REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.143 OF 2019

(As consolidated with Cr. Rev. No.141/19, Cr. Rev. No.145/19, Misc. Cr. Appl. No.257/19, Misc. Cr. Appl. No.259/19, Misc. Cr. Appl. No.256/19, Misc. Cr. Appl. No.270/19 & Misc. Cr. Appl. No.263/19)

KENNETH OMONDI OCHIENG & 39 OTHERS...APPLICANTS

VERSUS

REPUBLIC THRO' THE DIRECTOR OF PUBLIC PROSECUTIONS......RESPONDENT

RULING

The Applicants filed various similar applications before this court seeking *inter alia* the following orders from the court: that the Applicants be unconditionally discharged and/or released from the proceedings and/or any orders, directions, obligations, requirements, intended prosecution, arrest and such similar demands connected with and arising from **Nairobi Chief Magistrate's Court Misc. Criminal Application No.1964 of 2019 Republic vs. The Applicants**, **Nairobi Chief Magistrate's Court Misc. Criminal Application No.2025 of 2019**, **Nairobi Chief Magistrate's Court Misc. Criminal Application No.2112 of 2019** and **Nairobi Chief Magistrate's Court Misc. Criminal Application No.2082 of 2019**; that the proceedings in the said cases filed before the Nairobi Chief Magistrate's Court be terminated; that the court issue an order permanently restraining and prohibiting the Respondent and its agents from arresting, charging or otherwise prosecuting the Applicants in connection with the same matters as in the present case; a declaration that the Director of Public Prosecution and Director of Criminal Investigations overreached their jurisdictional mandate in conducting the investigations hereof, and that **Section 62** of **Anti-Corruption and Economic Crimes Act** is not applicable to the Applicants in the present case; that the cash bail of Kshs.200,000 deposited by each of the Applicants pursuant to the order of this court given on 22nd May 2019 be refunded to the Applicants; and that the Respondent and its agents be ordered to immediately and unconditionally release to the Applicants all items and private property seized from them.

The applications were consolidated and heard together as one. The application is supported by grounds in the notices of motion and the supporting affidavits of the Applicants. In summary, the Applicants averred that they were arrested on various dates in May 2019. The Respondent did not inform them the reason for their arrest. They were presented before the court on various dates in May 2019 where the prosecution sought orders that the Applicants be detained further by the Director of Criminal Investigations to facilitate conclusion of investigations. The trial court gave orders that the Applicants be detained by the Director of Criminal Investigations for fourteen (14) days to allow for conclusion of investigations. The said orders were reviewed by this court on 22nd May 2019 and the Applicants were released on a cash bail of Ksh.200,000 each pending conclusion of investigations. They were required to report to the Director of Criminal Investigations one day a week until further orders of the court. They were also prohibited from accessing Kenya Revenue Authority (KRA) premises as well as interfering with prosecution witnesses until conclusion of investigations or further orders of the court. They stated that they have duly complied with all the terms and conditions imposed upon them by this court.

The Applicants averred that they were subsequently interdicted by their employer, **Kenya Revenue Authority**, on or about 17th May 2019 and have since been earning half pay. Over eight (8) months have passed and the Respondent is yet to prefer any charges against them, despite this court giving the Respondent a last adjournment on 29th October 2019, to either prefer charges against the Applicants or have them discharged. The Applicants stated that they have cooperated with the investigators and have continued to faithfully appear before the court when required to. They deponed that despite the ample time given to the Respondent to finalize their investigation and charge or discharge the Applicants, the Respondents have failed to do. They averred that they are unable to move on with their lives as this case continues to hang over their heads. They are also unable to find other employment since they are still bound to their employer. They opined that the Respondent is abusing the process of the court and inflicting extra-judicial punishment on them including negative media publicity, social stigma linked to the alleged corruption charges, suspension from employment as well as psychological trauma arising from being the

subject of unending investigations. They deponed that their right to fair administrative action provided in the **Constitution** under **Article 47**, as well their constitutional rights under **Articles 28**, **40**, **48**, and **50** have been and continue to be violated by the actions of the Respondent. They stated that the indefinite investigations and infinite pendency of the present case is detrimental to the administration of justice. In the premises, they urged this court to allow their application as prayed.

The Applicants' application was opposed. The Director of Public Prosecution filed a replying affidavit sworn by Jennifer Kaniu on 19th February 2020. She deponed that the Applicants filed multiple applications before this court in an attempt to mislead this court and in abuse of the court process. She averred that the prayers sought by the Applicants to terminate proceedings before the trial court in **Misc. Criminal Application No.1964 of 2019** and **Misc. Criminal Application No.2025 of 2019** are spent since this Court in **Criminal Revision No.143 of 2019** as consolidated with **Criminal Revision No.141 of 2019** issued revisionary orders in the aforementioned applications. The applications were therefore moot before this Court. She deponed that the prayer for refund of cash bail to the Applicants was premature as the Applicants were yet to take plea before the trial court. She averred that the issue of interdiction of the Applicants did not fall within the ambit of the Respondent. She stated that the Applicants have not demonstrated that the Respondent in discharging its mandate has violated or contravened the provisions in the **Constitution** or any other provisions of law, or acted in excess of its powers as conferred by the law. She deponed that the decision to charge the Applicants was communicated to the court on 17th December 2019. She stated the court issued search and seizure warrants allowing the Respondent to seize items from the Applicants, and the said items are being retained as exhibits. She deponed that the Applicants were informed the reasons for their arrest and were given a chance to record their statements in response to the matters under investigation. She urged this court to dismiss the Applicants' application as the orders sought have the effect of usurping and crippling the powers and mandate of the Respondent, which is an independent office.

