REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 144 OF 2019

BETWEEN

EDGAR KAGONI MATSIGULU.....PETITIONER

VERSUS

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

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

LAW SOCIETY OF KENYA.....INTERESTED PARTY

CONSOLIDATED WITH PETITION NO. 145 OF 2019

BETWEEN

ONESMUS MIINDA MOMANYI.....1ST PETITIONER

ABDALLA AWADH ABUBAKAR.....2ND PETITIONER

LAWRENCE THOYA BAYAN.....3RD PETITIONER

VERSUS

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

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

CONSOLIDATED WITH PETITION NO. 143 OF 2019

KENYA MAGISTRATES AND JUDGES ASSOCIATION.....PETITIONER

VERSUS

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

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

EDGAR KAGONI MATSIGULU.....INTERESTED PARTY

Coram: Justice Reuben Nyakundi

Mr. Omollo, Mr. Ongoya Mr. Havi, Mr. Kirui, Mr. Wamotsa,

Mr. Anandwa, Mr. Wambui and Mr. Okoko for the Petitioners

Mr. Muteti, Mr. Omollo, Mr. Owili for the 1st Respondent

Mr. Makuto for the 2nd Respondent

Mr. Wafula Mr. Nyongesa for the Interested Party

JUDGEMENT

Introduction

1. Above all else, the three Petitions as consolidated are hinged on the extent to which judicial immunity as contemplated under Article 160(5) of the Constitution of Kenya, 2010 ought to be interpreted and applied.

2. For ease of reference, I have styled as the 1st Petitioner **Hon. Edgar Kagoni Matsigulu**, a Principal Magistrate at the Mombasa Law Courts and the Petitioner in Petition No. 144 of 2019 and Interested Party in Petition No. 143 of 2019.

3. Judicial staff working for gain at Mombasa Law Courts: Mr. **Onesmus Miinda Momanyi** a Court Assistant**; Mr. Abdalla Awadh Abubakar-** In charge of Exhibits; and **Mr. Lawrence Thoya Bayan-** a member of the support staff all being the Petitioners in Petition No. 145 of 2019 are henceforth referenced as the 2nd, 3rd and 4th Petitioners respectively.

4. The Kenya Magistrates and Judges Association, the Petitioner in Petition No. 143 of 2019 takes the form of the 5th Petitioner. Their interest in these proceedings are fully represented in the case for the 1st Petitioner on whose behalf their action has been brought.

5. The Director of Public Prosecutions and the Hon. Attorney General retain their designations in all the three Petitions as the 1st and 2nd Respondents respectively.

6. For the Law Society of Kenya, enjoined as the Interested Party in Petition No. 144 of 2019, it shall retain this designation for the purposes of this determination.

7. Petition No. 144 of 2019 was filed on 9th September 2019 contemporaneously with an Application and affidavits sworn by **Edgar Kagoni Matsigulu** on 8th September 2019.

8. Petition No. 143 of 2019, also accompanied by an Application and an affidavit sworn by one **Mr**. **Danstan Omari** who is described as an advocate of the High Court with full instructions to prosecute the Petition on behalf of the Petitioner, was similarly filed on 9th September 2019.

9. Finally, in Petition No. 145 of 2019, the Petition and Application are supported by an affidavit sworn by Danstan Omari on 9th September 2019. All documents were filed on 9th September 2019.

10. The 1st Respondent opposes the Petitions via a Replying Affidavit sworn on the 12th September 2019 by **Miss. Ngina Mutua** who is described as a Prosecution Counsel.

11. The Interested Party application to be enjoined was allowed. Its case in support of the petitions is supported by the supporting Affidavit sworn on the 11th September 2019 by **M/S Mercy Wambua** who is the Interested Party's Chief Executive Officer.

12. When the Petitions came up for hearing, the Court directed that the three Petitions, that is 143, 144 and 145 of 2019 be consolidated for ease of determination. This direction is founded on the basis that the subject matter in the Petitions is essentially the same, as it involves the arrest and intended prosecutions of the Petitioners for their respective roles in the alleged disappearance of exhibits connected to **Mombasa Chief Magistrate Criminal Case No. 468 of 2019 R v Hussein Massoud Eid & 2 others.**

13. Having given the preceding outline of events, I now turn to the substance of the Petitions at hand, beginning with a summary of the Petitioners' gravamen.

The Petitioners' Case

14. The 1st Petitioner avers that on the 6th September 2019, he was arrested, booked for aiding in trafficking of drugs and detained at the Port

Police Station. On the 7th September 2019,vide press statement issued by the Director of Public Prosecution(D.P.P), he found out that a decision had been made to charge him with two offences, namely;

a) Obstruction to defeat justice C/S 117(C) of the penal code.

b) Aiding the commission of an offence C/S 8(c) of the Narcotic Drugs and Psychotropic Substances (control) Act.

15. The 1st Petitioner states that the decision to charge him emanated from a complaint relating to loss of exhibits in **Mombasa Chief Magistrate Criminal Case No. 468 of 2019 R v Hussein Massoud Eid & 2 others** between 28th June 2019 and 26th July 2019. In the said case as a trial Magistrate, he heard the case to conclusion and sentenced the accused person to thirty(30) years imprisonment together with a fine of Kshs.90,000,000/=

16. The 1st Petitioner also states that during the trial he made a decision to return certain currency exhibits because in his view even though the money was found on the accused person, the said money was in no way connected to the charge of drug trafficking. Also, he declined an oral application by the prosecution to have back the exhibits that had been produced in Court, reason being that there is no provision in law for the release of exhibits back to the prosecution once produced in Court. The said decisions have to the best of his knowledge neither been Appealed against nor has an application for revision been made to the High Court in relation to the same.

