REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 470 OF 2018

PROF. TOM ODHIAMBO OJIENDA SC.....PETITIONER

-VERSUS-

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

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

THE SENIOR PRINCIPAL MAGISTRATE'S COURT

(JOMO KENYATTA INTERNATIONAL AIRPORT).....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

1. The Petitioner, Prof. Tom Ojienda, filed a petition dated 30th December, 2018 in which he seeks the following orders that:

a. **A declaration be and is hereby made that the investigations undertaken by the 2nd Respondent as against the Petitioner in respect to the Advocate/Client relationship between the Petitioner and Mumias Sugar Company, culminating in the recommendations made on 28th of December, 2018 by the 1st Respondent for the Petitioner's prosecution violates the Petitioner's Constitutional rights as set out under Article 27, 28, 29(a), 31, 47, 49(1)(a)(i), (c) & (h) of the Constitution, are an abuse of administrative power, are an abuse of the Court process and therefore unlawful, null and void *ab initio*.**

b. **A declaration be and is hereby made that the 2nd Respondent's seizure and detention of the Petitioner with effect from 1:00 p.m. on 28th December, 2018 to the time of his release violated his Constitutional right as set out under Article 27, 28, 29(a), 31, 47, 49(1)(a)(i), (c) & (h) and 157(11) of the Constitution.**

c. **A declaration be and is hereby made that the Order issued on 28th December, 2018 by the Senior Principal Magistrate Court at JKIA in Misc. Crim. App. No. 54 of 2018 Republic (Directorate of Criminal Investigation-HQ) v Tom Ojienda was unconstitutional and unlawful.**

d. **A Declaration be and is hereby made that the investigations on and the intended prosecution of the Petitioner in respect of the complaint the subject matter of the High Court Petition Number 122 of 2015 Prof Tom Ojienda T/A Prof. Tom Ojienda and Associates v Director of Public Prosecutions and 5 others amounts to double jeopardy, is an abuse of power and the Court process, is unconstitutional and therefore unlawful, null and void *ab initio.***

e. **A declaration be and is hereby made that the search conducted by the 2nd Respondent and the seizure of documents from the Petitioner's offices at Golf View Office Suites opposite Muthaiga Golf Club 4th Floor Suite No. 4A on the 29th of December 2018, violated the Advocate/Client privilege, was unconstitutional and therefore unlawful, null and void *ab initio.***

f. **A declaration be and is hereby made that a general search and seizure of documents and information in an Advocates office without specific and sufficient safeguards to protect the Advocate/Client confidentiality violates the Advocate/Client privilege, is unconstitutional and therefore unlawful, null and void *ab initio*.**

g. **A declaration be and is hereby made that the 1st and 2nd Respondents' action of seizing the Petitioner on a Friday and/or arresting any other suspect on the said day(s) knowing very well that the Petitioner could not be availed in Court within 24 hours constitutional period of being presented before a Court is an abuse of administrative powers and contravenes Article 49(1)(f) of the Constitution.**

h. **An Order of Mandamus be and is hereby issued directing the 1st and 2nd Respondents to release the Petitioner forthwith, and return all documents seized from the Petitioner's offices at Golf View Office Suites opposite Muthaiga Golf Club 4th Floor Suite No. 4A on 29th December, 2018 or as may have been seized from any other offices and premises of the Petitioner subsequent thereafter and all copies made therefrom.**

i. **An Order of Certiorari be and is hereby issued to bring before the High Court and quash the Order made on 28th December, 2018 and all proceedings in respect thereof by the Senior Principal Magistrate Court at JKIA in Misc. Crim. App. No. 54 of 2018 Republic (Directorate of Criminal Investigation-HQ) v Tom Ojienda.**

j. **An Oder of Certiorari be and is hereby issued to bring before the High Court and quash the decision made by the 1st Respondent on the 28th of December, 2018 to prosecute the Petitioner for the alleged offences of obtaining money by false pretences, uttering false documents, abuse of office, and conspiracy to defraud in respect to the Advocate/Client transaction between Petitioner and Mumias Sugar Company.**

k. **An Order of Prohibition be and is hereby issued prohibiting the 1st and 2nd Respondents from arraigning the Petitioner in Court for the alleged offences of obtaining money by false pretences, uttering false documents, abuse of office, and conspiracy to defraud in respect of Advocate/Client transaction between the Petitioner and Mumias Sugar Company and further, prohibiting the said 1st and 2nd Respondents from requiring the Petitioner to take plea before any subordinate Court in Kenya in respect of the said charges.**

l. **An Order Prohibition be and is hereby made prohibiting the 1st and 2nd Respondents from commencing any further criminal investigations against the Petitioner, from recommending the prosecution of the Petitioner, from arresting the Petitioner, from questioning the Petitioner, from conducting any searches on the Petitioner's offices and homes in respect to the Petitioner's performance of his professional functions in the Advocate/Client relationship between the Petitioner and Mumias Sugar Company.**

m. **An Order of Prohibition be and is hereby made prohibiting the 1st and 2nd Respondents from commencing any further criminal investigations against the Petitioner, from recommending the prosecution of the Petitioner, from arresting the Petitioner, from questioning the Petitioner, from conducting any searches on the Petitioner's offices and homes in respect to the Petitioner's performance of his professional functions in the Advocate/Client relationship between the Petitioner and any of his clients.**

n. **The 1st and 2nd Respondents be and are hereby directed to pay the Petitioner damages in the sum of Kenya Shillings Two Hundred Million (Kshs. 200,000,000.00) for the violation of the Petitioner's rights and fundamental freedoms in respect to the Petitioner's seizure, unlawful detention, unlawful search, intimidation, hindrance, harassment and improper interference with the Petitioner's performance of his professional functions as an Advocate of the High Court of Kenya in accordance with recognised professional duties, standards and ethics.**

o. **The 1st and 2nd Respondents be and are hereby directed to pay the Petitioner the costs of his Petition.**

2. The Petitioner named the Director of Public Prosecutions (DPP), the Director of Criminal Investigations (DCI), the Senior Principal Magistrate's Court (Jomo Kenyatta International Airport), and the Attorney General the respective 1st to 4th respondents.

3. The Petitioner's case is encompassed in his petition dated 30th December, 2018, supporting affidavit sworn on the date of the petition, and a supplementary affidavit sworn on 31st January, 2019. The petition emanates from the arrest of the Petitioner on 28th December, 2018 by officers of the 2nd Respondent and his holding for questioning at the 2nd Respondent's headquarters at Mazingira House along Kiambu Road.

4. The Petitioner asserts that upon his arrest he was not notified of the reasons for his arrest or why he was required for questioning. The Petitioner alleges that it was only after he had been detained for twenty-five hours that he was informed on 29th December, 2018 that his arrest was in respect of legal services rendered to Mumias Sugar Company (MSC) and payments made in that regard from 15th July, 2011 to the date of his arrest.

5. The Petitioner additionally avers that several officers of the 2nd Respondent acting on an order issued on 28th December, 2018 by the 3rd Respondent in **Misc. Criminal Application No. 54 of 2018 Republic (Directorate of Criminal Investigations-HQ) v Prof Tom Ojienda**, entered his offices at Golf View Office Suites off Wambui Road, Muthaiga and reviewed thirty identified files before taking both originals and copies of nine files. It was after these events, that the Petitioner was questioned for five hours and recorded a statement at about 6.00 p.m. on 29th December, 2018. The Petitioner alleges that no charge was presented for him to answer to and no evidence was presented of any complaint by anyone against him in respect to the investigations and all allegations being made.

