REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APP NO. 431 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF *CERTIORARI* AND *PROHIBITION*

AND

IN THE MATTER OF BREACH OF KIBERA CRIMINAL CASE NO. 1340 OF 2018- REPUBLIC V SAMUEL NDERITU WAKANYUA

REPUBLIC...APPLICANT

VS

DIRECTOR OF PUBLIC PROSECUTIONS......................1STRESPONDENT

KIBERA CHIEF MAGISTRATES COURT'S...................2NDRESPONDENT

DR. ROSA KO...3RDRESPONDENT

AND

***EX PARTE* APPLICANT...........................SAMUEL NDERIRU WAKANYUA**

JUDGMENT

The Parties

1. **Samuel Nderiru Wakanyua** (hereinafter referred to as the *ex parte* applicant) is a male adult residing in Nairobi and the acting dean of Students at the Catholic University of Eastern Africa.

2. The first Respondent is the Director of Public Prosecutions established under Article **157** of the Constitution with constitutional mandate to *inter alia* institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.[1]

3. The second Respondent is the Chief Magistrates Court, Kibera, Established under Article 169 (1) (a) of the Constitution.

4. The third Respondent, Prof. Rosa ko is a female adult of sound mind and a lecturer at the Catholic University of Eastern Africa. She is the complainant in the criminal case, the subject of this judicial review application.

Factual matrix

5. The *ex parte* applicant faces a charge of assault contrary to section 251 of the Penal Code[2] in Kibera Chief Magistrates Court No. 1340 of 2018. The particulars are that on the 3rd day of October 2018, at Catholic University of Eastern Africa, Karen, within Nairobi County, he unlawfully assaulted Prof. Rosa Ko, the third Respondent herein, thereby occasioning her actual bodily harm.

6. The ex *parte* applicant states that himself and the complainant aspire to become the Dean of Students at the said University and are in tight competition. He states that he believes that the criminal proceedings lodged against him by the police at the behest of the complainant aim at furthering her ambitions to rise to the said position, and, thus, deflate his chances of ascending to the same position.

7. The *ex parte* applicant also states that the police have not recorded any statements from him or the other lecturers who were present or students who witnessed the incidence, but instead only rushed to court armed with the complaint's statement. He further states the lecturers have recorded internal statements with the University officials and none of them states that they saw the applicant or any other person assaulting the complainant.

Legal foundation of the application

8. The *ex parte* applicant states that Article 157 (11) of the Constitution requires the DPP in exercise of prosecutorial powers to have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of legal process.

9. The *ex parte* applicant also states that the DPP exercises judicial or quasi-judicial functions and is therefore amenable to the supervisory jurisdiction of the High Court under Article 165(6) of the Constitution; hence, its decisions are reviewable under the Law Reform Act [3] and Order 53 of the Civil Procedure Rules.

10. The *ex parte* applicant also states that the criminal proceedings against him do not have an objective of achieving criminal law interests or protecting the society or serving a public interest, but are geared to advance the complainant's personal interests to assist her to attain the coveted position of Dean of Students of Catholic University of Eastern Africa.

11. Further, the *ex parte* applicant states that the criminal proceedings are a gross abuse of the criminal law process and they are brought with the ulterior motive of injuring his character and for the sole purpose of assisting the complainant to become the Dean of Students at the said University.

12. The *ex parte* applicant also contends that a fair investigation of his conduct is an inherent right under the Right to a Fair Trial under Article 50 of the Constitution , and, that, the DPP is under a duty to conduct a fair and independent investigation and not to arraign any one in court without evidence.

13. The *ex parte* applicant in his statutory statement relied on *Republic v Chief Magistrates Court, Mombasa ex parte Ganinjee & Another* ***[4]*** for the proposition that the use of criminal law to pursue a civil law objective is an abuse of the process of the court. The applicant further cited *Commissioner of Police & Others v Kenya Commercial Bank & Others* ***[5]*** for the holding that it is not in public interest or in the interests of administration of justice to use criminal justice process as a pawn in civil disputes.

The orders sought

14. The *ex parte* applicant prays for an order of *certiorari* to quash the charge sheet dated 30th October 2018 filed in Kibera Chief Magistrates Criminal Case No. 1340 of 2018, *Republic v Samuel Nderitu Wakanyua*.

15. He also prays for an order of *prohibition,* to prohibit the Chief Magistrate, Kibera Law Courts, or, any other Magistrate under him, or, in any other station within Nairobi, or throughout the Republic of Kenya from hearing, or mentioning, taking notes, or making any orders whatsoever in respect of Kibera Chief Magistrates Criminal Case No. 1340 of 2018, *Republic v Samuel Nderitu Wakanyua.*

The First and second Respondent's Replying Affidavit

16. PC Philip Musyoka attached at Hardy Police Station Crime Branch and engaged in investigation duties and one of the investigating officers in this case swore the Affidavit dated 17th January 2019. He averred that the complainant lodged a complaint on 30th October 2018, stating that she was in a meeting with other instructors at the University when the applicant assaulted her after differences arose between herself and the applicant.