17. The 1st Petitioner contends that he delivered his judgment on the 11th June 2019 and the exhibits according to the D.P.P's press statement release disappeared between the 28th June 2019 and 26th July 2019 a period he had no conduct with the said exhibits as he had allowed his Court assistant one Mr. **Onesmus Momanyi,** the 2nd Petitioner herein to take control of the produced exhibits as storage and handling of exhibits is a function of administrative staff in the judiciary.

18. The 1st Petitioner further contends that he acted in good faith and therefore, under Article 160(1) and 160(5) of the Constitution he is not liable in an action or suit in respect of anything done or omitted to be done in good faith in lawful performance of his judicial function. He further avers that the claims against him by the D.P.P suggest that it is taking issue with his actions and/or inactions in the discharge of his judicial function without the courage to attack the said orders and exercise of judicial discretion through the laid down legitimate channels of Appeal or application for revision. Instead, the D.P.P has opted to arrest and prosecute him in order to intimidate and frighten him and other judicial officers.

19. The 1st Petitioner states that his arrest, pre-arraignment and detention in the circumstances is a violation of his right to freedom and security of person which included the right not to be deprived of dignity and the right to have that dignity respected and protected and is a contravention of Articles 27,28 and 29 of the Constitution. He prays that this Court allows his Petition as prayed.

Reliefs sought

20. Based on the above set of facts, the 1st Petitioner deplores the Court to grant the following orders:

a. A declaration that the act of the Directorate of Criminal Investigations of the National Police Service to investigate, arrest and pre-arraignment detention of the 1st Petitioner because of the judicial orders and directions that he made in the course of his judicial duties in Mombasa Chief Magistrates Court Criminal Case Number 468 of 2018 is a violation of Articles 160(1) and 160(5) of the Constitution and such investigation, arrest, and pre-arraignment detention were all invalid within the meaning of article 2(4) of the Constitution of Kenya, 2010.

b. A declaration that the decision of the 1st Respondent to authorize the arrest, pre-arraignment detention and prosecution of the 1st Petitioner because of the judicial orders and directions that he made in the course of his judicial duties in Mombasa Chief Magistrates Court Criminal Case Number 468 of 2018 is a violation of articles 160(1) and 160(5) of the Constitution and therefore invalid within the meaning of article 2(4) of the Constitution of Kenya, 2010.

c. An order of Certiorari bringing into this Honourable Court and quashing the recommendations of the Directorate of Criminal Investigations to the Director of Public Prosecutions and the consequential decision of the Director of Public Prosecutions to charge the Petitioner contained in the Press Statement dated 07th September, 2019 to charge Kagoni Edgar Matsigulu, the 1st Petitioner herein with obstruction of justice contrary to Section 117 of the Penal Code, Aiding the commission of an offence contrary to Section 8(c) of the Narcotic Drugs and Psychotropic Substances (Control) Act or any other charge that may be founded on the facts of the 1st Petitioner's conduct as a judicial officer in Mombasa Chief Magistrates Court Criminal Case Number 468 of 2018.

d. An order of Prohibition prohibiting any Magistrates Court in Kenya from taking plea or any further criminal proceedings arising from the recommendations of the Directorate of Criminal Investigations to the Director of Public Prosecutions and the consequential decision of the Director of Public Prosecutions to charge the 1st Petitioner contained in the Press Statement dated 07.09.2019 to charge Kagoni Edgar Matsigulu, the Petitioner herein with obstruction of justice contrary to Section 117 of the Penal Code, Aiding the commission of an offence contrary to Section 8(c) of the Narcotic Drugs and Psychotropic Substances (Control) Act or any other charge that may be founded on the facts of the Petitioner's conduct as a judicial officer in Mombasa Chief Magistrates Court Criminal Case Number 468 of 2018.

e. A declaration that the arrest, pre-arraignment detention of the 1st Petitioner in the circumstances of this case was a violation of his right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause, and, the right to inherent dignity and the right to have that dignity respected and protected and contravenes articles 27 (1), 28 and 29 of the Constitution of Kenya, 2010.

f. General and exemplary damages for violation of the Petitioner's fundamental rights and freedoms.

g. Costs of and incidental to this petition.

h. Interest on (vi) and (vii) above at court rates from the date of judgment till payment in full.

i. Or that such other order(s) as this Honourable Court shall deem just.

21. For the 2nd to 5th Petitioners, Mr. Omari by his affidavits in Petition No. 143 and Petition No. 145 of 2019 avers that these petitioners were arrested on the 6th September 2019 to be charged with the offence of **stealing by person in the public service contrary to Section 268 as read with Section 280 of the penal code** in relation the 10.022kg of Heroin valued at Kshs. 30,066,000/=.