6. The Petitioner avers that the actions of the respondents in illegally summoning him violated a number of provisions of the Constitution including Article 29(a) on the right to freedom and security. It is the Petitioner's case that his rights under Article 29 were violated in that he was deprived of his freedom with no just cause; that upon his arrest he was not promptly informed of the reasons for his arrest; that he was

held incommunicado as his phones were confiscated after his seizure; and that he was detained without reason for twenty-five hours.

7. Additionally, the Petitioner avers that his right not to be discriminated against which is protected by Article 27 of the Constitution was infringed as he was not informed of the reasons for this detention or given an opportunity to clarify the issues being investigated by the 2nd Respondent unlike his former partner Mr. Peter Manyonge Wanyama who posted on his Facebook page that he had been accorded an opportunity to clarify issues.

8. The Petitioner alleges that the 1st Respondent has committed an abuse of power in violation of Article 157(11) of the Constitution as he has failed to have regard for the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. The Petitioner additionally deposes that the 1st and 2nd respondents have failed to adhere to the provisions of the Constitution, particularly Articles 10(1) & (2) and 239(a) and have engaged in a fishing expedition targeted at him.

9. The Petitioner avers *inter alia* that the matters upon which the 1st and 2nd respondents have chosen to conduct their investigations were conclusively dealt with by Lenaola, J (as he then was) in **High Court Petition No. 122 of 2015 Prof. Tom Ojienda T/A Prof. Ojienda & Associates v Director of Public Prosecutions & 5 others** and which was pending appeal at the time of his arrest. It is therefore the Petitioner's averment that the investigations by the 2nd Respondent and any intended prosecution infringes on the principle of *res judicata* and subjects him to double jeopardy and is an abuse of power.

10. The Petitioner avers that the documents that were sought by the 1st and 2nd respondents during the search conducted in his office were actually in their possession and formed part of the record of appeal in **Civil Appeal No. 109 of 2016, Director of Public Prosecutions v Prof Tom Ojienda T/A Prof. Tom Ojienda and Associates & others** and **Civil Appeal No. 103 of 2016, EACC v Prof Tom Ojienda T/A Prof. Tom Ojienda and Associates & others.**

11. The Petitioner further deposes that the matters under investigation and subject to the intended prosecution are inherently private and of a contractual nature. It is therefore the Petitioner's case that there is no apparent public interest element in the investigations, and the 1st and 2nd respondents are attempting to criminalise matters which are contractual and private, in other words civil matters in which there is neither a dispute nor a complainant.

12. The Petitioner asserts that the 1st and 2nd respondents have violated his rights under Article 2(5) of the Constitution and the basic principles on the role of lawyers in the **Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990**. The Petitioner avers that advocates cannot be held culpable in matters in which they are legally representing their clients, and any action would be against public interest, untenable in law, and cannot be reconciled within the terms of the Advocates Act, Cap. 16.

13. The Petitioner claims that his rights under Article 49(1)(a)(i), (c) & (h) of the Constitution were infringed by the 2nd Respondent during his arrest by failure to inform him promptly of the reasons for his arrest; denying him the right to promptly consult with his advocates upon his arrest; and denying him the right to bail or bond without disclosing any persuasive reasons for the denial.

14. It is further alleged that Articles 47(1) and 50(2)(a) of the Constitution were infringed as the Petitioner was never informed of the charges against him at the time of his arrest and only came to know of them on a Twitter post by the 1st Respondent on 29th December, 2018 at 12.57 a.m. The Petitioner states that this was a conviction in the eyes of the public. He claims that this was in breach of the evidential test requirement as the 1st Respondent widely publicised the alleged charges but only proceeded to search and seize documents in respect of the charges twelve hours later at 1.00 p.m. on 29th December, 2018 and questioned him at 6.30 p.m. on the same date.

15. The Petitioner finally alleges that the 2nd Respondent's actions of publicly arresting him and confiscating his phones without lawful justification instead of summoning him to answer to any charges to be preferred against him violated his right to dignity protected by Article 28 of the Constitution.

16. The Petitioner in his supporting affidavit calls into question the jurisdiction of the 3rd Respondent claiming that the Principal Magistrate's Court at JKIA is gazetted as a special court and empowered with limited jurisdiction on drug trafficking offences.

17. Through his supplementary affidavit the Petitioner denies the allegation made by the 2nd Respondent through the replying affidavit dated 14th January, 2019 that he falsified fee notes and fiscal receipts pertaining to court cases in which MSC allegedly was not involved in and which MSC erroneously paid for.

18. The Petitioner asserts that the charges in counts three, four and five in the charge sheet registered in Court on 31st December, 2018 in **Criminal Case No. 2427 of 2018 Republic v Tom Odhiambo Ojienda** are based on erroneous or intentional misinterpretation of the facts by officers of the 1st and 2nd respondents, and the conclusion arrived at by the respondents are in disregard, ignorance or concealment of the facts.

19. The Petitioner contends that MSC is not a public body but a public limited liability company, and has not made any complaint against him on any of the six charges in the charge sheet registered on 31st December, 2018. He avers that Chief Inspector Patrick Maloba who swore an affidavit on behalf of the 2nd Respondent has failed to demonstrate that there is any factual or legal foundation to warrant his arrest, detention for two days, unlawful search of his offices and preferment of criminal charges against him.

20. It is deposed that the continued publication of false claims against the Petitioner is an attempt by the 1st and 2nd respondents to prosecute the case before the court of public opinion and undermines the authority and dignity of the courts. The Petitioner therefore urge that the

investigations, recommendations for his prosecution, and charges proffered against him should be quashed and declared unconstitutional.

21. The 1st Respondent filed a replying affidavit sworn by Wakio Mwamburi on 14th January, 2019. The 1st Respondent clarifies that he issued the Twitter statement complained of by the Petitioner in his official capacity and purely to inform the public of his decision.

22. The 1st Respondent deposes that the order issued for the search and seizure of documents did specify the reasons for the intended search and the Petitioner's allegation that he was not aware of the reason is not true. It is further contended that the Petitioner's advocate admitted in his statement recorded on 30th December, 2018 that there was no breach of confidentiality and privilege as alleged in the petition.

23. The 1st Respondent rejects the Petitioner's impeachment of the jurisdiction of the 3rd Respondent stating that the Petitioner and his counsel had submitted themselves to the 3rd Respondent's order and assisted in the investigation. The 1st Respondent additionally contend that the 3rd Respondent enjoys the same jurisdiction as any other magistrate's court established under the Magistrates' Court Act, 2015.

24. It is the 1st Respondent's case that he has at all times acted in the best interest of the public and upheld the constitutional values and principles. He maintains that the action of charging the Petitioner and communicating the same to the public was in line with the ideals of transparency and accountability.

25. It is further deposed that the matters referred to by the Petitioner in paragraph 50(g) of his petition are not private and contractual in nature so as to be excluded from criminal investigations as parties to a contract are also susceptible to commit crimes. The 1st Respondent further asserts that properties belonging to MSC are public and therefore the suppliers of cane to the company are entitled to the protection of the law.

26. On the matter of advocate-client privilege, it is deposed that the same does not extend to cover criminal conduct and would be waived by the operation of the law under Section 134 of the Evidence Act, Cap. 80.

27. In response to the allegation that the Petitioner has been subjected to trial by the public, it is contended that the public communication of the charges was made in good faith, and in any event the trial as envisaged under Article 50(2) of the Constitution would take place in open court and the public and media would learn of the charges. The 1st Respondent also faults the Petitioner's counsel for the publicity surrounding his arrest stating that he was among the first persons who tweeted about the Petitioner's arrest.