17. He averred that she reported the assault to the police, and, she was referred to hospital for treatment, and, a P3 Form was filled and the degree of injury was classified as harm. He deposed that criminal charges were preferred against the applicant, hence, this application has been filed in bad faith, is misconceived and an abuse of court process.

18. PC Mr. Musyoka reiterated the functions of the DPP and the National Police Service under the Constitution. He averred that the DPP and the National Police Service acted within their powers, and, that, the DPP independently reviewed the evidence and gave instructions for the prosecution to proceed. He also deposed that the decision to charge the applicant was informed by the sufficiency of the evidence and the public interest and not on any other considerations.

19. He also deposed that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court, and, that, the allegations that the case is an abuse of court process is unfounded and bad in law. He averred that the applicant has not demonstrated that the DPP did not act independently.

Third respondent's Replying Affidavit

20. Dr. Rosa ko, the complainant, in her Replying Affidavit dated 18th January 2019 averred that on 3rd October 2018, the applicant as the acting Dean of Students asked her to attend an examination moderation meeting for Political Science Courses where she was a senior lecturer. She stated that the meeting was held at Nsubuga Hall Room 114, a Regular Class room instead of the Campus Board Room as was the routine.

21. She deposed that the Examination Moderation involves the review of examination questions prepared by other course instructors and in

certain instances correcting the questions. She stated that at the meeting, she was issued with Examination Drafts for the various political science courses set by other course instructors.

22. She further deposed that she raised concerns with the venue since it was an open room and students could listen to the discussion, which involved setting examination questions and moderation of already set questions. She also deposed that upon being issued with the examination drafts, she found that there was a new department called Diploma in International Relations which she was not aware of and upon reviewing the questions, she found them to be open ended, lacking in content and did not cover any of the course theories and literature review and therefore insufficient.

23. In addition, she deposed that she brought the foregoing to the applicant's attention and informed him that she would not approve the draft examination questions unless her concerns were addressed. She also stated that she questioned the manner in which the lecturers were hired since they did not meet the required qualifications and added that the instructors were her former students who had not completed their masters' programme.

24. She added that that instead of resolving and addressing her concerns in an amicable manner, the applicant became confrontational and informed her that she had no authority to question him as he was in charge of the programme and could hire anyone. She stated that she decided to leave the room, but the applicant became adamant and insisted that she had to sign and approve the examination drafts, and, in an attempt to stop her from walking out of the room, he grabbed her upper right arm, twisted and yanked it injuring her right hand and shoulder.

25. Prof. ko deposed that she yelled loudly and asked him to release her hand attracting the attention of some of the lecturers inside the room and students outside, and, after leaving the room, she reported to the police. She added that she was issued with a P3 form and recorded a statement. She denied that the alleged malice and unlawfulness.

***Ex parte* applicants advocates submissions**

26. The crux of the *ex parte* applicant's counsel's submissions were that the criminal case was filed out of spite, malice and abuse of criminal justice system to settle personal scores. He argued that the police never carried out investigations. To buttress his argument, he cited *Nicholas Mwaniki Waweru & Another v Attorney General & 5 Others*[6] in which the court stated the circumstances under which the High Court can stop a criminal prosecution. In addition, he cited *Stanley Munga Githunguri v Republic*[7]for the holding that the High Court possesses authority to stop oppressive and vexatious criminal prosecution or where there is abuse of court process.

27. It was his submission that the complaint's complainant is frivolous, vexatious and is aimed at using the machinery of criminal justice system to settle scores with the applicant.

First and Second Respondents' Advocates submissions

28. The first and second Respondent's counsel argued that the state powers of prosecution are conferred upon DPP by the Constitution. He submitted that the High Court would be encroaching on the independence of the DPP unless it is demonstrated that the DPP has not acted independently, or he acted in bad faith, or has abused court process, or acted in excess of jurisdiction.[8]

29. He relied on *Thuita Mwangi & Another v The Ethics and Anti-Corruption Commission & 3 Others*[9] for the proposition that the court can only intervene where it is proved that the DPP has acted in excess of jurisdiction or has abused his powers. He added that the applicant would have the opportunity to prove his innocence in the lower court. He reiterated that the DPP acted independently and added that the applicant is not entitled to the orders sought.[10]

The Third Respondents Advocates Submissions

30. Counsel for the third Respondent relied on the complainant's affidavit dated 18th January 2018 and adopted the submissions made by counsel for the first and second Respondents.