22. The 2nd to 4th Petitioners filed an Application for Conservatory orders which was found to be without merit and the same was declined. The Application for conservatory orders having been declined, by the time this Petition was being heard, the Petitioners had already been charged with the aforementioned offence. Therefore, Counsel for the 2nd to 4th Petitioners orally made an application to amend their Petition which was allowed. In the amended Petition this Court was urged to quash the charges that had already been preferred against the 2nd to 4th Petitioners.

23. **Mr. Omari** avers that following the sudden disappearance of exhibits of 10.002 kg heroin which Hon. **Kagoni Edgar Matsigulu** had ordered the same to be kept under lock and key, the Chief Magistrate Mombasa Law Courts made a formal complaint and requested that the Directorate of criminal investigation to institute investigations in order to establish the persons culpable.

24. **Mr. Omari** avers that there is no legal justification upon which the Petitioners should be charged for the theft of exhibits as their roles are limited. It is averred that the 1st Respondent decision to charge them was made in bad faith and in brazen violation of public interest yet they were exercising a lawful judicial function and a s a result, if the charges against them are allowed to prevail, then the independence of the judiciary will be threatened with encroachment by the 1st Respondent.

The 1st Respondent's Case.

25. In the affidavit sworn by Ngina Mutua on behalf of the 1st Respondent, she states that on the 8th August 2019 the Regional Directorate of Criminal Investigations, Mombasa received a complaint letter **Ref.No. JUD/MSA/GEN/VOL.1** from Chief Magistrate Hon. Evans Makori which was on allegation of reckless handling of exhibits in **Mombasa Criminal Case No. 468 of 2018 R v Hussein Massoud Eid & 2 others.**

26. **Miss. Ngina** further states that an inquiry into the loss was commenced and upon completion, investigations revealed that the 10.002.kilos of heroin and foreign currency worth over Kshs.600, 000/= were produced as exhibits on the 4th December 2018 and upon production of the said exhibits, the 1st Petitioner ordered that the same be kept by the Court. Due to the sensitivity of the matter, **SGT. Francis Mjomba** (investigating Officer) made an oral application to be allowed to keep the Narcotic exhibits under police safe custody but his application was declined and the Narcotics Drugs subsequently released to the Court Assistant Mr. **Onesmus Miinda Momanyi** to take control of the produced exhibits. Per the 1st Respondent, the 1st Petitioner failed to make any written directions as to how and/or where to store the said exhibits. They were taken to the exhibit stores on the 5th December 2018 which was a day later.

27. The deponent avers that failure by the 1st Petitioner to make any written directions as to how and where to store the said exhibits facilitated their loss. The said decision was contrary to the mandatory provisions of part F 65(F) and 68(a) of the Registry Manual that requires Courts to give appropriate directions on storage of exhibits. Also, the order in the judgment issued on 11th June 2019 that the money amounting to over Kshs.600,000/=be returned to the convict Mr. **Hussein Massoud Eid** breached Sections 36 and 78 of the Narcotics Drugs and Psychotropic Substance (Control) Act No.4 of 1994 which obligated the 1st Petitioner upon convicting the accused to forfeit the seized money exhibits.

28. The deponent further avers that the recklessness by the 1st Petitioner amounts to criminal culpability liable to prosecution and it is on that basis that the 1st Petitioner and his then Court Assistant Mr. **Onesmus Miinda Momanyi Mr. Abdalla Awadh Abubakar** the then in Charge of Exhibits and **Mr. Lawrence Thoya Bayan** a support staff were arrested on the 7th September 2019.Hence,the aforementioned charges against the four persons including the 1st Petitioner have a proper factual and legal basis and are brought in good faith and in public interest in pursuit of the Administration of the criminal Justice and nothing else.

29. The deponent also avers that judicial immunity under Article 160(5) of the Constitution does not protect judicial officers who Act in bad faith by committing impropriety in the nature of criminal conduct including violation of law, breach of Court rules and abuse of office or interfering with the flow of justice.

30. The deponent avers that the 1st Respondent as an independent office under the Constitution is mandated among other things to institute and undertake criminal proceedings against those whom it has sufficient factual and legal basis and the Petitioners have failed to demonstrate or furnish evidence of how the Petitioner's right to a Fair trial have been compromised and/or violated. Also the Petitioners have not provided any proof that the 1st Respondent acted maliciously by instituting the charges against the 1st Petitioner. Therefore, the petitions have been made in bad faith and thus frivolous, vexatious and lack merit and should be dismissed.

The 2nd Respondent's Case.

31. The 2nd Respondent by the Reply to the Petition dated 12th September 2019 avers that the Attorney General has been wrongly be enjoined as a Party as the Attorney general has no control over criminal proceedings in Kenya. Nevertheless, it contends that public interest will be best served by allowing the pending proceedings before the subordinate Court to continue to their logical conclusion and for the same to be decided in a fair and public hearing as provided for under Article 50 of the Constitution.

32 The 2nd Respondent further states that there was no basis for the Petitioner to presume that the subordinate Court would not have control of its proceedings and ensure that the Petitioner's right are protected as provided under the law.

The Interested Party's Case

33. Mercy Wambua, CEO of the Interested Party, makes the case that the decision by the D.P.P to prosecute a judicial officer while exercising judicial discretion in terms of directing that exhibits be stored by the judiciary is ultra vires, unconstitutional and a threat to judicial independence.

