of which would be sufficient grounds of excuse in a court of law. Nor can a witness refuse to produce documents in his possession on the ground that, though in his possession, they are under the control of a client who has given him instructions not disclose them without his express authority."

32. The 1st Respondent urges that parliamentary committees are not restricted on the questions they can ask witnesses who appear before them. It is submitted based on the above statement by Erskine May that the parliamentary powers are unlimited. It is further contended that the powers donated to Parliament by Article 125(b) of the Constitution to compel any person to produce documents cannot be overridden by an Act of Parliament. I must say that the argument that constitutional powers cannot be limited by an Act of Parliament appears attractive but it cannot be upheld.

33. Article 125 of the Constitution provides as follows:-

"125. (1) Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.

(2) For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court—

(*a*) to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;

(*b*) to compel the production of documents; and

(*c*) to issue a commission or request to examine witnesses abroad."

34. Article 125(2) clearly shows that the power donated to the houses of Parliament and its committees are those of the High Court. In the execution of its mandate the High Court is guided by various Acts of Parliament which includes the Evidence Act, Cap. 80. Can Parliament when exercising a power which is the same of that of the High Court claim it is not bound by the Evidence Act? I do not think so. Just like the High Court is bound by the laws of Kenya so is Parliament. Powers donated by the Constitution are exercised within a legal framework and not in a vacuum as the 1st Respondent appears to suggest.

35. I do not wish to explore the issue of advocate-client confidentiality any further because the client of the petitioners is said to have divulged all the information that was required to the PAC. It is also clear that the 1st Petitioner stood his ground and declined to reveal information which he perceived to be privileged. I also note that the outcome of this petition will not be affected by the determination of this particular question. I will therefore leave the matter at that.

36. On the right to privacy it is well recognised that it is a right which can be limited under the Constitution. The right to privacy does not fall within the purview of the rights which cannot be limited under Article 25. According to Article 24, the right to privacy can therefore be limited under the law and to the extent that the limitation is reasonable and justifiable in an open democratic society. The petitioners have not explained in what way the actions of the National Assembly violated their right to privacy. It has not been said that the National Assembly had no mandate to do what it did. I am thus not convinced that the respondents violated the petitioners' right to privacy in any manner whatsoever. The petitioners' case cannot therefore succeed on this ground.

37. The petitioners submit that the National Assembly violated Article 157 of the Constitution and the provisions of Chapter 15 regarding the independence of constitutional commissions and independent offices. The submission is targeted at the recommendation by the National Assembly in part VI of the report particularly recommendation 12 which called upon the DPP to prefer charges of aiding and abetting money laundering on the partners of the 2nd Petitioner. The petitioners assert that the recommendation is based on factual errors and errors of law at paragraphs 3.24.1 to 3.24.10 and the recommendation is therefore in violation of the petitioners' rights under Articles 27 and 47 of the Constitution.

38. The 1st Respondent submits that it recognises the independence of the ODPP and the EACC to carry out investigations concerning corruption. It is further recognised that under Article 157 (10) the DPP does not require the consent of any person and is not under the control or direction of any person or authority in executing his duties.

39. The independence of the DPP is detailed in Article 157 (10) of the Constitution which states that:-

"The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."

40. The provisions of the Constitution are restated in Section 6 of the Office of the Director of Public Prosecutions Act, 2013. In the case of **Republic v Chief Magistrate, Milimani Criminal Division & 4 others Ex-Parte John Wachira Wambugu & another [2018] eKLR**, Mativo, J opined on the independence of the Office of the DPP as follows:-

> **"37. The architecture and design of the above provision leaves no doubt that the DPP is not only required to act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. More fundamental is the fact that 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. Differently stated, 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. The reverse is that where the DPP does not act independently, the decision cannot be allowed to stand."**

41. It was further held that:-

> **"41. […] A clear reading of the architecture of Article 157 of the Constitution leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. The *ex parte* applicant is a complainant and has an interest in the outcome of the criminal case. He cannot be seen to be the one pushing the DPP to mount a prosecution without offending Article 157 (10) of the Constitution. If that were to happen, the criminal proceedings would risk being quashed on grounds that the DPP did not act independently. All that the Petitioner is required to do is to present his evidence to the investigating officers, (which he did) and leave it to the DPP to independently evaluate the evidence and make a decision whether or not to mount the prosecution."**