28. The 1st Respondent asserts that the Petitioner has not placed any material before the Court to establish a breach of any of his constitutional rights and has failed to meet the threshold for grant of the orders sought. Further, that the 1st and 2nd respondents had probable cause to initiate criminal proceedings against the Petitioner.

29. The 2nd Respondent filed a replying affidavit sworn by Chief Inspector Patrick Maloba on 14th January, 2019. The 2nd Respondent avers that during the investigation into the near collapse of MSC it was discovered that the same was occasioned through fraud by contractors and employees of MSC which included fictitious court cases and payment of the legal fees by MSC in court cases where MSC was not a party. It is alleged that the Petitioner was a party to some of the fraudulent legal schemes and the 2nd Respondent applied for a court warrant to search the Petitioner's office in line with its mandate.

30. The 2nd Respondent avers that the Petitioner and his advocates were informed of the reasons for his arrest. Further, that the 2nd Respondent is not privy to the reports by media houses as his investigations are independent. The 2nd Respondent further contends that the Petitioner was informed of and allowed his right to representation.

31. The 2nd Respondent contends that the Petitioner was lawfully arrested and held legally as an outcome of investigations, and the charges preferred against him are based on evidence. Furthermore, that the search conducted by the 2nd Respondent's officers was done with the free consent of the Petitioner in the presence of his two advocates.

32. The 2nd Respondent avers that investigations into some of the cases that the Petitioner allegedly represented on behalf of MSC, namely **Kisumu Civil Appeal No. 5 of 2012** and **Eldoret Civil Appeal No. 10 of 2012** revealed that the cases did not involve MSC yet the Petitioner raised fee notes under those case numbers.

33. The 2nd Respondent additionally deposes that the Petitioner instituted proceedings under **High Court of Kenya Misc. Application No. 167 of 2017 Prof Tom Ojienda & Associates v Mumias Sugar Company Limited** seeking the payment of bill of costs amounting to Kshs. 6,086,100.00 for a legal audit which his firm allegedly undertook in 2014 for the company. However, the actual legal audit was undertaken by advocate Peter Manyonge Wanyama and not by the Petitioner as he claims.

34. The 2nd Respondent claims that the petition is premature as it seeks to block the prosecution which is in the public's interest and where public money is involved. Additionally, it is asserted that if the petition is allowed it shall set precedent of impunity in the legal process and will reflect negatively on judicial decisions.

35. I have carefully considered the parties' pleadings and submissions and in my view the issues for the determination of this Court are:

a) Whether the 1st and 2nd respondents acted *ultra vires* in the investigation and arrest of the Petitioner;

b) Whether the 3rd Respondent had jurisdiction to grant the search order dated 28th December, 2018 in Misc. Crim. App. No. 54 of

2018;

c) Whether the Petitioner's rights were infringed by the actions of the respondents; and

d) Whether the Petitioner is entitled to the reliefs sought.

36. The Petitioner asserts in his petition that the matters upon which the 1st and 2nd respondents have chosen to conduct their investigations were conclusively dealt with in **High Court Petition Number 122 of 2015 Prof Tom Ojienda T/A Prof. Ojienda and Associates v Director of Public Prosecution & 5 others.** He contends that the investigations by the 2nd Respondent and any intended prosecution infringes on the principle of *res judicata*, subjects him to double jeopardy and is an abuse of power.

37. The Petitioner in his written submissions dated 12th February, 2019 and supplementary submissions dated 9th March, 2020, asserts that the 1st and 2nd respondents have abused their powers by pursuing the criminal charges against him without any factual or legal foundation, as there is no accuser against him because MSC has not complained. He also asserts that the respondents have abused their powers in criminalising a civil transaction in which there is no complaint from MSC and have contravened the recognised separation of the criminal and civil justice systems.

38. By way of written submissions dated 18th February, 2019, the 1st and 2nd respondents deny any malfeasance on their part and submit that the directive to the 2nd Respondent by the 1st Respondent was not malicious and the 1st Respondent cannot be faulted in the absence of evidence to establish *mala fides* on his part. They further assert that the decision to institute criminal proceedings is discretionary and the 1st Respondent's discretion should not be unnecessarily fettered by the courts unless it has been proven that the 1st Respondent contravened the Constitution. Further, that the mere existence of an appeal in the Court of Appeal in respect of the decision in **High Court Petition Number 122 of 2015 Prof Tom Ojienda T/A Prof. Ojienda and Associates v Director of Public Prosecution & 5 others** does not bar the initiation of criminal proceedings against the Petitioner. Also, that Lenaola, J (as he then was) in **High Court Petition Number 122 of 2015 Prof Tom Ojienda T/A Prof. Ojienda and Associates v Director of Public Prosecution & 5 others** did not prohibit the investigation or prosecution of the Petitioner.

39. In order to determine whether the Petitioner's claim that the issue of his arrest in respect of issues arising from his transactions with MSC is *res judicata* by virtue of the judgment in **High Court Petition Number 122 of 2015 Prof Tom Ojienda T/A Prof. Ojienda and Associates v Director of Public Prosecution & 5 others,** it is necessary to review the said judgement which is attached to the 2nd Respondent's replying affidavit and marked PM5**.** In his judgement the Judge clearly held that:

> **"136. […] my final orders below cannot stop fresh investigations into the issues in dispute before me if the 1st Respondent follows the law and due process. The quashing of prior warrants cannot stop issuance of fresh ones."**

40. Although this Court fully recognises and submits itself to the principles of *res judicata* and double jeopardy, it is clear that Justice Lenaola (as he then was) expressly held that the respondents were free to conduct fresh investigations into the issues which were before him. The only condition for the fresh investigations and proceedings was that the same should be conducted in accordance with the law and due process. Therefore, the 1st and 2nd respondents have not infringed the principles of *res judicata* or double jeopardy in conducting fresh investigations into the matter.

41. The next step is to establish whether the investigations carried out by the 1st and 2nd respondents were conducted in accordance with the law and due process. The first issue is whether there existed a complaint which the 1st and 2nd respondents acted upon. The 1st and 2nd respondents claim that they acted in accordance with the findings in the KPMG report attached to the 2nd Respondent's replying affidavit. I have perused the KPMG report relied upon by the 2nd Respondent, and find that the investigation into the financial losses of MSC does not point to the Petitioner in any way. Therefore, the allegation by the 1st and 2nd respondents that their investigation of the Petitioner was triggered by that report is incorrect. There is no other evidence that the 1st and 2nd respondents indeed acted upon sufficient information in seizing the Petitioner.

42. However, it is important to clarify at the outset that where there exists a complaint, which raises criminal culpability, against an advocate arising from the relationship between the advocate and the client, the client is free to seek criminal redress and is not bound by the procedure in the Advocates Act. It is also possible that in the course of transactions between an advocate and a client, crimes may be committed. In such circumstances the procedure for dealing with criminal offences can be engaged by the 1st and 2nd respondents. In that regard I agree with the holding of Lenaola, J (as he then was) in **Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR** that:

> **"132. The question that now arises is whether the issues in contest before me should first have been placed before the Advocates Complaint Commission and/or the Advocates Disciplinary Tribunal. To my mind the answer is simple; criminal offences including questions of corruption committed by advocates are not any different from those committed by laymen in law. The regime of the Commission and Tribunal aforesaid is limited to professional misconduct and not criminal conduct. To say otherwise would give advocates a special place in the criminal justice system and however attractive such a proposition may be to advocates, it is fallacious and against the public interest and the need to apprehend criminals, whatever their profession. In any event, an advocate may suffer both a professional sanction as can be seen above and simultaneously suffer a criminal sanction and in the circumstances, I see no value in the Petitioner's arguments on that point. That is all there is to say on that matter."**

43. It is therefore my view that the 2nd Respondent can investigate and the 1st Respondent can prosecute criminal matters raised in relation to

the actions of an advocate in the advocate's professional capacity. However, the question remains as to whether there was a complaint or allegation of criminal misconduct against the Petitioner by MSC.