The Director of Criminal Investigations also filed various replying affidavits sworn by I.P. Nobert Kioko and I.P. Arthur K. Onyango in response to the Applicants' application. I.P. Nobert Kioko and I.P. Arthur K. Onyango deponed that the Applicants were presented before the court on 13th May 2019 where the Respondent sought more time to finalize investigations. The Applicants were released on anticipatory bail. They stated that the investigations in the present case were complex and required detailed analysis. They averred that the Respondent made a decision to charge the Applicants and the same was communicated to the Director of Criminal Investigations vide a letter dated 16th September 2019. The said decision was also communicated to the court on 17th December 2019. They stated that the Respondent has not delayed in preferring charges against the Applicants, as the same was subject to finalization of investigations. They deponed that the court on 17th December 2019, directed that no action should be taken against the Applicants until further directions of the court. They averred that the Applicants initially moved this court for revisionary orders seeking to be released from custody pending the conclusion of investigations, which orders were granted by this court on 17th May 2019. Therefore, the Applicants' application before this court is moot since the said orders granted by this court have not be revised or appealed against. They stated that the Respondent should be allowed to discharge its mandate under the **Constitution** and charge the Applicants. They therefore urged this court to dismiss the Applicants' application.

Both parties filed written submission in support and opposition of the application. During the hearing of the application, this court heard oral submission made by Professor Ojienda appearing together with Ms. Kithi, Dr. Muthomi, Mr. Ndiso, Mr. Ouma Opolo, Ms. Soweto, Ms. Waweru, Mr. Omari and Ms. Ngania for the Applicants; as well as Ms. Sigei appearing together with Ms. Kimiri, Ms. Kanywora, Ms. Gitau and Ms. Mangoli for the State. Counsels for the Applicants submitted that the Applicants filed various applications seeking orders before the court as stated at the beginning of this ruling. They relied on the supporting affidavits filed by the respective Applicants herein. They asserted that the Applicants were arrested on 10th May 2019 without any justifiable cause. When they were presented before the trial court, the prosecution sought time to investigate and charge the Applicants with the appropriate offences. They stated that it has been fourteen (14) months since the Applicants were arrested and branded as suspects. Shortly after their arrest, the Applicants were interdicted from employment and subjected to half monthly pay. They stated that the prosecution took over seven (7) months to investigate the case. In addition, the prosecution was yet to charge the Applicants herein before the trial court. Counsels for the Applicants averred that the Applicants have co-operated with the investigators. They pointed out that under Article 49(1)(a) of the Constitution, the prosecution is only required to arrest a suspect when charges have been preferred against them. They said that no individual charges have been preferred against any of the Applicants. They were of the view that the Applicants' arrest was without foundation or legal justification.

Counsels for the Applicants further submitted that Article 157 of the Constitution grants the Director of Public Prosecutions power to direct investigations within timelines that do not abuse the rights of an accused person. They stated that Article 157(11) prohibits the Director of Public Prosecutions from abusing the legal process. They cited the case of Rehankantilal Shah vs. Director of Public Prosecution and 3 others [2016] eKLR where Odunga J., while deprecating prolonged investigations or interrogations and processes that are an affront to human dignity, highlighted the need for the prosecution and arresting authorities to ensure that rights of suspects or accused persons are not violated. They averred that in the present application, the prosecution was not ready to charge the Applicants before the trial court, and therefore their arrest and detention was unlawful. They opined that the Director of Public Prosecutions ought to direct the release of the Applicants until there is sufficient grounds to charge them.

Counsels for the Applicants further stated that the constitutional right to liberty of the Applicants was violated by the Respondent. They submitted that the Director of Public Prosecution is required to apply reasonable foresight to ensure that an offence has been disclosed, as opposed to rushing suspects to court without any evidential basis of charging them. To this end they relied on a South African case namely De Klerk vs. Minister of Police (CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC) (22 August 2019). In the stated authority, the court frowned upon officers presenting an alleged offender upon a routine court that would imminently and unwarrantedly make an order of detention. Counsels for the Applicants stated that there was an abuse of power on the part of the Director of Public Prosecution. They cited the case of Christopher Ndarathi Murungaru vs. Kenya Anti-Corruption Commission & Another [2006] eKLR which elaborated the notion of public interest. They submitted that there ought to be a balance between public interest and timeliness of a prosecution. They were of the view that the prosecution should not be allowed to have the threat of prosecution hanging over the Applicants' head for a period of over twelve (12) months. This was in breach of fair trial provisions.

Counsels for the Applicants further submitted that the Applicants' rights under Article 49 and 50 of the Constitution, Article 9 of the African Charter on Human and People's Rights as well as under Article 5(2) of the European Convention on Human Rights were violated by the Respondent. The Applicants were not informed the reason for their arrest. They said that Article 19 of the Constitution provides that the rights and fundamental freedoms of any Kenyan citizen are inherent. They asserted that it is not the intention of the law that arrest should precede investigations. They stated that the Applicant's charges were disclosed eight (8) months after they were arrested. They opined that

the investigations were biased. They asserted that the Applicants have the right to be presumed innocent until proven guilty.