34. She further states that Article 171 of the Constitution establishes the Judicial Service Commission (JSC) which is mandated to manage and discipline judicial officers for offences committed during the execution of their functions. Therefore, if at all there is any offence alleged to have been committed, then the same ought to be channeled through the JSC and it is only after the said process is exhausted that the Petitioner can be arraigned in Court.

35. In addition to the documents filed is support of the Petitions and the Responses by the Respondents, Counsel put in their written submissions and in turn proceeded to highlight them orally in line with the directions of the Court.

The submissions on behalf of the 1st Petitioner

36. Learned Counsel Mr. Havi and Mr. Ongoya submitted orally on behalf of the 1st Petitioner. Of note to them is that the mandate of the 1st Respondent under Article 157 of the Constitution of Kenya, 2010 to initiate criminal proceedings against the 1st Petitioner is fundamentally in contravention of Article 10 of the Constitution on good governance and also outside the scope of Article 160 of the Constitution on judicial independence and specifically on the immunity of judicial officers.

37. Counsel submits that the facts of this case are substantially not in dispute. They posit that these facts arise out of a 1 st Petitioner who occupies an office of a principal magistrate. In one of his duties, the 1st Petitioner presided over Mombasa Law Courts Criminal Case No. 468 of 2018 which was determined on the merits against the accused persons therein. Mr. Havi submits that it is alleged that on 4th December 2018, the 1st Petitioner in his capacity as the Principal Magistrate rejected an oral application that the 1st Respondent made seeking the release of exhibits. According to learned counsel, from the court record of this date, it is clear that there was no such application made or considered by the 1st Petitioner. None of the proceedings on that date have anything to do with the release of the exhibits in question.

38. It is further submitted that the instant Petition is one where there is a determination of the case by way of a judgement against the accused persons in Mombasa Law Courts Criminal Case No. 468 of 2018. The learned magistrate found that the offence of trafficking had been proven and also made a finding on the release of the over Ksh. 600,000 in foreign currency to the accused persons. Further, the 1st Petitioner ordered for the destruction of the narcotic drugs. Counsel therefore submits that the allegation that the exhibits got lost or went missing cannot be laid on the shoulders of the 1st Petitioner and neither can he be found culpable as part of his function is not to store or take care of the exhibits, this is a ministerial function.

39. For the 1st Petitioner it is submitted that interestingly, there is neither an appeal on the alleged decision of the 1st Petitioner denying an oral application made on the 4th December 2018 by the 1st Respondent nor is there one on the final determination in Mombasa Law Courts Criminal Case No. 468 of 2018 made on 11th June 2019. On this basis counsel submits that the two counts in the intended prosecution against the 1st Petitioner are founded on bad faith, are not in the public interest and are not as provided for under Article 157 of the Constitution.

40. It is submitted that it has not been shown by the 1st Respondent that the exhibits were under the custody of the 1st Petitioner and neither has it been shown how the 1st Petitioner conspired in view of the clear judgement he delivered on 11th June 2019.

41. The argument is put forth that the physical custody of the exhibits cannot be said to be under the power and control of the 1st Petitioner.

42. In buttressing their arguments, counsels referred the court to the **Constitution of Kenya 2010** and specifically to **Article 160 (5)** on judicial immunity. Reference was also made to **Section 6 of the Judicature Act** and **Section 15 of the Penal Code**. Counsel for the 1st Petitioners cited the **Narcotic Drugs and Psychotropic Substances (Control) Act**. Reliance was also placed on the **Judicial Service Commission Act** and the **Magistrates Court Act**. Counsel further cited the provisions of the High Court as well as the Magistrates and Kadhi's Court **Registry Manual** provisions on the handling of exhibits.

43. The extensive arguments made in favour of the 1st Petitioner's case drew inference from the Canadian case of **Mackeigan vs Hickman [1989] 2 S.C.R.** and the **American Supreme Court case of Stump vs Sparkman, 435 U.S 349 [1978].** Locally, Counsels supplemented their arguments with excerpts from **Bellevue Development Company Limited vs Francis Gikonyo & 7 Others [2018] eKLR, Philomena Mbete Mwilu vs Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima(Interested Party); International Commission Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR, Augustin Michael Murandi & 2 Others vs Nolturesh Loitoktok Water & Sanitation Co. Ltd (Successor in title of National Water Conservation and Pipeline Conservation) [2017] eKLR** and **Bryan Mandila**

The Submissions on behalf of the 2nd to 4th Petitioners

44. Mr. Wambui and Mr. Okoko in their submissions put up a spirited effort to demonstrate that the 2nd to 4th Petitioners, being members of the judiciary, are exempted from criminal or civil suits against them in person for acts and omissions committed in the line of duty as judicial officers in exercise of judicial functions. Furthermore, they submit that the charges of stealing of narcotic drugs levelled against the Petitioners are lacking in any factual basis and flow from the 1st Respondent's indignation of the orders made by the 1st Petitioner to have the Exhibits in Mombasa Criminal Case number 468 of 2018 kept at the Courts Exhibits Store. Counsel submit that this order by the Hon Kagoni was in exercise of judicial discretion and the 1st Respondent never preferred any appeal nor review but instead through illegal ingenuity has decided to hound a sitting magistrate and other judicial staff attached to him and drag them to Court to face prosecution for allegedly lost exhibits.