44. In the case of **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party) [2019] eKLR; International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** the Court cited with approval the decision of the Court of Appeal in **Kamau John Kinyanjui v Republic [2010] eKLR** where it was stated that:

> **"260. […] Our conclusion on this issue is that in cases being conducted by the Attorney-General on behalf of the Republic, the complainant is the Republic itself and not the victim of the crime.**
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> **Of course the Republic as complainant would not go far in a prosecution if the victim of the crime does not cooperate and is unwilling to come and testify, but in such a case, the acquittal of the accused person will not be on the basis that the complainant is absent; it will be on the basis that no evidence or no sufficient evidence has been called to support the charge. The complaint of the Republic respecting the alleged criminality of the accused person would have failed. We repeat that except in those rare cases where the court has allowed a private prosecution, the complainant envisaged in the various provisions of the Criminal Procedure Code is always the Republic."**

45.What I understand from the above passage is that, even where the DPP is acting on behalf of the public in prosecuting an individual, it is important that the alleged victim of the crime appears before the court or must make a statement to support the charge. This was the position of the Court in **Republic v Advocates Disciplinary Committee & another Ex-Parte Keith Howard Osmond [2013] eKLR** where it was held that:

> **"Having said so, I must state that the institution of a complaint against an advocate by an affidavit sworn by the complainant should be the norm and not the exception. It is only the complainant who is privy to the facts of the complaint and he should be confident enough to bring forward the complaint by swearing an affidavit himself."**

46. In this case, there is no sworn statement or affidavit by a director or an officer of MSC to prove that a complaint was indeed raised against the Petitioner. In light of the above, I concur with the Petitioner that the 1st and 2nd respondents have failed to prove that they acted on a legitimate complaint by MSC as the client of the Petitioner. However, this would not be a good reason for stopping the Petitioner's prosecution. Ordinary Kenyans and the Government of Kenya are among the shareholders of MSC. If the respondents can establish, without calling a witness from MSC, that criminal activities leading to loss of money by the company were committed by the Petitioner, then I do not see why the Petitioner should not answer for such crimes.

47. The next question is whether the evidence relied on by the 1st and 2nd respondents in seizing the Petitioner is sound enough to justify prosecution. What is the jurisdiction of this Court in such a situation? In **Philomena Mbete Mwilu (supra)** the Court stated that:

> **"239. […] There is an emerging view that a substantive review of the exercise of the DPP's decision must necessarily involve an assessment of the merit of the decision in the context of the threshold set for the DPP by the Constitution. In this regard the decision of Onguto J in Republic v Director of Public Prosecution & another ex parte Patrick Ogola Onyango & 8 others (supra) proposes the rationale of a more involved review as follows:**
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> **'116. The courts' twin approach in ensuring that the discretion to prosecute is not abused if only to maintain public confidence in the criminal justice system and the same time balancing the public interest in seeing that criminals are brought to book has led to rather contradictory principles….'"**

48. The Court went on to determine that:

> **"243. We agree that there is a real danger of courts overreaching if they were to routinely question the merit of the DPP's decisions. However, there are circumstances where the type of scrutiny set out in the majority decision of Njuguna S. Ndungu (supra) is called for. Should there be credible evidence that the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, then a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled."**
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> **"244. To be underscored is that judicial review of the foundational basis of a charge should only be undertaken when an applicant has first established that there are reasonable grounds that the challenged proceedings are a vehicle for a purpose other than a true pursuit of criminal justice. To allow a willy-nilly and casual review of the foundational basis of criminal charges would be to turn judicial review proceedings into criminal mini-trials, a prospect that anyone keen to stop a criminal trial would relish. The question is whether the present case fits into the latter scenario."**

49. On the power of this Court to scrutinise the merits of the decision of the Director of Public Prosecutions (DPP) to prosecute, Githinji, JA stated in the case of **Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR** that:

> **"[16] […] The National Prosecution Policy states in part in para. 4 (B) (1):**
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> **'The decision to prosecute as a concept envisages two basic components namely; that the evidence available is admissible and sufficient and that public interest requires a prosecution to be conducted…' and in para. 4 (B) (2), the Policy states:**

'The Evidential Test –

Public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available'"

50. Githinji, JA went on to hold that:

> **"[24] […] In my respectful view, the High Court erred in law by failing to scrutinize the charges, the relevant documents including the decisions of Evaluation Committee, Tender Committee, Review Board and the High Court proceedings and reach a conclusive and objective decision on whether or not the charges had any legal or factual foundation and also a realistic prospect of conviction."**

51. The Court of Appeal in **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR** similarly held that:

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

52. From the foregoing, it is understood that the DPP in deciding to prosecute an individual must not only rely on inculpatory evidence, but must also look at the exculpatory evidence available. Where it is believed that the DPP has failed to do so, the Court is permitted to step in and review the evidence in order to determine whether the DPP made the decision in a fair and just manner, and in line with the evidential test. The need for the Court to review the material before it is elevated where it is alleged that the prosecution is driven by ill-motive and is meant to achieve purposes not related to the objectives of criminal trials.

53. In the case before this Court, the Petitioner has alleged that there was no basis for the commencement of the investigations against him. This averment has been found by this Court to be correct. There was no complain by MSC against the Petitioner and neither did the KPMG report implicate the Petitioner in respect of procurement of services by MSC.

54. The 1st and 2nd respondents' evidence is to the effect that the Petitioner falsified fee notes by claiming to have represented MSC in cases which did not involve the company. They further claim that the Petitioner prepared a bill of costs pursuing fees for a legal audit which they claim the Petitioner's current firm was not involved in. The 1st Respondent also relies on the ruling in **Misc App No 167 of 2017 Prof. Tom Ojienda & Associates v Mumias Sugar Company Ltd** which was made in reference to a bill of costs raised by the Petitioner herein for the legal audit he allegedly performed. In that ruling the Petitioner's bill of costs was struck out, and the 1st and 2nd respondents relies on this as evidence of the Petitioner's culpability.

55. The Petitioner on the contrary, has placed before this Court evidence which is clearly exculpatory to the effect that there were two legal audits which were undertaken. The first legal audit marked 'PM18' in the 1st and 2nd respondents' replying affidavit, was undertaken by the Prof Otieno Odek, Prof Ojienda & Wanyama Advocates and the Petitioner confirms that the firm was paid for the services rendered in 2011. The Petitioner avers that the fees in question relate to the forensic audit undertaken by Ojienda and Company Advocates as per the instructions of MSC on 13th February, 2013 attached as 'PTO11' to his supplementary affidavit.

56. Furthermore, the Petitioner has presented the Court with evidence being his statements made to the DPP and has clarified that the DPP made mistakes concerning the claims which he is accused of having falsified since he had indeed represented MSC in the cases he was paid for. The evidence of the Petitioner indicates that in reference to the cases being Kisumu Civil Application Nai. No. 5 of 2012 and Eldoret Civil Appeal No. 10 of 2012, when the cases moved registries the case numbers were changed to Civil Application No. Nai 57 of 2012 (UR 41/2012) and Civil Appeal No.117 of 2012 respectively. According to the Petitioner, this explains why the cases referred to by the 1st and 2nd respondents were in respect of different parties.