Counsels for the Applicants further submitted that the Applicants were exposed to the media and prejudiced by the endless investigations by the Respondent. They urged the court to consider the provisions of Articles 10, 47, 50 and 232 of the Constitution which have been violated by the Respondent. They stated that the Applicants' rights were constricted when they were required to appear before the investigators each Monday. They were also denied their right to privacy.

Counsels for the Applicants further challenged the jurisdiction of the Director of Criminal Investigations to investigate taxation matters and allegations of bribery. They also challenged the jurisdiction of the Director of Public Prosecution to prosecute taxation matters. They submitted that the Tax Procedure Act and East African Community Customs Management Act give Kenya Revenue Authority power, rights, privileges and protection of the police officers to investigate and prosecute tax related matters. To this end, they relied on the case of African Spirits Ltd vs. Director of Public Prosecutions & another (Interested Parties) Wow Beverages Limited & 6 others [2019] eKLR. They asserted that investigation by the Director of Criminal investigations in the present case was unlawful. They stated that no one can exercise authority except as provided by the Constitution. They averred that the Director of Public Prosecution does not have authority to charge the Applicants herein. With regard to the corruption allegations, Counsels for the Applicants submitted that the Ethics and Anti-Corruption Commission has the mandate to investigate corruption cases. The Director of Criminal Investigations was therefore acting in excess of its powers by investigating the present case. They added that the Director of Criminal Investigations did not have the mandate to investigate any matters relating to proceeds of crime. The said mandate lies with the Assets Recovery Agency Director. They submitted that the Applicants were public officers. Section 36 of the Public Officers Ethics Act sets out procedures to be followed if an employee acts to the detriments of the purpose he was employed. Further, Kenya Revenue Authority staff have their own Code of Conduct which provides mechanism of discipline for employees being accused of misconduct. They said that the said mechanism was not followed by Kenya Revenue Authority. They stated that in view of the stated illegalities, it would not be right for the Director of Public Prosecution to prefer charges against the Applicants. They cited the case of Stanley Munga Githunguri vs. R [1986] eKLR where it was held that the court can terminate proceedings to protect an individual's constitutional rights.

Counsels for the Applicants submitted that the raid at Kenya Revenue Authority by the Director of Criminal Investigations was illegal since the Director of Criminal Investigations had not procured search warrants from the court. They stated that any evidence obtained from the said search was inadmissible. In that regard, they relied on the case of Philomena Mbete Mwilu vs. Director of Pubic Prosecutions and 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR. They maintained that the Director of Public Prosecution cannot prefer charges against the Applicants on the basis of illegally obtained evidence. They urged this court to find that the provisions of the Anti-Corruption and Economic Crimes Act, and specifically Section 62, do not apply to the Applicants in the present case. Counsels for the Applicants were of the view that once the legal process is tainted with unfairness, it cannot be good fruit. Justice cannot be achieved through injustice. They urged this court to find that the length of time the investigators have taken to investigate the case before the trial court is in contravention of the provisions of Article 49 and 50 of the Constitution. In the premises, they were of the view that the proceedings before the trial court ought to be terminated.

The Applicants' application was opposed. Prosecution Counsels addressed this court on the issue of arrest, decision to charge the Applicants and the judicial review orders sought by the Applicants. They submitted that the issue of the Applicants' arrest was addressed by this court in its decision delivered on 22nd May 2020 where the Applicants were granted bail pending trial. With regard to the decision to charge the Applicants, Prosecution Counsels submitted that the Director of Public Prosecution by virtue of Article 157 of the Constitution has power to institute and undertake any criminal proceedings against any person before any court, other than a Court Martial, in respect of any offence alleged to have been committed. They stated that The Director of Public Prosecution retained the power to direct the Inspector General of Police to investigate any matter.

Learned State Counsels asserted that as at 17th December 2019, the Director of Public Prosecution was ready to charge the Applicants, but the court put a halt to the process since it was during the December holidays. They stated that they were ready, and have always been ready to charge the Applicants. They were of the view that the Applicants have not placed any material before the court to establish that the Director of Public Prosecution acted in excess of his powers or departed from the rules of natural justice. They averred that the judicial review orders sought by the Applicants are based on processes of state organs, and the same will require this court to look into the merits of the case, an exercise that ought to be left to the trial court. To this end, they cited the cases of Cape Holding Ltd vs. Attorney General & Another [2012] eKLR, John Swaka vs. Director of Public Prosecution and 2 Others [2013] eKLR and Republic vs. Director of Public Prosecution *ex parte* Julius Kimeli Rotich [2019] eKLR. They stated that the above cited cases established that a Constitutional Court should not interfere with the powers of the Director of Public Prosecution in exercise of his discretion, unless there is a clear violation of the Constitution.

With regard to the jurisdiction of the Director of Public Prosecution to charge persons accused of tax related offences, Prosecution Counsels submitted that Section 107 of the Tax Procedure Act as read together with Article 157(a) of the Constitution grants the Director of Public Prosecution power to prosecute tax related matters, either in person or through an authorized officer who shall have same powers as that of the Director of Public Prosecution. They were of the opinion that the Director of Public Prosecution should be allowed to exercise his powers without interference.