45. It is submitted that the 1st Respondent being a constitutional office established under Article 157 of the Constitution is mandated under Article 157(11) to exercise its powers by having regard to the public interest, the interest of the administration of justice and the need to prevent abuse of Court process.

46. Counsel argue that as the Petitioners are not in charge of the Courts security system, it is farfetched and irresponsible for the 1st Respondent to hound court officers in a fishing expedition clouded by speculation in response to his indignation/chagrin.

47. In closing, Counsel point to the fact that the 1st Respondent opted to charge the Petitioners in a Nairobi based Court despite the alleged offences having been committed in Mombasa Law Courts. This, it is contended, is calculated to prejudice the Petitioners' right to access to justice and a fair trial.

48. **Section 6 of the Judicature Act, Section 45 of the Judicial Service Commission Act** as well as the cases of **Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR, Republic v Inspector General of Police & 2 others Ex parte Jimi Richard Wanjigi [20191 eKLR** and **Moses Wamalwa Mukamari vs John O. Makali & 3 Others (2012) eKLR** are instrumental in Counsel's submissions.

The Respondent's Submissions

49. The 1st Respondents submissions were highlighted orally by Prosecution Counsel Mr. Muteti and Mr. Okello. In their considered view, the Applications and Petitions as consolidated turn on three issues. The concept of the independence of the judiciary vis a vis the extent of Judicial Immunity contemplated under Article 160(5) of the Constitution and the powers of the 1st Respondent under Article 157 of the Constitution to initiate criminal proceedings against a sitting Magistrate.

50. On the powers of the 1st Respondent to initiate criminal proceedings against a sitting magistrate, the 1st Respondent submits that key among the considerations before a prosecution is commenced is whether the evidence placed before the 1st Respondent discloses a prosecutable case and whether it is in the public interest to commence a prosecution. That where acts of a criminal nature are brought to the knowledge of the 1st Respondent, it is incumbent to ensure that the allegations are thoroughly investigated and appropriate action taken in order to guard the high office of a judge from any false and or malicious accusations by any person.

51. It is submitted that having received the inquiry file from the DCI, the 1st Respondent independently reviewed the same before reaching the considered decision that the Petitioners' were criminally liable for their individual and respective acts of commission and omission that led to the loss of the exhibits. The 1st Respondent's decision was therefore not actuated by malice, ill will or spite.

52. The case was further made that the 1st Respondent's duty to prosecute was discretionary and not up to direction from in anyone. Further, this mandate could not be usurped by the court. The court, in the view of the 1st Respondent, ought to exercise its power to prohibit prosecution sparingly and in the clearest of cases.

53. According to Counsel for the 1st Respondent, the Petitioner has failed to establish a case that merits the review of the decision to prosecute and should therefore not be granted the orders sought.

54. Support for this position is sought from the cases of **Paul Ng'ang'a Nyaga vs. Attorney General & 3 Others (2013) eKLR, Francis Anyango Juma v The Director of Public Prosecutions and Another Petition No 160 of 2012, Kenya Commercial Bank Limited & 2 others V Commissioner of Police and Another, Nairobi Petition No. 218 of 2012 (2013) eKLR, George Joshua Okungu and Another v Chief Magistrate Court Anti-Corruption Court at Nairobi and Another (2014) eKLR, Republic v Royal Media Service JR Case Number 221 of 2013, Mohit v The Director of Public Prosecutions of Mauritius (Mauritius) [2006] UKPC 20 and Matatulu v DPP [2003] 4LRC 712.**

55. Further reliance was placed on **Diamond Hasham Lalji & Another v Attorney General and 4 others (2018) eKLR** which cited with approval the case of **William v Spautz [1993] 2 LRC 659** and **R v Sussex Justices, I KB 256, [19231 All ER Rep 233)**

56. Mr. Muteti in submissions makes the point that the mere institution of a criminal case against judicial officer is not in itself a threat to Judicial Independence. He contends that with judicial independence comes judicial accountability and judicial officers like all other persons are under an obligation to ensure that they operate within the provisions of the law and should not expect preferential treatment in the enforcement of criminal law. The submission is made that judicial immunity extended to the 1st Petitioner and other judicial officers under

Article 160 (5) of the Constitution does not extend to acts that are criminal and or not done in good faith. In buttressing this argument, solace is sought in Section 6 of the Judicature Act and a corpus of judicial decisions not least among them **Abdulkadir Athman Salim Elkindy v Director of Public Prosecution and Another [2017] eKLR, Nganjiwa v FRN (2017) LPELR - 43391 (CA), Sharma v Deputy Director of Public Prosecution & Others (Trinidad and Tobago) [2006] UKPC 57 (30 November 2006), Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733, Braatelien et al. v United States (147 F 2.d 888 (1945)** and **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya and 5 Others [2016] eKLR.**

57. Further reliance is placed on **Alfred Mutua v Ethics and Anti-Corruption Commission and 4 others [2016] eKLR, N. Edath-Tally v M.J.K. Glover [1994 MR 200]** and **Borough of Wandsworth vs. Rashid (2009) EWHC 1844 (Admin).**

58. In conclusion, Counsel for the 1st Respondent urges the Court to dismiss all the Petitions with costs, stating that the Petitioners have not made out a case with sufficient evidence to warrant the Court to grant the orders of sought.