57. Even in the face of the evidence of the Petitioner, the 2nd Respondent nevertheless went ahead to present a charge sheet before the Magistrate's Court instead of cross-checking the Petitioner's statements. It is also noted that no affidavit was filed before this Court to rebut the Petitioner's averments or explain why despite what the Petitioner had stated there was still reason for taking him through a criminal trial.

58. Had the 1st Respondent taken into consideration the exculpatory evidence, he would not have made the decision to prosecute the Petitioner, as there would be no factual and legal basis for doing so. Moreover, the existence of the ruling dated 30th October, 2018 in **Misc App No 167 of 2017 Prof. Tom Ojienda & Associates v Mumias Sugar Company Ltd**, in which the Court dismissed the Petitioner's bill of costs for the second audit is not evidence of criminal culpability of the Petitioner. It is also noted that the decision is the subject of an appeal which is yet to be determined by the Court of Appeal.

59. It is my finding that the Petitioner had provided exculpatory evidence to the 1st and 2nd respondents which demonstrated that the impugned fee notes were not irregular, and that there was no factual basis to arrest and charge him. Additionally, the fact that there was no official complaint by MSC or an affidavit to evidence its complaint against the Petitioner demonstrates that the 1st and 2nd respondents failed to act in accordance with the rules of procedure and the law when exercising their mandates in this matter. In view of the fact that there was no evidence to support the allegations against the Petitioner, I find and hold that the 1st and 2nd respondents exceeded and abused their

constitutional and statutory mandates.

60. The Petitioner in his affidavit dated 30th December, 2018 calls into question the jurisdiction of the 3rd Respondent, claiming that the Principal Magistrate's Court at JKIA is gazetted as a special court and empowered with limited jurisdiction to handle drug trafficking offences. The 1st Respondent contends that the Court enjoys the same jurisdiction as any other Magistrate's Court established under the Magistrates' Court Act, 2015.

61. The Petitioner submits in his petition two pieces of evidence marked as TO-1 to support his argument that the 3rd Respondent did not have jurisdiction to issue the impugned order. These are the Gazette Notice establishing the 3rd Respondent Court and a copy of an online news article from the Star newspaper on the jurisdiction of the 3rd Respondent.

62. According to Gazette Notice No. 3337 the Jomo Kenyatta International Airport (JKIA) Law Court is established as *"a magistrate's court that is within the supervisory jurisdiction of Nairobi High Court, with effect from 16th May, 2016."* The Gazette Notice does not mention in any way the alleged limited jurisdiction of the Court but establishes it as any Magistrate's Court under the Magistrates' Court Act.

63. The second piece of evidence submitted by the Petitioner as proof of the 3rd Respondent's limited jurisdiction is an online news article in a newspaper. Section 78A of the Evidence Act, Cap. 80 provides for the admissibility of electronic evidence by stating that:

> **(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.**
>
> **(2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.**
>
> **(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—**
>
> > **(a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;**
> >
> > **(b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;**
> >
> > **(c) the manner in which the originator of the electronic and digital evidence was identified; and**
> >
> > **(d) any other relevant factor.**
>
> **(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.**

64. In order to understand the applicability of the above provision to the facts herein, I rely on the holding of Mativo, J in the case of **Donald Atemia Sipendi v Republic [2019] eKLR** in which he states that:

> **"47. Where the probative value of the information in a data message depends upon the credibility of a (natural) person other than the person giving the evidence, there is no reason to suppose that section 78A seeks to override the normal rules applying to hearsay evidence. On the other hand, where the probative value of the evidence depends upon the "credibility" of the computer (because information was processed by the computer), the Prosecution is obliged to adduce evidence to satisfy the court as to the evidence is credible."**

65. In accordance with the facts in the case before me, what needs to be determined is the probative value of the information contained in the electronic newspaper, in other words its accuracy and trustworthiness. In order to establish the probative value of the evidence, it must be certified to be correct by the creator/writer of the article.

66. It is my position that given the dangers of inaccuracy posed by digital media and online news platforms, and the underlying reality that the information provided by the Petitioner is indeed hearsay evidence, it would have been prudent for the Petitioner to provide certification from the Star as to the accuracy of the information provided in the referenced article, so as to give it evidential value. Since the Petitioner has not provided the relevant certification, I must rely on the Gazette Notice establishing the Court as a Magistrate's Court just like any other Court established under the Magistrates' Court Act, 2015. Therefore, the jurisdiction of the 3rd Respondent is to be enjoyed within the confines of the Act. The Petitioner has not placed any evidence before this Court to show that the 3rd Respondent exceeded the jurisdiction donated by the establishing law.

67. I now turn to the procedure of granting search orders. According to Section 118 of the Criminal Procedure Code, Cap. 75:

> **"Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship,**

aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law."

68. It has been established by this Court that the 1st and 2nd respondents did not act upon any reasonable suspicion against the Petitioner in investigating or arresting him. The same can be said in regard to the search of his offices. It was determined in **George Onyango Oloo v EACC & another [2019] eKLR** that:

> **"54. The applicant also relied on the decision of Majanja J in Manfred Walter Schmitt & Another V Republic & Another (supra) in which he had addressed the duty of the court and the police with respect to search warrants as follows:**
>
> ***'I would be remiss if I did not comment on the nature of the proceedings before the subordinate court. The duty imposed on the judiciary to issue warrants of search and seizure is a constitutional safeguard to protect the rights and fundamental freedoms of an individual. The Court is not a conveyor belt for issuing warrants when an application is made nor must the court issue warrants of search and seizure as a matter of course. When an application is made, the Court is required to address itself to the facts of the case and determine, in accordance with the statutory provisions, whether a reasonable case has been made to limit a person's rights and fundamental freedoms. On the other hand, the duty of the State and its agencies, in investigating and prosecuting crime, is to furnish the Court with facts upon which the court can conclude that there is reasonable evidence of commission of a crime by the person it seeks to implicate by the application for search and seizure.'"***

69. In case of **Innocent Momanyi Obiri v Ethics & Anti-Corruption Commission & another [2019] eKLR**, the Court at paragraph 43 cited with approval the decision in **Okiya Omtatah v AG & 4 others where it was observed that:**

> ***"113. We are aware that search warrants ought to be scrutinized with "sometimes technical rigour and exactitude.'[84] This is because as the Supreme Court of Appeal of South Africa observed:-***
>
> ***'A search warrant is not some kind of mere, interdepartmental correspondence "or note.' It is, as its very name suggests, a substantive weapon in the armoury of the State. It embodies awesome powers as well as formidable consequences. It must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere, checklist approach. …***
>
> ***114. In the absence of evidence of abuse of power or a gross violation of the rights of a person to be searched, a court would be slow to find that a search warrant is unlawful on purely technical grounds.***
>
> ***115. The right to privacy is expressly guaranteed by Article 31 of the Constitution, while the statutory procedure for conducting search and seizure by the police has three inbuilt requirements to be met. Such requirements are that:- (a) prior to the search and seizure the police should obtain a search warrant; (b) such warrant should be issued by a judicial officer; and (c) lastly there should be proof on oath that there is reasonable suspicion of commission of an offence."***

70. It was determined by the Court in the **Innocent Momanyi Obiri (supra)** that search warrants are to be *"scrutinised with sometimes technical rigour and exactitude"* and can only be found unlawful where there is evidence brought before the court to the effect that there was an abuse of power.