Learned State Counsels further submitted that by virtue of Section 35 of the National Police Service Act, the Director of Criminal Investigations has power to investigate serious crimes including economic crimes. They stated that any offence involving dishonesty in connection with tax related matters is a corruption offence as defined under Section 2(g) as read together with Section 45 of Anti-Corruption and Economic Crimes Act. They pointed out that this court appreciated that a search and swoop was necessary in the present case. They said that this court did not fault the investigations carried out by the Director of Criminal Investigations, and held that the Director of Criminal Investigations has power to collect intelligence in criminal matters. The investigation by the Director of Criminal Investigations was therefore justified. They submitted that the investigation as well as the charges to be preferred against the Applicants are related to various offences relating to taxes, and not solely based on tax evasion.

Learned State Counsels further submitted that the Director of Public Prosecution was not responsible for the interdiction, or any other labour related decisions made by Kenya Revenue Authority against the Applicants. They asserted that this court in its ruling dated 22nd May 2019

prohibited the Applicants from accessing Kenya Revenue Authority premises until conclusion of the investigation. They stated the period the Applicants have spent outside Kenya Revenue Authority premises has therefore been as a result of a court order which the Applicants are yet to challenge before this court or the Court of Appeal. They maintained that no material evidence has been placed before this court to establish that the Respondent has interfered with any internal issues at Kenya Revenue Authority.

With regard to the issue of delay in preferring charges against the Applicants, Prosecution Counsels submitted that the Director of Public Prosecution explained to this court that he needed time to go through the questioned files. They stated that the time spent investigating this matter upto 17th December 2019 was with the permission and consent of this court. They averred that the Director of Public Prosecution presented charges to be preferred against the Applicants before the court, which was sufficient proof that the he had made the decision to charge the Applicants. They said that this court gave the order prohibiting the Respondent from charging the Applicants. They asserted that if the said court order did not exist, the Applicants would have already been charged. They were of the view that no delay has been occasioned by the Director of Public Prosecution with regard to charging the Applicants.

Learned State Counsels submitted that they were not in opposition to the prayer for refund of cash bail to the Applicants. However they opined that the same ought to be addressed before the trial court when the Applicants are formally charged. They stated that the electronic gadgets and equipment that were seized from the Applicants are exhibits in the case before the trial court and can therefore not be released to the Applicants at this stage. Save for the prayers of refund of cash bail to the Applicants, Learned State Counsels submitted that they were in opposition of all other orders prayed by the Applicants in their application. They urged this court to dismiss the application for lack of merit.

This court has carefully read the pleadings filed by the parties to this application. It has also considered the submission, both oral and written, made by the respective counsel for the parties. There are several issues that emerged for determination. The issues are; whether the Director of Criminal Investigations (DCI) abused the Applicants' right to fair trial with regard to the manner of their arrest and initial detention; whether the Director of Criminal Investigations has power to investigate taxation, economic crimes and money laundering in light of existence of statutes that empower other agencies to investigate and recommend for prosecution of such crimes; whether the Director of Public Prosecutions contravened the Applicants' right to fair trial as enshrined by the Constitution by delaying in bringing charges against the Applicants; and finally, whether the manner in which investigations were carried out by the Director of Criminal Investigations was inimical to the fair trial protection afforded to the Applicants by the Constitution, that the charges against the Applicants should be quashed.

In respect of the Applicant's complaint in regard to the manner of their arrest and subsequent detention by officers attached to the Directorate of Criminal Investigations, it was common ground, indeed, it was not disputed that the Applicants were arrested in a swoop at the Kenya Revenue Authority (KRA) offices. According to the investigators, they had received credible intelligence that the Applicants were acting in cahoots with tax payers to deny the government revenue that is due to it from tax collection. The said officers summoned the Applicants to a boardroom upon which they confiscated their phones, personal computers and other electronic communication gadgets. They then arrested the Applicants and detained them in various police stations within the city. The officer from the Directorate of Criminal Investigations explained that they took the action so as to obtain evidence from the Applicants which would likely have been lost or erased if the Applicants were given advance notice of commencement of investigations. It was the prosecution's submission that it had obtained a court order allowing them to conduct the swoop and seize electronic communication gadgets from the Applicants. On their part, the Applicants urged the court to find that their constitutionally guaranteed right as arrested persons as enshrined in Article 49(1) of the Constitution was breached in the manner in which the swoop and arrest was carried out without their being informed promptly of the reason for their arrest and their rights as arrested persons.