Determination

31. The starting point is to acknowledge the existence of an undeniable special feature in our Constitution, which is the establishment of an independent office of the DPP. This independence is guaranteed under Article **157 (10)** of the Constitution. The Article declares that the DPP shall not require the consent of any person or authority to commence criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority.

32. The above position is replicated in Section **6** of the Office of the Director of Public Prosecutions Act.[11] The section provides that pursuant to Article **157 (10)** of the Constitution, the DPP shall:- **(a)** not require the consent of any person or authority for the commencement of criminal proceedings; **(b)** not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and **(c)** be subject only to the Constitution and the law.

33. Another significant point to note is that under Article **245 (4) (a)** of the Constitution, "no person may give direction to the Inspector General with respect to the investigation of any offence or offences." Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.

34. Simply put, the question raised in this case is an invitation to this court to restate the circumstances, under which the High Court in exercise of its vast jurisdiction conferred upon it by the Constitution can halt, stop, prohibit or quash a police investigations or criminal prosecution. It is common ground that the Office of the Director of Public Prosecutions (DPP) is a constitutional office, which plays a vital

role in the administration of justice in criminal matters. The Constitution vests the DPP with the sole Authority, power and responsibility to exercise control over the prosecution of all criminal matters except the institution of cases at the Court?Martial.[12]

35. It is pertinent to state that it is an acknowledged position that individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution. In short, the proper and effective administration of the criminal justice system is a matter of great public interest.

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

37. *Second,* the primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to seek conviction. *Third,* the prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion not to pursue criminal charges in appropriate circumstances. *Fourth*, the DPP is required to protect the innocent and to seek conviction of the guilty, and to consider the interests of victims and witnesses. *Fifth,* the DPP has an obligation to respect the constitutional and legal rights of all persons and should avoid any appearance of impropriety in performing the prosecution function. *Sixth*, a key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest.

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

39. *Eighth, the* decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.

40. It is beyond doubt that courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power *to 'stay'* an *indictment* (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of a citizens' fundamental rights. Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.[13]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.

41. It is common ground that the *ex parte* applicant and the complainant teach at the same University. It is not disputed that that the two attended a meeting called by the *ex parte* applicant. The point of departure is whether the *ex parte* applicant assaulted the complainant.

42. The *ex parte* applicant fiercely disputes the alleged assault and attributes it to rivalry between him and the complainant caused by differences emanating from an impeding election to Deanship at the University. He argues that the criminal case is a move to diminish his chances to ascend to what he describes as the coveted office if a Dean. He describes the criminal complaint as lacking foundation, malicious and an abuse of the criminal justice system. He also argues that no witnesses' statements were recorded from the persons who were present in the said meeting.

43.The DPP took a diametrically opposed position maintaining that a complaint was lodged and upon investigations, the charges were preferred. Differently put, the investigations disclosed an offence known to the law, and, that, the DPP acted independently.

44. The complainant's position remained that she was assaulted, and, that she reported the assault to the police, and was issued with a P3 form.

45. It is an established position of the law that it not for this court to determine the veracity or to weigh the strength of the evidence or the accused persons' defence. That is a function for the trial court hearing the criminal trial. This court can only intervene if there are cogent allegations of violation of constitutional rights; or threat to violation of the Rights; or in clear circumstances where it is evident that the accused will not be afforded a fair trial; or the right to a Fair Trial has been infringed or threatened; or where the prosecution is commenced without a factual basis.

46. The *ex parte* applicant argued that no investigations were done, and that the police did not record statements from the persons who were present at the material time.

47. This argument falls on the ground that section **143** of the Evidence Act[14]provides that *"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."* Expounding this position, the Court of Appeal in *Julius Kalewa Mutunga vs Republic*[15] held that*"…As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."*

48. The above position was reiterated by the Court of Appeal in the case *Alex Lichodo vs Republic*.[16] Perhaps the leading authority on this issue is the case of *Bukenya & Others vs Uganda*[17] where the East African Court of Appeal held that:-

i. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

49. However, in the above case, the court was categorical that the prosecution is not expected to call a superfluity of witnesses. The court held that where a witness is not called, adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly cannot be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

50. *First,* the prosecution has discretion to assess the importance the testimony of a witness would play, or would likely have played in relation to the issue concerned. *Second,* the unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case.

51. It follows that the question of whether or not the prosecution failed to call crucial witnesses can properly be raised before the trial court but not in this judicial review application. After appreciating the facts and the evidence, the trial court will be properly justified to make such inference as it may deem fit.

52. Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.[18]

53. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[19] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution.

54. The high court will only prohibit or quash prosecutions in cases where it would be impossible to give the accused a fair trial, or where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[20]

55. A criminal prosecution can be stopped if it was commenced in the absence of proper factual foundation. The enquiry is whether there has been an irregularity or an illegality that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right.

56. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as *certiorari*, *prohibition* and *mandamus* are a device to advance justice and not to frustrate it. The saving High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution.