71. In the case before this Court, the Petitioner has established that the 1st and 2nd respondents had no basis for commencing the investigations against him. His case that there was no evidence to raise a reasonable suspicion against him has not been dislodged. There was therefore no basis for the 2nd Respondent to seek a search warrant from the 3rd Respondent. The tools placed in the hands of investigators for purposes of unearthing evidence in circumstances where crime is suspected to have been committed should be exercised with a lot of circumspection. Such powers are not toys to be played around with. In this particular case, the Petitioner was arrested and placed in custody even before the evidence that was to form the basis of his prosecution was retrieved. The impression one gets from the actions of the 1st and 2nd respondents is that a decision had been made to charge the Petitioner notwithstanding the results of the search.

72. The Petitioner avers that he was seized, detained for a non-cognisable offence, was denied bail, and held for over twenty-four hours in violation of his rights. He claims that his arrest and detention was malicious in accordance with the decision in **Jacob Juma & another v Commissioner of Police & another [2013] eKLR**. The Petitioner claims that his rights under Articles 49(1)(a)(i), (c) & (h), Articles 47(1), 50(2)(a) and Article 28 of the Constitution were infringed by the actions of the 1st and 2nd respondents.

73. The 3rd and 4th respondents through their written submissions dated 27th May, 2019 stated that the Petitioner failed to submit any evidence in support of the allegation that the 1st and 2nd respondents went beyond their constitutional mandate when carrying out their investigations. They rely on the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** in support of the assertion that no constitutional violation has been established with precision.

74. The Petitioner also alleges that the 2nd Respondent's actions of publicly arresting him, confiscating his phones without lawful justification; failing to summon him to answer to any charges to be preferred against him were all a violation of his human dignity.

75. There is no provision in the Criminal Procedure Code, Cap. 75 which requires the arresting officer to carry out an arrest privately or that arrests should not be conducted in public places. What I believe the Petitioner is complaining about is not that his right to dignity was infringed by his public arrest but that he was embarrassed by the arrest. He has not demonstrated how the public arrest violated any provision of the Constitution.

76. The Petitioner claims that his mobile phone was confiscated from him rendering him incommunicado while he was under detention. Unfortunately, the Petitioner has not produced any proof of this to the Court.

77. The Petitioner further argues that he was not summoned to answer to the charges against him. The 1st and 2nd respondents, however, claim that they moved to court in **Criminal Case No. 2427 of 2018 Republic v Tom Odhiambo Ojienda** so as to afford the Petitioner an opportunity to respond to the charges against him, but he declined to do so in favour of instituting these proceedings.

78. The Petitioner does indeed acknowledge the existence of the criminal case. It is noted from the evidence placed before this Court by the parties that the Petitioner was accorded an opportunity to state his part of the story when he was allowed to record the statements exhibited in his supplementary affidavit. Whether his evidence was taken seriously is another issue altogether. However, his averment that he was not given an opportunity to confront the case against him is therefore without basis.

79. The Petitioner alleges that his right to freedom from discrimination under Article 27 of the Constitution was infringed as he was not informed of the reasons for his arrest and therefore was not granted an opportunity to clarify on the issues being investigated unlike his former partner who did so through a Facebook post.

80. The Petitioner has failed to provide the Court with any proof that he was not immediately informed of the reasons for his arrest, as the allegation has been denied by the 2nd Respondent. In any case, it is unlikely that the Petitioner could have recorded statements without knowing the accusations that were being made against him by the 1st and 2nd respondents. Furthermore, the Petitioner has not demonstrated that the 1st and 2nd respondents exonerated Mr. Wanyama based on the opportunity extended to him as alleged in his postings on his Facebook account. The claim that the 2nd Respondent discriminated against him on this account therefore fails. I therefore cannot find that the Petitioner's right to equality and freedom from discrimination was infringed by the respondents.

81. The Petitioner also submits that the search and seizure of files from his office not only violated his right to privacy under Article 31 of the Constitution but additionally breached the confidentiality and privilege of his offices and clients. The Petitioner argues that any conflict between an advocate and his client should follow the dispute resolution procedure provided under the Advocates Act. The Petitioner cites the decisions in **Lavallee, Rackel & Heintz v Canada [2002] SCC 61; Samura Engineering Limited & 10 others v Kenya Revenue Authority [2012] eKLR; Manfred Walter Schmitt & another v Republic & another [2013] eKLR; Standard Newspapers Limited & another v Attorney General & 4 others [2013] eKLR; Abubakar Shariff Abubakar v Attorney General & another [2014] eKLR;** and**, Manfred Walter Schmitt & another v Attorney General & 3 others [2014] eKLR** to support this argument.

82. The 1st Respondent in his replying affidavit asserts that the advocate-client privilege does not cover criminal conduct and would be waived by the operation of the law pursuant to Section 134 of the Evidence Act, Cap. 80. The 1st and 2nd respondents submitted that Section 134 provides that advocate-client confidentiality and privilege does not extend to actions that are criminal in nature or in furtherance of any illegal purpose. They refer to the decision in the case of **Tom Ojienda t/a Ojienda & Associates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR** as confirming this position.

83. I have already made a determination on the place of the advocate-client confidentiality principle vis-à-vis criminal liability of an advocate. I will, nevertheless, make comments on the claim that the Petitioner's right to privacy was violated. Section 134 of the Evidence Act states:

> **"(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."**

84. In the case before me, the 2nd Respondent sought information from the Petitioner pertaining to alleged offences of obtaining money by false pretences, uttering false documents, abuse of office, and conspiracy to defraud in respect of advocate-client transaction between the Petitioner and MSC. The information collected by the 2nd Respondent pertained to communications between the Petitioner and MSC which they believe would support the allegations of illegal transactions.

85. In the case of **Tom Ojienda t/a Ojienda & Associates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR,** it was held that:

> **"75. The above notwithstanding, in the Berstein vs Bester NO (supra) case the South Africa Constitutional Court cautioned against a straightforward use of common law principles to interpret fundamental rights and freedoms. In determining therefore whether an invasion of the common law right to privacy has been violated, the Court stated as follows regarding**

the applicable test;

> **'It essentially involves an assessment as to whether the invasion is unlawful. And, as with other forms of anuria, <u>the presence of a ground of justification (such as statutory authority) means that an invasion of privacy is not wrongful</u>. Under the Constitution, by contrast, a two-stage analysis must be employed in deciding whether there is a violation of the right to privacy. First the scope of the right must be assessed to determine whether law or conduct has infringed the right. If there has been an infringement it must be determined whether it is justifiable under the limitation clause.'"**

86. It is important to appreciate the roles of investigative and legislative agencies in the proper functioning of societies. Although the 2nd Respondent has been found not to have had justification for investigating the Petitioner, it is possible that the information the investigative agency had at the time it sought warrants from the 3rd Respondent disclosed what appeared to be criminal offences. In that regard, it cannot be said that the Petitioner's right to privacy was violated.

87. The Petitioner also alleges that his rights under Article 49(1)(a)(i), (c) & (h) of the Constitution were infringed by the 2nd Respondent by failing to inform him promptly of the reasons for his arrest; denying him the right to promptly consult with his advocates upon his arrest; and denying his right to be released on bail or bond without disclosing any persuasive reasons for the denial.

88. Under Article 49(1)(a)(i) of the Constitution, an arrested person has the right to know the reasons for the arrest. Article 49(1)(c) guarantees the right of an arrested person to communicate with an advocate. The 2nd Respondent herein denies that the Petitioner was not told the reasons for his arrest promptly and contends that the Petitioner has admitted that he was granted the opportunity to speak to his advocates. It was therefore upon the Petitioner to prove through evidence that he was not informed promptly of the reasons of this arrest. In my view, he has not sufficiently discharged this burden. Furthermore, he was indeed granted an opportunity to communicate with his advocate, who was also present during the search of his offices, and this is confirmed by the statement of his counsel dated 30th December, 2018.