This court agrees with the Applicants that indeed the police were required to inform them of their rights as arrested persons especially as provided under Article 49(1) of the Constitution which provides thus:

> **"An arrested person has the right:-**
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> **a. to be informed promptly, in a language that the person understands of;**
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> **i. the reason for the arrest;**
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> **ii. the right to remain silent;**
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> **iii. the consequences of not remaining silent**
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> **b. to remain silent;**
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> **c. to communicate with an advocate, and other persons whose assistance is necessary;**
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> **d. not to be compelled to make any confession or admission that could be used in evidence against the person;**
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> **e. to be held separately from persons who are serving a sentence;**
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> **f. to be brought before a court as soon as reasonably possible, but not later than-**
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> **i. twenty-four hours after being arrested; or**
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> **ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;**

g. at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

h. to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

As correctly noted by the Respondent, the above issues raised by the Applicants were addressed by this court in the decision rendered by this court on 22nd May 2019. In that decision, the Applicants' application to be released on anticipatory bail pending their formal charge was allowed. The court made observations regarding the Applicants' arrest and pre-charge detention which need not be repeated here. Suffice for this court to state that the court noted that the Applicants' rights as arrested persons were infringed. The court gave appropriate remedies that the Applicants had sought. This court agrees with the Prosecution that the issue cannot be re-litigated in this subsequent application.

The Applicants have submitted that the charges intended to be laid against them should be quashed on account of the fact that the Director of Criminal Investigations did not have power to investigate taxation, economic and money laundering crimes. The court heard the Applicants say that other agencies have been established by statute which have the primary mandate to investigate such alleged offences. They argued that the Director of Criminal Investigations did not have jurisdiction to investigate such crimes, and if he did, then the charges emanating from such investigations ought to quashed. The Respondent vehemently rejected this submission. It was the Respondent's case that however a crime was investigated, the office which has the mandate to approve and bring charges before court is that of the Director of Public Prosecutions. In regard to the charges to be brought against the Applicants, the Respondent submitted that the Director of Public Prosecutions had gone through the evidence and was satisfied that the threshold to charge the Applicants had been met, hence the charges laid against the Applicants.

This court has considered the rival submission made by the parties in regard to the above. It takes the following view of the matter: Section 35 of the National Police Service Act sets out the functions of the Directorate of Criminal Investigations. They include:

a. Collect and provide criminal intelligence;

b. Undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crimes and cybercrimes among others."

The Directorate of Criminal Investigations does not however have exclusive mandate or jurisdiction to investigate the crimes referred to in Section 35(b) of the National Police Service Act. Indeed, other specialized agencies have been established by statute to investigate and recommend for prosecution similar crimes. For instance, Section 2(a) and (b) of the Anti-Corruption and Economic Crimes Act grants the Ethics and Anti-Corruption Commission the mandate to investigate economic crimes. Again, the Ethics and Anti-Corruption Commission does not have the exclusive mandate to investigate economic crimes. However, Parliament in enacting the Anti-Corruption and Economic Crimes Act intended that a specialized agency be granted the mandate to investigate such crimes. Such specialization enables the Ethics and Anti-Corruption Commission to develop expertise in investigating and recommending for prosecution those who have committed corruption and economic related crimes. This is unlike the Directorate of Criminal Investigations whose mandate in investigating crimes is broader and less targeted.

Similarly, Section 107 of the Tax Procedures Act grants the mandate to the Commissioner-General of Kenya Revenue Authority to investigate and prosecute tax related crimes, with the concurrence of the Director of Public Prosecutions. The Tax Procedures Act creates offences and provides punishment for those offences. Section 107 of the Act provides thus:

1. "Despite any written law, an authorized officer may appear in any court on behalf of the Commissioner in proceedings in which the Commissioner is a party and, subject to the directions of the Director of Public Prosecutions, that officer may prosecute a person accused of committing an offence under a tax law.

2. An authorized officer conducting prosecution in accordance with Sub-Section (1) shall have all the powers of a public prosecutor under the Office of the Director of Public Prosecutions Act, 2013."

With regard to the power to investigate, search and seize, under Section 7 of the Tax Procedures Act, an Authorized officer of the Kenya Revenue Authority has powers similar to that of a police officer. The said Section 7 provides thus:

1. "For the purpose of administering a tax law, an authorized officer shall, in the performance of that officer's duties, have all the powers, rights, privileges and protection of a police officer.

2. Without prejudice to the generality of Sub-section (1), the authorized officer shall have power to enter and search any premises or vessel and seize, collect, detain evidence and produce such evidence in any proceedings before a court of law or tax appeals tribunal."

This court agrees with the Applicants that where there is a specific statute granting jurisdiction to officers under the statute to conduct investigations in relation to the specific offences created under that statute, it is good practice, where crime is detected, for the Directorate of Criminal Investigations to defer to agencies established under such statutes. The Applicants are correct in stating that the Directorate of Criminal Investigations should have deferred to authorized officers appointed by the Commissioner-General of Kenya Revenue Authority in investigating offences related to tax. This is in view of the fact that such authorized officers have the experience borne out of specific training to investigate and prosecute tax related crimes.

This court is however not persuaded by the argument advanced by the Applicants which was to the effect that this court should nullify the investigations conducted by the Directorate of Criminal Investigations on the basis of jurisdictional overreach. This court formed the firm

view that although the ideal situation would have been that authorized officers under the Tax Procedures Act would have investigated the alleged tax related crimes allegedly committed by the Applicants, the fact that the Directorate of Criminal Investigations conducted the investigations at the invitation of the Commissioner-General of Kenya Revenue Authority, does not by itself invalidate the investigations and its resultant outcome.