59. The 2nd Respondent through its Advocates support the Submissions made the 1st Respondent, adding that Article 160(5) does not grant absolute immunity especially in criminal proceedings where it is further submitted that in certain circumstances where the 1st Respondent is reasonably apprehensive that a crime may have been committed by a judicial officer, that officer would not be shielded from prosecution by that Article.

60. It is submitted further that it is in the public interest that the Court disallow the Petitions and give the 1st Respondent the freedom to pursue the Petitioners.

The Interested Party's Submissions

61. For the Interested Party, Counsel express their agreement with and support for the submissions made in support of the Petitioners' case. They seek to supplement the position taken on the two fundamental issues that in their view arise in the instant proceedings. In their submissions, reference is made to the already stated Sections of the Constitution and the Judicature Act on the doctrine of judicial independence and the concept of immunity of judicial officers.

62. Judicial independence, it is submitted, involves judges acting independently of the government of the day and free from external pressure from any source. Counsel submits that a more refined conception is that judicial independence is concerned both with the institutional and individual autonomy of judges as well as the actual capacity of the judiciary to render independent decisions. The idea of judicial independence is traceable to the liberal democratic ideals including the separation of powers espoused by Aristotle, Locke and Montesquieu. These points are argued with reference to what several authors have stated entails the principles of judicial independence, not least among them, Hon. Mr. Justice Gicheru in **Independence of the Judiciary: Accountability and Contempt of Court;** Michael Gilbert in **Judicial Independence and Social Welfare** where judicial independence is defined and R Kauffman in **The Essence of Judicial Independence.**

63. Mr. Nyongesa further looks to several International Instruments that form part of Kenyan law, including the International Covenant for Civil and Political Rights.

64. For the Interested Party, it is submitted that the actions of the 1st Respondent in attempting to prosecute the Petitioners who are judicial officers, are an indication that judicial officers will have to contend with facing retribution for making decisions that go against the wishes of the 1st Respondent.

65. It is submitted that far from being for the protection of judicial officers alone, judicial immunity, as well as the independence of the Judiciary must be guarded for it is for the benefit of the public at large.

66. Additionally, Counsel submits that while the Court ought not to usurp the mandate of the 1st Respondent, where it is shown, as is the case in the instant proceedings, that the Prosecutor intends to carry out an abuse of the process in violation of the Constitution, the Court should not hesitate to put a stop to such proceedings.

67. By the by the Interested Party submits that the Petitions should be allowed in order to stop the 1st Respondent from victimizing judicial officers in performance of their duties.

68. The case by the Interested Party is fortified with references to **Nafus Rabui vs. The State (1981) 22 NCLR 293, Joram Mwenda Guantai vs The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] eKLR, Meixner and Another vs The Attorney General [2005] 2 KLR 189** and **Republic vs Commissioner of Police and Another Ex-parte Michael Monari & Another [2012] eKLR.**

Analysis and Determinations

69. As I have diligently pored over the Petitions and the facts in support thereof, the affidavits and Replying Affidavit thereto, the submissions made in support of the parties' respective cases as well as the authorities relied upon, I am confident that in order to reach a resolution of the issues adumbrated upon, the Court must address itself to the following questions:

a. What does judicial independence as articulated under Article 160 (1) of the Constitution of Kenya entail?

b. Is the immunity accorded to members of the judiciary in the terms set out under Article 160(5) of the Constitution of Kenya, 2010 absolute?

c. What are the powers of the 1st Respondent in relation to the investigation, arrest and intended prosecution of the Petitioners?

d. Whether the arrest of the Petitioners, being members of the judiciary in the meaning of Article 161(1) of the Constitution, is a violation of the doctrine of judicial independence as contemplated under Article 160 (1) and judicial immunity sanctioned under Article 160(5) of the Constitution?

e. Whether the manner of the arrest and pre-arraignment of the Petitioners' was conducted in violation of their human rights guaranteed under the constitution?

f. Whether the Petitioners are entitled to the reliefs sought?

Principles of Constitutional Interpretation

70. When called upon to interpret the Constitution of Kenya, 2010, the first port of call has to be Article **10** because it enjoins the application of the national values and principles, which are binding to all, when enacting, applying and interpreting any law. These principles as serialized therein include inter alia giving due regard to the rule of law, human dignity, human rights, non-discrimination, good governance, integrity, transparency as well as accountability.

71. **Article 259** directs that the Constitution ought to be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

72. Constitutional interpretation as directed by the Supreme Court in **In the Matter of Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011] eKLR** ought to be done in the following manner:

> *"…The rules of constitutional interpretation do not favour formalistic or positivistic approaches **(Articles 20(4)** and **259(1)).** The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the **Preamble,** in **Article 10,** in **Chapter 6**, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. **Article 159(1)** states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.*
>
> *[87] In **Article 259(1)** the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." **Article 20** requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights."*

73. The basis for interpretation per **Mativo J**. in **Apollo v Attorney General & 2 others Petition No. 472 of 2017 [2018] eKLR,** ought to be:

> *"34. It is useful to restate the well-known general principles relating to constitutional interpretation, which are, in any event, incontrovertible. The first principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described the Constitution as "a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government" The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion. In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner. Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism.' It is also true to say that situations may arise where the generous and purposive interpretations do not coincide. In such instances, it was held that it may be necessary for the generous to yield to the purposive. Secondly, in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question." (**See National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24, Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26., S v Acheson 1991 NR 1(HC) at 10A-B, Government of the Republic of Namibia v Cultura 2000 1993 NR328 (SC) at 340A-C., The South African Constitutional Court cases of S v Makwanyane 1995 (3) SA 391 (CC) at Para [9] footnote 8; Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC) at para 17., Kauesa v Minister of Home Affairs and Others 1995 NR 175 (SC) at 183J-184B; S v Zemburuka (2) 2003 NR 200 (HC) at 20E-H; Tlhoro v Minister of Home Affairs 2008 (1) NR 97 (HC) at116H-I; Schroeder and Another v Solomon and 48 Others 2009 (1) NR 1 (SC) at 6J-7A; Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia 2009 (2) NR 596 (SC) at 269B-C.** *and* **Minister of Defence v Mwandinghi 1993 NR 63 (SC); S v Heidenreich 1998 NR 229 (HC) at 234.")***

What does judicial independence as articulated under Article 160 (1) of the Constitution of Kenya entail?

74. Having laid the foundation for how the Constitution will be interpreted, I now make my foray into the resolution of the substantive issues. For starters, an earnest discussion on the place of Article 160(1) of the Constitution as regards the doctrine of judicial independence is of necessity. The Article provides:

"In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."

75. Essentially, Article 160(1) asserts the independence of the Judiciary by outlining that the Judiciary is only subject to the Constitution and the law. As an institution, it is crucial that the Judiciary be seen as not beholden to certain interests, inspiring public confidence in the system.

76. The term "Independence" as contemplated by the Constitution of Kenya has been severally adumbrated upon by the Courts. The Supreme Court for instance in the case of **Communication Commission of Kenya & 5 Others v Royal Media Services limited & 5 others [2014] eKLR** states:

"'[I]independence' is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.

"How is the shield of independence to be attained" In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain 'independence' in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these 'other safeguards' can singly guarantee 'independence'. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence. "

77. The rationale for protecting the independence of the Judiciary finds favour in the Court of Appeal decision in **Bellevue Development Company Limited vs Francis Gikonyo & 7 Others [2018] eKLR** which resonates with my position on the same. In this case, Kiage JA makes the important point that the independence of the judiciary rests on the tenet of judicial immunity. He holds thus:

"The judicial immunity conferred by Article 160(5) is an important pillar or prop of the independence of the judiciary, a core tenet of the Constitution of Kenya. The immunity is not for the personal benefit of judges; like the contempt power, it was never intended for the ego or personal interest of judges. The true intention is protection of the administration of justice. Judicial immunity is founded on public interest considerations that, while determining cases, judges should be free from external pressures and in particular, the anxiety of having to personally defend suits and actions at the instance of parties who believe that the outcome of their cases should have been different from what the judge decreed."

Is the immunity accorded to members of the judiciary in the terms set out under Article 160(5) of the Constitution of Kenya, 2010 absolute?

78. The succinct summations on the independence of the judiciary serve as a suitable point of departure in returning a verdict on whether the immunity accorded to members of the judiciary in the terms set out under Article 160(5) of the Constitution of Kenya, 2010 is absolute. The said Article provides as follows:

"*A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function."*

79. Under **Section 6 of the Judicature Act, Cap. 8** the judicial immunity accorded to judicial officers is set out in the following terms:

"No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it."

80. Judicial officers are immune from prosecution according to **Section 15 of the Penal Code** which provides that:

"Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done, or omitted to be done by him in the exercise of his judicial functions, although the act done is in excess of his judicial authority or although he is bound to do the act omitted to be done"

81. The immunity of judges in the performance of their judicial functions is implied in the **Bangalore Principles of Judicial Conduct** as follows:

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence."

82. Turning to what courts have said on this doctrine, the default position on judicial immunity in American jurisprudence is to be found in **Bradley v. Fisher *80 U.S. (13 Wall), 335, 351 (197***2) where it is stated;

"For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful."

83. In **Floyd vs Barker 77 Eng. Rep 1305 (Star Chamber 1609)**, an early English case, it is held that a judge could not be prosecuted in another court for an alleged criminal conspiracy in the way he had handled a murder trial. The judges held that if the King wished to discipline a judge he needed to do it himself without resort to criminal prosecution.

84. Rendering his views on judicial immunity, Lord Denning aptly puts it in **Sirros v Moore [1974] 3 AER 776 at 781J– 782D** as such**:**

"Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action…..Of course if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear."

85. Similar views are expressed in **Forrester V. White (1988) No. 86-761** where it is held as follows:

"Judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error. See Block, Stump v. Sparkman and the History of Judicial Immunity, 1980 Duke L. J. 879. More recently, this Court found that judicial immunity was "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country." Bradley v. Fisher, 13 Wall. 335, 347 (1872). Besides protecting the finality of judgments or discouraging inappropriate collateral attacks, the Bradley Court concluded, judicial immunity also protected judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants."

86. Historically, in answer to the question of whether the immunity accorded to judges is absolute, the position has long been that for actions taken under the auspices of their judicial function, judges are immune to prosecution. Illuminating this position are the words of Lord Esher M.R. from over a century ago in **Anderson vs. Gorrie [1895]1QB 668** at 670-671:

"…the question arises whether there can be an action against a Judge of a Court of Record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie.…

To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a Judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office."