89. The Petitioner further claims that he was arrested without just cause in violation of Article 29 of the Constitution. This complaint is answered by the finding already made that the investigator may have had reason to move against the Petitioner. It would be an impediment to the fight against crime to find that an investigator violated the law by acting on what appeared to him or her to be evidence of commission of a crime. The arrest of the Petitioner cannot therefore be faulted.

90. There is, however, merit in the Petitioner's complain that his arrest on a Friday was meant to hold him in custody without bail until Monday when courts would be open. The practice of arresting criminal suspects on Fridays only to hold them over the weekend was frowned upon in the case of **Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another [2019] eKLR** thus:

> **"64. In other words, the police and the prosecutors must not exercise their powers with a view to extracting revenge or maliciously. To effect an arrest of a citizen after hours on a Friday in order to avoid arraigning him in court till after he has spent a number of days in custody without any justification for doing so, in my respectful view, amounts to abuse of power. The practice that is ominously gaining ground in this country otherwise infamously known as *"kamata kamata Friday arrests"* whereby suspects are deliberately arrested on Fridays and kept in police custody over the weekend must not be permitted to take root. To do so, in my respectful view, amount to chipping away at the democratic gains achieved in this country since the promulgation of the Constitution of Kenya, 2010. It would in effect take the country back to the dark days when suspects faced frivolous capital charges aimed at unlawfully incarcerating them with a view to achieving extraneous objectives, thereby unjustifiably denying them of their liberty. The attempt to claw back at non-existent powers ought to be restricted at all costs by the courts which are the temples of justice in this country."**

91. Although the Constitution and the criminal laws of this country allow the arrest of persons suspected of committing crime during any day of the week, it is improper for the police to execute an arrest on a Friday or during the weekend so as to ensure that the suspect remains in custody. Such actions can be evidence of malice where the suspect is denied bond or bail without compelling reason. It can easily be assumed that the intention of the person executing the arrest is aimed at defeating the requirement of presenting an arrested person in court within twenty-four hours of arrest. Where it is clear that the arresting officer is acting without any reasonable suspicion or without sufficient evidence, the said arrest can be regarded as arbitrary and malicious. The 1st and 2nd respondents have not explained why it was necessary to hold the Petitioner in custody notwithstanding the fact that the offences that he was eventually charged with were bailable.

92. Notwithstanding what I have stated above, it is noted that the arrest of a suspect on Friday or during the weekend or during a public holiday is not expressly prohibited in law, and in fact according to Article 49(1)(f) (ii) it is accepted that a person may be arrested on a day or at a time which is not an ordinary court day and may be held by police until the next court day. The Petitioner has not established malice on the part of the 2nd Respondent and I would therefore be reluctant to find in such circumstances that his right to freedom of person under Article 29(a) of the Constitution was infringed.

93. The Petitioner alleges that Articles 47(1) and 50(2)(a) of the Constitution were infringed as he was never informed of the charges against him at the time of his arrest and only came to know of them on a Twitter post by the 1st Respondent which he claims led to his conviction in the public eye. He claims that this was in breach of the evidential test requirement.

94. The 1st and 2nd respondents, however, submit that there are procedural safeguards embedded in the Criminal Procedure Code and the Evidence Act which are sufficient to ensure that the Petitioner is accorded a fair trial and that the magistrate before whom the case will be heard will ensure that justice is done. Reliance is placed on the case of **R v Sussex Justices, Ex Parte McCarthy [1924] 1KB 256, [1923] All ER Rep 233** in support of the proposition. The respondents assert that adverse media coverage does not sway the minds of judges. They support this contention by citing the decisions in **Republic v AG & others Misc. Civil Application 305 of 2012; Thuita Mwangi & 2 others v Ethics and Anti-Corruption Commission & 3 others [2013] eKLR;** and **William S.K Ruto & another v Attorney General,**

95. Furthermore, the 3rd and 4th respondents in their submissions urge that there was no infringement of the Petitioner's rights on their part and that the actions taken by the 2nd Respondent were legal and within the constitutional and statutory powers under Articles 244(b), 245, 249 and 259 of the Constitution and Section 35 of the National Police Service Act.

96. The 2nd Respondent states that he acted within his mandate because the offences committed by the Petitioner demanded investigation. The respondents support their submissions by relying on the decisions in **Republic v Directorate of Criminal Investigations & 4 others Ex-Parte Edwin Harold Dayan Dande & 4 others [2016] eKLR;** and **Anthony Kihara Gethi v Ben Gethi & 4 others [2016] eKLR.**

97. On the claim by the Petitioner that he will not be guaranteed a fair trial due to the publicity surrounding his arrest, I only need to cite the decision in the case of **William S. K. Ruto & another v Attorney General [2010] eKLR** where it was held that:

> **"The applicants will be tried by qualified, competent and independent judicial officers who are not easily influenced by statements made by politicians to the press. In our country today, such statements are the order of the day and it is our view that the courts will rise above such utterances. We find no basis for the applicant's fears. In Kamlesh Pattni v AG the court held as follows: - "Media publicity per se does not constitute of itself a violation of a party's right to a fair hearing." The court in Deepak Kamani v AG reached a similar finding on allegations of pre-trial publicity."**

98. The 1st Respondent claims that that the publicity surrounding the arrest of the Petitioner was at the fault of his own counsel. The 1st Respondent has, however, failed to bring before the Court any evidence in support of that averment. Nevertheless, in line with the cited decision, judicial officers in Kenya are qualified and competent enough to hear the matter despite the media coverage and determine the matter in a fair and just manner. Indeed, reporting of any newsworthy event in the mainstream and social media is as a matter of course and agreeing with the Petitioner that his trial should be prohibited on this ground would mean that no criminal prosecution can be mounted in this country. I therefore find myself in agreement with the decision in **Philomena Mbete Mwilu (supra)** that:

> **"345. What emerges from these decisions is that in a criminal justice system such as ours in which the trial is conducted by a judicial officer as opposed to trial by jury, pre-trial media publicity or any media publicity cannot influence the mind of the trial court which is manned by a competent and independent judicial officer. It follows therefore that such publicity would not be deemed to be in violation of the right of an accused person to the presumption of innocence and the right to a fair trial. That is the position in this Petition."**

99. It is my finding that the Petitioner would have been guaranteed a fair trial despite the media coverage concerning his arrest, owing to the independence and high level of competency of the Kenyan Judiciary.

100. It is my view that the arguments surrounding the constitutional right to fair administrative action have already been addressed and I need not deal with the issue again.