Why does the court reach this finding? It is because every investigation that results in a recommendation for a person to be charged will be subject to approval by the Director of Public Prosecutions exercising his powers as provided under Article 157(6) of the Constitution and Section 5 of the Office of the Director of Public Prosecutions Act. The court has no jurisdiction to supervise the Director of Public Prosecutions in the performance of his duty in determining who to charge, unless it is established that the Director of Public Prosecutions did so in disregard of the law, capriciously or against the public interest. To do so will be in breach of Article 157(10) of the Constitution which commands that in exercise of his authority, the Director of Public Prosecutions shall not be under the direction or control of any person or authority.

The Applicants asserted that the decision by the Director of Public Prosecutions to charge them was made in contravention of their constitutional right to fair trial. In particular, the Applicants argued that the manner in which they were arrested and their electronic gadgets seized from them was contrary to the law. They submitted that the evidence obtained from the said seizure, where a warrant was not obtained from the court, will constitute illegally obtained evidence which is inadmissible in court. The Applicants further contended that there was inordinate delay from the time of their arrest to the time the Director of Public Prosecutions indicated to the court that he was ready to charge them. They argued that the period of fourteen (14) months that the Director of Public Prosecutions took to charge them constituted a breach of their constitutional right to fair trial. The Applicants further submitted that the extensive press coverage, including the uploading of their names in the Kenya Revenue Authority website irretrievably prejudiced them to the extent that it would be impossible for them to fairly defend themselves. They contended that the charges brought against them were made on the basis of a post-facto collection of evidence to justify their unlawful arrest, detention and subsequent interdiction from work. In essence, the Applicants are saying that the entire process from the time they were arrested, detained, investigated and the intended charge is tainted with illegality that their prosecution would be inimical to justice and against the public interest. They were of the view that the Director of Public Prosecutions would be acting in abuse of his powers to prosecute if the court allows their prosecution to continue.

In response, it was the Respondent's case that the investigations had been conducted in accordance with the law; that the Director of Public Prosecutions had made the decision to charge the Applicants on the basis of evidence and nothing else; that the Applicants will have an opportunity to interrogate the evidence once their respective trials commence; that the delay in presenting the charges before court was occasioned by the complex nature of investigations; that it was not correct for the Applicants to assert that there had been inordinate delay in bringing charges against them; the Respondent pointed out that it had been ready to have the Applicants charged six (6) months after the initial order of anticipatory bail was granted by the court in favour of the Applicants; that the subsequent delay was not caused by the Respondent but rather by the court process and the intervention measures put in place to contain the COVID-19 pandemic; that there was no basis for this court to make a finding that the Director of Public Prosecutions had abused his powers or authority when he made the decision to charge the Applicants.

That this court has jurisdiction to terminate criminal proceedings where it is established that there is abuse of the due process of the court is without doubt. The Court of Appeal in Diamond Hasham Lalji & Another vs Attorney General & 4 others [2018] eKLR held thus:

> **"[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in Mohit v Director of Public Prosecutions of *Mauritius [2006] 5LRC 234:***
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> > **"these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all…**
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> > **…**
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> **[44] The categories of abuse of process are not closed. Whether or not an abuse of power of criminal process has occurred ultimately depends on the circumstances of each case. One of the important factors at common law which underlie a prosecutorial decision is whether the available evidence discloses a realistic prospect of a conviction. In Walton v Gardener *[1993] 177 CLR 378, the High Court of Australia said at para 23 –***
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> > **"The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all categories of cases in which the process and procedures of the court which exist to administer justice with fairness and impartiality may be converted into instruments of injustice and unfairness. Thus, it has long been established that regardless of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be seen clearly to be foredoomed to fail…, if that court is in all circumstances of the particular case a clearly inappropriate forum to entertain them…, if, notwithstanding that circumstances do not give rise to an estoppel their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a case which has already been disposed of by earlier proceedings."**
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> > **[45] In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which the 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."

The Court [Odunga J] in Republic vs Attorney General & 4 others *ex parte* Kenneth Kariuki Githii [2014] eKLR stated thus;

> **"26. The court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in exercise of discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That the Applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings."**

The Court [Mativo J] in Republic vs Director of Public Prosecutions & another *ex parte* Warsama Ismail [2019] eKLR held as follows:

> **"34. It is an established position of the law that it is not for this court to determine the veracity or to weigh the strength of the evidence or accused person's defence. That is a function for the trial court hearing the criminal trial. The court will only intervene if there are cogent allegations of violation of constitutional rights; or threat to violation of the Rights; or in clear circumstances where it is evident that the accused will not be afforded a fair trial; or the right to a fair trial has been infringed or threatened; or where the prosecution is commenced without factual basis.**
>
> **35. Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. The concept of fair trial involves fairness to the prosecution and to the public as well as the accused.**
>
> **36. The inherent jurisdiction of the Court to stop a prosecution to prevent an abuse of the process is to be exercised only in exceptional circumstances. The essential focus of the doctrine is on preventing unfairness of trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent a 'fair trial' and if there is then the court ought to stop the prosecution."**

In respect to this ground, the Applicants argument to the effect that the Director of Public Prosecutions violated their right to fair trial by bringing charges against them after an inordinately long delay is without merit. The court assumed jurisdiction in this matter when the Applicants filed an application seeking orders of revision of the magistrate's court's decision. The Applicants challenged the decision of the trial court on the basis that the order that they should remain detained in custody while the police conclude investigations breached their fundamental right to liberty. This court agreed with the Applicants. It issued an order granting the Applicants' application to be released on anticipatory bail pending conclusion of investigations, and subsequently, if at all, their formal charge before the trial magistrate's court. As a condition of the Applicants' release on anticipatory bail, the court prohibited the Applicants from accessing the Kenya Revenue Authority offices. Further, the court directed the Applicants not to interfere with prosecution witnesses. The Applicants were further required to report to the offices of the Directorate of Criminal Investigations should they be required to be processed before being charged. The court finally ordered that the case be mentioned for further directions.