42. The cited decision, which I agree with, confirms the constitutional independence of the DPP and the requirement that his decisions should not be influenced by other persons or authorities. Where it is deemed or perceived that the DPP is functioning under the direction of another, or that the decision to prosecute was not independent, it can have serious implications on the legitimacy of the decision to prosecute and the prosecution itself. That concern becomes acute when it is an all-powerful arm of government like the National Assembly that is directing the DPP to mount a prosecution.

43. There is indeed no doubt of the scope of the powers bestowed upon the National Assembly and its committees. According to Article 125(1) of the Constitution, both the Senate and National Assembly, and any of their committees can summon an individual to appear before it for purposes of giving evidence. This is for all intents and purposes a form of investigation which concludes with the issuing of recommendations. However, it is not the kind of investigation carried out by the agencies mandated to carry out investigations into alleged criminal conduct. Those agencies are trained and equipped on how to protect the rights of suspects in the course of the investigations. They are aware of the standards to be met before a decision to prosecute is made. The investigative agencies independently recommend a prosecution which is either accepted or rejected by the DPP.

44. In my understanding, there is nothing within the law or the Constitution which denies the National Assembly or the PAC the authority to conduct investigations and make recommendations which include the proposition of crimes to be charged. However, such an action by the National Assembly and the PAC attracts the kind of litigation before this court. It would have been better for the PAC to make a finding that crimes may have been committed and let the investigative agencies take up from there. By recommending in Recommendation Number 12 of its impugned report that the DPP should prefer charges of aiding and abetting money laundering against certain persons, the PAC transgressed into the province of the investigative and prosecutorial agencies. Were the DPP to mount a prosecution, it would be difficult to convince a reasonable person in the streets of Nairobi that the prosecution is not an implementation of the command of the National Assembly. In such circumstances, the independence of the investigative and prosecutorial authorities would amount to nothing.

45. Further, the PAC usurped the power of the Director of Criminal Investigations (DCI) in its recommendation Number 13 by directing him to commence investigations against the 1st Petitioner in respect of withdrawal of Kshs. 500, 000.00 from the clients' account. It is only the DPP who has the power to direct the Inspector-General, and by extension the DCI, to conduct investigations into an allegation of criminal conduct. This power is found in Article 157(4) of the Constitution and replicated in Section 5(1)(a) of the Office of the Director of Public Prosecutions Act and Section 35 of the National Police Service Act, 2011. In directing the DCI to carry out investigations, the National Assembly clearly usurped the mandate the DPP who is the only person who can direct the police to carry out investigation into alleged criminal conduct.

46. The question is whether the actions of the National Assembly are deserving of reprimand through issuance of the orders sought by the petitioners. The petitioners submit that the court can interfere in the unconstitutional and illegitimate decisions of public bodies and authorities including the PAC. It is averred that the court is entitled to review the decision of the PAC to ensure the procedural soundness of the inquiry.

47. The 1st Respondent in its grounds of opposition dated 30th June, 2017 claims that the petitioners failed to exercise their right to appeal the decision when the report was finalised and tabled for adoption.

48. The 1st Respondent in his submissions urged that the court's jurisdiction cannot be invoked in this matter as there has been no constitutional violation. This, it is said, is in line with the decision in **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others, Nairobi Civil Appeal No. 290 of 2012.** It is further submitted that in the case of **John Harun Mwau v Dr. Andrew Mullei & others [2009] eKLR**, it was held that the court's jurisdiction cannot be invoked in reference to a person wronged by parliamentary proceedings. The restriction of judicial interference in parliamentary proceedings is further highlighted by reference to the cases of **HC Petition No. 227 of 2013 Okiya Omtatah Okoiti & 3 others v Attorney General & 5 others [2014] eKLR,** and **Republic v National Assembly Committee of Privileges & 2 others Exparte Ababu Namwamba [2016] eKLR.**

49. The 1st Respondent asserts that the recommendations by the National Assembly are not so perverse or irrational to warrant the intervention of the court unless the petitioners have established that there was a violation or threat of violation of the Constitution. It is further contended that the order of prohibition cannot be sanctioned against the 3rd and 2nd respondents as they were acting within their legal mandate in investigating the petitioners.