101. The Petitioner in his supplementary submissions dated 9th March, 2020 submits that as was held in **Justus Mwenda Kathenge v Director of Public Prosecutions & 2 others [2014] eKLR**, this Court has the power to halt criminal proceedings that constitute abuse of process where it is shown that the DPP has acted without due regard to public interest; has acted against the interests of the administration of justice; or has not taken account of the need to prevent and avoid abuse of the court process. To buttress his arguments, the Petitioner also relies on the decisions in **Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecutions & another [2019] eKLR;** and **Mohammed Gulan Hussein Fazal Karmali (supra).**

102. The 1st and 2nd respondents submit that the Court has a duty to promote public confidence and protect institutions of governance from all forms of threats faced in the discharge of their respective mandates. Therefore, the Court is urged to allow the DPP discharge his mandate without fear or favour. They rely on the decision in **Kuria & others v AG [2002] 2 KLR 69.**

103. Article 157(11) of the Constitution provides that:

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

104. In the **Diamond Hasham Lalji (supra)** it was held that:

> **"[49] […] The society has an interest in both the lawful exercise of prosecutorial powers and in employing a fair procedure that does not amount to oppression and persecution. The Constitution envisions a just society. It would not be consistent with the values of the society as reflected in the Constitution if power is abused or unfair administration of justice is resorted to. Both would shock the conscience of the society and would result in the loss of confidence in the institution of the DPP and in the integrity of the judicial process.**
>
> **The exercise of prosecutorial discretion in such a manner would be in contravention of the Constitution and the court has power to intervene regardless of the seriousness of the alleged offence or the merits of the case. As Article 2(4) provides an act or omission in contravention of the Constitution is invalid."**

105. The Court of Appeal in the case of **Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018]**

eKLR held that:

> **[30] Therefore, it is evident that the discretion of the DPP to initiate prosecutions must be exercised in accordance with Article 157(11) taking into account the principles and values of the Constitution. In determining the petition before it, the High Court was obliged to consider whether in exercising his discretion to initiate prosecutions against the appellant, the DPP properly exercised his discretion. In doing so, the High Court had to consider the circumstances presented before it and determine whether the DPP was properly guided by the Constitution or abused his discretion by being motivated by factors other than the vindication of justice; or by taking into account extraneous factors. Critical to that consideration, was the issue whether the DPP acted in violation of the appellant's fundamental rights and freedoms."**

106. It is trite that the public interest typically lies in the prosecution of crimes. That statement is, nevertheless, counterbalanced by an equally important principle that the DPP and DCI should not act in violation of the principles and values of the Constitution or the fundamental rights and freedoms protected therein. Where the exercise of prosecutorial powers is under scrutiny, the Court has a duty to ensure that there has been a fair procedure and that the powers of public authorities are not exercised in an arbitrary manner which would endanger the rights and freedoms of the people of Kenya.

107. In this case, it has been established that based on the evidence that was available, the 1st and 2nd respondents had no justification for initiating criminal proceedings against the Petitioner. In essence, there was no evidence upon which the Petitioner could be taken through the criminal justice system.

108. The case before me presents the scenario the Court had in mind in the case of **Stanley Munga Githunguri v Republic [1986] eKLR** when it held that:

> **"Mr Chunga argued that Prohibition ought not to be granted where alternative remedies are available to an applicant. He said the applicant would be entitled to defend himself. He referred to appeal after conviction, bail pending appeal, review by the High Court. Mr Chunga must have been speaking lightly for the impracticability of his proposition is brightly apparent. <u>What kind of a mad man who has an opportunity to apply for Prohibition would opt for a trial, the risk of conviction and imprisonment.</u> Review would not be available to him for section364(5) of Criminal Procedure Code lays down that where there is a right of appeal, review ought not to be granted. It was also so decided as far back as 1937 in *Chhagan Raja v Gordhan Gopal*, 17 KLR 69."**

[Emphasis supplied]

109. It is my finding that it is in the public interest to quash the prosecution of the Petitioner by the DPP. No man should undergo a trial just because the DPP has powers to prosecute. The Constitution expressly pronounces that in exercise of the power to prosecute the DPP **"shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."** The power to prosecute is therefore limited at the constitutional source and has to be applied in accordance with the instrument that donates that power. A river must flow within its course and whenever it leaves its path it causes floods and untold human suffering. The power of the DPP to prosecute must be confined within the four corners of the Constitution otherwise innocent citizens will suffer if the courts do not check the abuse of that power.

110. Among the orders sought by the Petitioner is an order of prohibition prohibiting the 1st and 2nd respondents from investigating, prosecuting and arresting him or searching his homes and offices in respect of the performance of his professional duties in the advocate-client relationship between him and MSC and other clients.

111. The 2nd, 3rd and 4th respondents submit that the prayers sought by the Petitioner cannot be granted by this Court as such orders would curtail the operations of statutory recognised institutions. Furthermore, the respondents submit that the 2nd Respondent has carried out and continues to carry out its functions diligently, without bias and should not be curtailed from execution of his mandate. Reliance is placed on the decision in **Inspector General of Police & another v East African Portland Cement Co. Limited & 3 others [2016]** in support of the assertion.

112. On this issue I turn to the statement of the Court of Appeal in **Njuguna S. Ndung'u (supra)** that:

> **"[32] I am in agreement with the learned Judge's approach to the law. As already noted, the discretion of the DPP to initiate prosecutions is a constitutional power conferred through Article 157 of the Constitution. To interfere with the exercise of that power is to interfere with the Constitution. The role of the High Court as the guardian of the Constitution is not to hinder the DPP from exercising his constitutional powers, but to ensure that the DPP exercises his powers in accordance with the Constitution. This means that the High Court had to be satisfied that the decision taken by the DPP to prosecute the appellant was to advance the key values and principles of governance espoused in the Constitution, and does not violate the fundamental rights and freedoms enshrined in the Bill of Rights."**

113. This Court is mandated to review the decisions made by the 1st and 2nd respondents to determine whether they have exercised their powers in accordance with the Constitution. Where it is found that they have not, this Court is empowered to halt the prosecution in order to protect the accused person from further infringements of his rights. The power bestowed upon the Court, however, cannot be exercised in a manner which completely prohibits the DPP and the DCI from exercising their powers under the Constitution as to do so would be to undermine the constitutional foundation of those powers.

114. In the circumstances, the Court cannot issue orders in the language used by the Petitioner. The finding of this Court is that based on the evidence that was available to the 1st and 2nd respondents at the time of the prosecution of the Petitioner, there was no justification for taking

him through a criminal trial. Basing his prosecution on the evidence that was available at the time was an affront to the public interest. It is possible that new evidence may emerge that would make it necessary for the Petitioner to be arrested and charged afresh. The window must be left open for the 1st and 2nd respondents so that they can fully exercise their constitutional mandates.

115. The Petitioner will, however, not leave this Court empty-handed. He has established that his prosecution was not merited based on the evidence that was available to the 1st and 2nd respondents. Allowing his prosecution to proceed based on the evidence would be inimical to the public interest and amount to an abuse of the court process. As such, an order of prohibition shall issue prohibiting the 1st Respondent from prosecuting the Petitioner solely based on the evidence that had been gathered by the time he was presented to the Magistrate's Court for prosecution. For avoidance of doubt, this order does not stop the DCI from carrying out further investigations into any criminal offences that may have occurred when the Petitioner was discharging his professional duties in the advocate-client relationship between him and MSC. Likewise, the DPP is at liberty to prosecute the Petitioner based on any newly collected evidence.

116. The Petitioner prays that the 1st and 2nd respondents be directed to pay him damages in the sum of two hundred million Kenyan shillings for the violation of his rights and fundamental freedoms in respect to his seizure, unlawful detention, unlawful search, intimidation, hindrance, harassment and improper interference of the performance of his professional functions as an advocate of the High Court of Kenya.

117. The Petitioner's prayer for an award of damages fails for two reasons. Firstly, he has failed to establish through precedent or through mathematical calculation why he deserves such a huge award. The Court cannot therefore award damages whose basis has not been properly established. Secondly, it is appreciated that this petition has mainly succeeded on the ground that the evidence the 1st and 2nd respondents had was insufficient for the purposes of mounting a prosecution against the Petitioner. However, no malice or outright abuse of power can be attributed to any of the respondents. In my view, the quashing of the prosecution is sufficient remedy.

118. On the issue of costs, each party is directed to meet own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 7th day of October, 2020.

W. Korir,

Judge of the High Court