The purpose of the mention, was initially to confirm the Applicants' compliance with the conditions that were attached in order for the Applicants to be released on anticipatory bail. However, over time, the mentions became an opportunity for the Applicants, through their advocates, to press the Respondent to be told of the progress of investigations and to establish whether a decision had been made to charge any one of them. At some point, due to intervention by Counsel for the Applicants, this court directed the Applicants to file an appropriate application if they were of the opinion that their fundamental rights and freedoms were being infringed. The Applicants duly complied with the directions of the court and filed the present applications.

Meanwhile, before the Applications were heard by the court, the Director of Public Prosecutions indicated to the court, on 17th December 2019, that he had concluded its investigations and was ready to charge some of the Applicants. The Director of Public Prosecutions indicated to the court that charges in respect of some of the Applicants had been prepared, and requested the court to direct the said Applicants to present themselves before the magistrate's court to take plea. The Applicants, through counsel, were unwilling to have the Applicants charged before their respective applications were heard and determined by court. This court then stayed the intended prosecution of the Applicants pending the hearing and determination of the said applications.

The hearing of the applications (which were more or less similar, and were consolidated for the ease of hearing and disposal), unfortunately, was frustrated when the courts were closed due to the COVID-19 pandemic and subsequent operations parred down. It took a period of over six (6) months before it became sufficiently safe for the hearing to proceed under the strict Ministry of Health protocols and guidelines. The oral hearing of the applications commenced on 22nd July 2020 and was concluded on 30th September 2020 when the court reserved the case for ruling.

This court has narrated the above background for appreciation of the nature of proceedings that are before the court. Whereas the Applicants have a point when they submitted that there was delay, firstly by the police to conclude the investigations, and secondly by the Director of Public Prosecutions to make the decision to charge them, the Applicants complaint cannot be considered outside the context in which the proceedings before this court took place. As earlier observed by this court, there was a delay of approximately six (6) months from the time the Applicants were arrested and later released on anticipatory bail by this court, to the time the Director of Public of Prosecutions indicated to the court that he was ready to lay charges against the Applicants.

Did that period constitute a long delay as to justify this court to terminate the criminal charges intended to be laid against the Applicants for

being in breach of their fundamental rights and freedoms? This court does not think so. Firstly, this court did not list the case for mention for purpose of supervising the investigations or to ascertain whether or not the Director of Public Prosecutions had made a decision to charge the Applicants. Secondly, this court did not set a time limit or specify the period by which the police and the prosecution were required to report to the court that they had completed investigations or were ready to charge the Applicants. This court does not have jurisdiction at that stage of proceedings to give any direction on how the investigations or the decision to charge should be undertaken.

Even if this court was persuaded by the Applicants' argument that there was inordinate delay in the manner in which the case was investigated and the decision to charge made, the Applicants would be required to measure up to the test laid by the Court [Odunga J.] in **Republic vs Attorney General & 4 others *ex parte* Kenneth Kariuki Githii [2014] eKLR** where it was held thus:

> **"38. The Applicant has alluded to the fact that the criminal charges were brought after a long delay. However as was held by this court in George Joshua Okungu & Another vs The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another Petition No.227 and 230 of 2009:**
>
> > **"…It is not mere delay in preferring charges that would warrant the halting of criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations of fair trial."**

In the present case, part of the delay in laying charges against the Applicants by the Director of Public Prosecutions was contributed by the Applicants insistence that the present application be heard and determined first before the Applicants were asked to plead to the charges. This court stayed the intended prosecution of the Applicants on 17th December 2019 pending the hearing and determination of the Applications that had been filed by the Applicants. The Applicants cannot now turn around and claim that they were prejudiced by the delay in bringing charges against them in the intervening period between the time this court granted the order staying further proceedings to the time this application was heard and disposed of by the court. This court holds that the investigations and decision by the Director of Public Prosecutions to charge the Applicants was not unduly delayed nor did it prejudice the Applicants in the preparation of their respective defences in the charges intended to be laid against them.

The pertinent issue that the Applicants raised regarded whether their employer, Kenya Revenue Authority (KRA), made the right call when it decided to call officers from the Directorate of Criminal Investigations to investigate commission of alleged tax related offences. This court heard the Applicants say that issues that now constitute the charges that are intended to be brought against them should have been resolved by Kenya Revenue Authority applying its internal disciplinary mechanisms. The Applicants were of the view that Kenya Revenue Authority breached their rights as employees of the organization by criminalizing an issue that was otherwise a labour dispute.