57. The High Court's inherent powers to quash, stay or prohibit criminal proceedings are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences, which they carry, the Supreme Court of India[21] revisited the law on the issue and held that *'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.'*

58. The Supreme Court of India in the above case delineated the law in the following terms:-

"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings…The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers."[22]

59. In *Bennet vs Horseferry Magistrates Court & another*,[23]the court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

i. Where it would be impossible to give the accused a fair trial; or;

ii. *Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.*

60. Chris Corns[24]argues that the grounds upon which a stay will be granted can be classified under three categories:-

i. When the continuation of the proceedings would constitute an 'abuse of process,'

ii. When any resultant trial would be 'unfair' to the accused, and

iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

61. As stated above, the applicants' case essentially stands on two grounds. *First,* that he did not assault the complainant. That is an attractive argument. However, the denial that he assaulted the complainant is his defence in the criminal trial not in this case. He will have the benefit of cross-examining the complainant and disapprove her allegations. That function is conferred to the trial court, not this court. In this application, the High Court has no way of assessing the veracity of the evidence. In the event of being put on his defence in the lower court, the *ex parte* applicant will have the excellent opportunity of rebutting all the allegations made against him. This court cannot weigh the veracity of his defence. Simply put, the above issue is a matter of the *ex parte* applicant's defence in the lower court.

62. *Second,* I have already addressed the question of the alleged failure to record statements from other persons who were present. It will suffice to add that, the *ex parte* applicant will have the opportunity of asking the trial court to make an adverse inference if he establishes that indeed some crucial witnesses were not called. That is not a function for this court.

63. The other ground upon which this case stands is the alleged motive for the complaint. The applicant states that the criminal trial is aimed at diminishing his chances to ascend to the office of the Dean of the University. Again, this is a matter for his defence in the lower court.

64. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. As stated earlier, the power to quash proceedings is immense since it amounts to exonerating a suspect before trial. Such power must be exercised with extreme care and caution. It is a power, which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount a prosecution.

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

66. The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. This is a decision constitutionally vested on the DPP.Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[25]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

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

68. As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. It has not been demonstrated that the decision to prosecute was influenced by irrelevant or extraneous considerations. Further, it has not been established that the DPP did not act independently in arriving at the decision to prosecute.

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

70. The Constitutional provision in Article **157 (10)** of the Constitution ensures that the DPP has complete independence in his decision-making processes, which is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. This court respects this Constitutional imperative and will hesitate to interfere with the functions of the DPP unless there is clear evidence of breach of the Constitution or abuse of discretion to prosecute.

71. Applying the legal tests discussed above to the facts and circumstances of this case, I find that there is nothing to show that the prosecution is unfair or an abuse of court process or abuse of police powers or judicial process. There is no material before me to demonstrate that the prosecution has no proper factual foundation.[26] It has not been demonstrated that the prosecution will be conducted or is being undertaken without due regard to traditional considerations of candour, fairness, and justice, nor has it been shown that the trial is being conducted or will be conducted in a manner different from what is prescribed under the law, or that the trial is bad in law.[27]

72. In view of my analysis and findings herein above, the conclusion becomes irresistible that the *ex parte* applicant's Notice of Motion dated **8th** November 2018 must fail. Accordingly, I hereby dismiss the said application with no orders as to costs.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 23rd day of July 2019.

John M. Mativo

Judge

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

[2] Cap 63, Laws of Kenya.

[3] Cap 26, Law Reform Act.

[4] {2002} 2 KLR.

[5] {2013} e KLR.

[6] {2017} e KLR.

[7] HC Cr App No. 271 of 1985.

[8] Counsel cited *Beatrice Ngonyo Kamau & 2 Others v Commissioner of Police and the DPP & Another*, High Court Pet No. 21 of 2012.

[9] High Court Pet No. 153 of 2013.

[10] Citing Kenya National Examinations Council v Republic, Civil Appeal No. 266 of 1996.

[11] Act No. 2 of 2013.

[12] Article 157 of the constitution.

[13] *Hui Chi-Ming vs R* {1992} 1 A.C. 34, PC.

[14]Cap 80, Laws of Kenya.

[15] Criminal Appeal No. 31 of 2005.

[16] Criminal Appeal No. 11 of 2015-Visram A, Karanja W, and Mwilu P. JJJA.

[17] {1972}E.A.549.

[18]*DPP vs Meakin {2006} EWHC 1067.*

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

[20]*See Bennett v Horseferry Road Magistrates' Court and Another [1993] 3 All E.R. 138, 151, HL; see also R v Methyr Tydfil Magistrates' Court and Day ex parte DPP [1989] Crim. L. R. 148.*

[21] See *Maharashtra vs Arun Gulab Gawali*.

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

[23] {1993}All E.R 138, 151, House of Lords.

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

[25] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

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

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