50. The 2nd Respondent submits that an order of prohibition cannot be granted against an action that has already been taken. It is said that in this case the 2nd Respondent has commenced independent investigations against the petitioners. The case of **Republic v Kenya National Examinations Council ex parte Gathenji & others Civil Appeal No. 266 of 1996** is cited in support of the assertion that an order of prohibition cannot issue in respect of an action already taken. Further, that issuance of the orders sought would amount to interfering with the investigative mandate of the 2nd Respondent as provided under Section 11(1)(d) of the Ethics and Anti-Corruption Commission Act. The 2nd Respondent relies on the cases of **R v Anti-Counterfeit Agency & 2 others Ex-parte Surghipharm [2015] eKLR,** and **R v Commissioner of Police & another Ex-parte Monari & another [2012] eKLR** to demonstrate that the High Court should not intervene in the statutory mandate of an investigative authority by restraining the authority from performing its mandate.

51. Regarding the orders sought against the 3rd and 4th respondents, the 2nd Respondent asserts that the court cannot intervene where another constitutional body is properly exercising its mandate, and that the petitioners have failed to demonstrate how those respondents acted in a manner which contravened the Constitution. Reference was made to the cases of **Paul Nganga & 2 others v Attorney General & 3 others [2013] eKLR; Total Kenya Limited & 9 others v Director of Criminal Investigations Department & 3 others [2013] eKLR, and James Ondichi Gesami v Attorney General & 2 others [2012] eKLR.**

52. The 3rd Respondent in his grounds of opposition states that he is yet to receive a report and recommendation from the EACC or any other investigative agency concerning the investigation of the petitioners in this matter. Therefore, the order of prohibition sought against the 3rd Respondent amounts to curtailing the exercise of his constitutional powers and functions without proof of a violation.

53. The 4th Respondent submits that the petitioners have failed to demonstrate how the PAC violated the Constitution and urge that the National Assembly did not act outside its constitutional mandate. It is further submitted that the petitioners are seeking for the merits-based review of the investigation which does not fall within the scope of judicial review.

54. The court is also urged to abide by the tenets of the principle of separation of powers, and to respect Parliament's oversight role as was pronounced in the cases of **Speaker of the Senate & another v Attorney General & 4 others [2013] eKLR; Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others [2013] eKLR;** and **Okiya Omtatah Okoiti v Attorney General & 5 others [2014] eKLR.**

55. In addressing the issue, it is important to first appreciate the privileges and powers bestowed upon Parliament. According to Section 12(2) of the Parliamentary Powers and Privileges Act, 2017:-

> **"No civil suit shall be commended against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office."**

56. Despite the above provision, the Constitution has mandated the High Court to oversight the decisions of the actions of State organs in their administrative capacities. Article 165(3)(d) states that the High Court has the jurisdiction to :-

> **"… hear any question respecting the interpretation of this Constitution including the determination of—**
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> **(i) the question whether any law is inconsistent with or in contravention of this Constitution;**
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> **(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**
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> **(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**
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> **(iv) a question relating to conflict of laws under Article 191."**

57. These powers have been discussed in the case of **Republic v Speaker of the National Assembly & 4 others Ex-Parte Edward R.O. Ouko [2017] eKLR** where the Court held that:

> **"81. With respect to the issue whether Parliament is free to adopt any procedure it wishes to adopt based on the doctrine of separation of powers, I with respect associate with the school of thought propounded in Commission for the Implementation of the Constitution vs. National Assembly of Kenya, … JSC vs. Speaker of the National Assembly & 8 Others (2014) eKLR citing the case of Okiya Omtatah & 3 Others vs. Attorney General & 3 Others [2014] eKLR, that the doctrine of separation of powers enables the three traditional arms of government as well as independent commissions to function freely without any direction or control by any other person; that unlike countries which have adopted Parliamentary Supremacy systems such as the United Kingdom, Parliament in Kenya cannot enjoy privilege, immunities and powers which are inconsistent with the fundamental rights guaranteed in the Constitution. Thus, whereas Parliamentary privilege is recognized, it does not extend to violation of the Constitution hence Parliament cannot flout the Constitution and the law and then plead immunity; where a claim to parliamentary privilege violates constitutional provisions, the Court's jurisdiction would not be defeated by the claim to privilege; that the concept of statutory finality does not detract from or abrogate the Court's jurisdiction in so far as the complaints made are based on violation of constitutional mandates or non-compliance with rules of natural justice; that whereas the people of Kenya gave the responsibility of making laws to Parliament, and such legislative power must be fully respected, the Courts can however interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution."**

58. It was further stated that:-

> **"87. Therefore with regard to the doctrine of separation of powers, it is my view that Lord Denning's statement in Gouriet vs. Union of Post Office Workers and Others (1977) CA suffices as a response; where he affirmed: "Be you ever so high, the law is above you." In Biti and Another vs. Minister of Justice, Legal and Parliamentary Affairs and Another [2002] ZWSC 10, the Court when called upon to resolve a conflict between fundamental rights and privileges of Parliament, held that where a claim to parliamentary privilege violated constitutional provisions, the Court's jurisdiction would not be defeated by the claim to privilege."**

59. I agree with the law as propounded in the cited decision. It is clear in my mind that although the doctrine of separation of powers between the three arms of government is integral to any working democracy, the same cannot be maintained while Parliament in exercising its legal mandate disregards and violates the rights and fundamental freedoms that form the Bill of Rights. Indeed Parliament cannot violate the Constitution and the laws of the land and expect its actions, once challenged, to be upheld. Therefore, this court does have the jurisdiction to review the report by the National Assembly's PAC in order to ascertain whether it has violated the Constitution. The petitioners were well within their rights in instituting these proceedings as they are claiming that there has been a violation of their constitutional rights.

60. Ordinarily, courts will not unleash its quashing powers in respect of recommendations. This is because the implementing agency will still decide whether to act on those recommendations. However, in the case at hand, the National Assembly commanded independent constitutional office holders to take prejudicial action against the petitioners. The commands by the National Assembly leave no room for exercise independence by the investigative and prosecutorial agencies. It is immaterial that the 2nd and 3rd respondents have the mandate to do what they are being told to do. The National Assembly cannot tell the DPP to charge the 1st Petitioner and his partners with a particular offence. What then is the role of the DPP? Is he a puppet of the National Assembly?

61. This is not to say that the DCI and the DPP cannot investigate the petitioners and prosecute them, if need be, for any criminal role they may have played in the National Youth Service scandal. The National Assembly could have indeed recommended that the petitioners be investigated and charged if found culpable. In this instance the National Assembly, however, crossed its boundaries by directing the DCI and the DPP to act in a particular manner. By so doing, it violated the petitioners' right to fair administrative action. The petitioners' rights to be investigated and, if need be, be prosecuted by independent investigative and prosecutorial agencies was violated by the National Assembly.

62. In light of the above analysis and determination, I enter judgment in favour of the petitioners as follows:-

a. A declaration is hereby issued that Recommendations 12 and 13 of Part VI (Recommendations) of the Report of the Public Accounts Committee inquiring into the happenings at the National Youth Service violate the petitioners' rights guaranteed by Article 47 of the Constitution of the Republic and Kenya;

b. An order of certiorari is issued to bring into this court and quash Recommendations 12 and 13 of Part VI (Recommendations) of the Report of the Public Accounts Committee inquiring into the happenings at the National Youth Service; and

c. The petitioners are awarded costs against the 1st Respondent, the Speaker of the National Assembly.

Dated, signed and delivered at Nairobi this 3rd of April, 2020.

W. Korir,

Judge of the High Court