This court, having carefully considered this argument, takes the following view: Kenya Revenue Authority is a statutory body. It is a government agency. It performs a public function. In discharge of its mandate, Kenya Revenue Authority employees are part of public service. They are liable to be held accountable in what they do, including scrutiny by investigative agencies. The fact that such investigations may have adverse effect on their employment, is, unless sufficient grounds are established, no reason for the Applicants to claim protection from the court. In the course of the discharge of their statutory duties, the Applicants do not have immunity from being investigated, and indeed, if sufficient evidence is obtained, from being charged with disclosed offences. If such event happens, the Applicants' employment will definitely be affected. However, as a court dealing with criminal related issues, this court lacks jurisdiction to entertain labour related issues. If the Applicants are aggrieved by their current employment situation, they are at liberty to file suit before a court which has requisite jurisdiction.

The last issue is whether the Applicants' right to fair trial as enshrined in **Article 50(2)** of the **Constitution** was breached. The Applicants argued that their right to prepare and present their respective defences was prejudiced in the manner in which the evidence that the prosecution intends to adduce against them was obtained. The Applicants submitted that the manner in which the evidence was obtained was illegal. A fair trial from such proceedings based on illegally obtained evidence would not be possible. The Respondent denied that the evidence obtained in the course of investigations was illegally obtained.

This court, in considering the present application, is not required to be supplied with evidence that the prosecution intends to adduce against the Applicants in the intended charges to be brought against them. The reason for this is clear. This court will not give its opinion regarding such evidence. To do so may prejudice and embarrass the magistrate's court that will try the case. This court therefore declines the invitation by the Applicants to render an opinion regarding whether the evidence that the prosecution will tender against them was illegally obtained in the course of investigations. The determination of whether such evidence meets the threshold of admissibility is within the mandate and jurisdiction of the trial court that will hear the case.

This court cannot delve into the merits or otherwise of the evidence that the prosecution intends to present before the trial court, or examine the minutiae of such evidence, because to do so, would amount to this court usurping the jurisdiction of the trial court to independently and impartially evaluate the evidence and render a decision. This court agrees with the hold by the court [Nyamweya J.] in **Republic vs Director of Public Prosecutions; Joseph K. Njoroge (interested party) *ex parte* Justus Kimeli Rotich [2019] eKLR** where the court in considering an application similar to the present one held thus:

> **"44. As explained earlier on this judgment, courts ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in exercise of the discretion conferred upon that office under Article 157 of the Constitution, unless there is clear evidence that he acted in abuse of process…**
>
> **45. Likewise, it is not the duty of the Judicial Review Court to engage in an examination of the merits or otherwise of the charges to be preferred. The sufficiency or otherwise of the charges is left to the trial court if the same does end up there…"**

In **Republic vs Director of Public Prosecutions & 2 others *ex parte* Stephen Mwangi Macharia [2014] eKLR** the court held thus:

> **"…the mere fact that's there is no sufficient evidence to sustain a conviction is no ground for halting or terminating a criminal case. The trial court is usually in a better position to scrutinize the evidence presented before it in determining whether such evidence proves the accused is guilty beyond reasonable doubt. To paraphrase the decision in Meixner & Another vs Attorney General (supra) to set out on that voyage would have the effect of embarking upon an examination and appraisal of the evidence to be adduced before the trial court with a view to showing the Applicants' innocence yet that is hardly the function of a judicial review court."**

In the instant application, the concerns raised by the Applicants regarding the circumstances some of the evidence that will be presented against them was collected is an issue squarely within the purview of the trial court. The Applicants fear that they may not likely be subjected to a fair trial has no basis; no concrete evidence has been presented to this court to support such assertion. Further, there are sufficient constitutional and statutory safeguards embedded in the trial process itself that guarantee that the Applicants will have an opportunity to put forward their respective defences; they will be supplied with the evidence the prosecution will rely on before the trial; they will have sufficient time to prepare and present their respective defences; they will have the right to be represented by an advocate of their choice. These are some of the safeguards provided under **Article 50(2)** of the **Constitution**. The trial court cannot derogate from them.

Enough said. It is clear from the above reasons that the respective applications filed by the Applicants cannot be allowed. Each application is hereby dismissed. The order that commands itself to this court to enable the Applicants to appear before the trial court is as follows:

> **i. The order staying the prosecution of the Applicants issued on 17th December 2019 and extended thereafter shall be vacated upon the Applicants being charged before the trial court.**
>
> **ii. The cash bail of Kshs.200,000 deposited in court by the Applicants to secure their release on anticipatory bail shall be refunded to them upon being charged before the trial court.**
>
> **iii. For those that have not been charged, the said deposited sum shall be refunded to them forthwith.**
>
> **iv. The court declines the Applicants' request to have the communication equipment and personal computers that were seized from them by the police during investigations to be released to them. The Applicants shall be at liberty to apply for such release before the trial court.**
>
> **v. Those Applicants that have not been charged will have all their properties returned to them by the police.**
>
> **vi.The Applicants intended to be charged shall present themselves before the Chief Magistrate's Court Nairobi (Milimani Law Courts) on 16th November 2020 to take plea. In the meantime, they shall not be arrested or detained.**
>
> **vii. The Applicants are at liberty to pursue any labour related grievance against their employer before the appropriate court.**

It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2020

L. KIMARU

JUDGE

Delivered and read in open court this 11th day of November 2020.

J. WAKIAGA

JUDGE