87. Bringing the discussion closer home, the High Court explores the question of judicial immunity in **Maina Gitonga vs. Catherine Nyawira Maina & Another [2015] eKLR** and considers judicial immunity as an established doctrine by holding as below:

"it is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from a criminal or civil suit arising from acts taken within or even in excess of his jurisdiction…Judicial immunity is necessary for various policies. The public interest is substantially weakened if a judge or a magistrate allows fear of a criminal or civil suit to affect his decisions. In addition, if judicial matters are drawn into question by frivolous and vexatious actions, 'there never will be an end of causes: but controversies will be infinite…I agree with Bosire J that judicial officers should not be put in a position which forces them to look over their backs every time they make a decision. Whenever a judicial officer has to make a decision, he should make such a decision in good faith and without fear that he will be taken to court for making the decision. Whenever a party wants to challenge the decision of a judicial officer by way of a judicial review, he should not make the judicial officer who

made the decision a respondent. …"

88. Seized of yet another opportunity to render itself on Article 160(5), the Court in **Moses Wamalwa Mukamari vs. John O. Makali & 3 Others [2012] eKLR** opines thus:

> *"The protection offered to judicial officers in Article 160(5) of the Constitution is inherent in the independence of the judiciary as a state organ within the doctrine of separation of powers. The protection encapsulates protection from being sued in a personal capacity in a cause of action based on an act or omission emanating from the lawful performance of a judicial function. I am convinced; this is intended to make the cover against personal liability complete, especially to prevent the essential substance of the protection from oozing out. If it were to be the contrary, that kind of interpretation will result into an absurdity, because, allowing the officer to be sued and appear in his personal capacity in a suit based on an act he did in the lawful performance of a judicial function, will already have blown away the very constitutional cover for the officer's fallibility provided under Article 160(5) of the Constitution.*
>
> ***……****it will be contrary to the Constitution to enjoin the judicial officer in a suit challenging what he did in the lawful exercise of a judicial function. On his basis, the correct party in a proceeding such as this is the Attorney General, who is already a party in the suit, and does not suffer any deficiency or impairment in law as to require the judicial officer to be cited as a party. See the case of CHOKOLINGO v A-G TRINIDAD AND TOBAGO where the Attorney General was substituted for the wrong party that had been sued in the case." "…to allow a judicial officer to be named as a party in this suit, will not only violate the constitutional restriction on that kind of practice, but will also extend embarrassment to the judicial officer as well as the judiciary-a state organ exercising delegated sovereign power of the people."*

89. Odunga J in **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya and 5 Others [2016] eKLR** contemplates the place of judicial immunity within the Kenyan context to mean:

> *"A judicial officer is not immuned in respect of all actions and inactions done or omitted by himself or herself unless such omission or commission occurs in the course of performance of his or her judicial functions…It therefore follows that members of the judiciary, in carrying out their judicial functions must adhere to the dictates of the Constitution and the law. As long as they do that their actions cannot be the subject of civil and criminal litigation."*

90. My learned colleague in the same judgment, adopts the following stance:

> *"116. In my view judicial immunity must be read in the context of our Constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles that doctrine or principle must bow to the dictates of the spirit and the letter of the Constitution and the enabling legislation and it is not only the role of the Courts to superintend the exercise of such powers but their constitutional obligation to do so. In effect the immunity accorded to the judiciary by Article 160(5) of the Constitution only remains valid and insurmountable as long as its members are exercising their functions in good faith in the lawful performance of such judicial functions."*

91. **Again, in Bryan Mandila Khaemba vs Chief Justice and President of the Supreme Court of Kenya & Another [2019] eKLR,** the judicial immunity outlined under Article 160(5) is taken to be absolute with the exception towards its application being hinged on the judicial officer's good faith conduct. In this instance, the Court opines:

> *"The Court observes that towards safeguarding the independence of the Judiciary, Article 160 (5) provides that a member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. It is sufficient for the Court to hold that unless it is shown that a judicial officer has not acted in good faith in the lawful performance of a judicial function, the liability for anything done or omitted shall not accrue and that protection of judicial officers, in the opinion of the Court, spreads to liability in administrative disciplinary proceedings as appropriate or the case may be."*

92. Per M'Inoti, in **Bellevue Development Company Limited vs Francis Gikonyo and 7 Others [supra]** the immunity contemplated by Article 160(5) is available only in instances where the judicial officer in question acts in good faith in the lawful performance of his or her judicial function. He states:

> *"I would accordingly read Article 160(5) to be saying that judicial immunity is not available to a judge who acts in bad faith or omits to act in good faith in the lawful performance of his or her judicial function"*

93. The dialectic exposed by the foregoing persuasive authorities point to a scenario where the immunity of a judicial officer is absolute but only to the extent that it is in conformity with the good-faith based, lawful performance of their judicial functions. Where however a judicial officer goes out on a frolic of his own, to the extent of going beyond the constraints of what can be considered as their judicial function, he/she opens themselves up to liability. Such an instance is alluded to by my learned colleagues' in the case ***Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR*** where it is held as follows:

> *"However, if acts of a criminal nature are committed <u>outside the scope of official judicial function</u>, the judge or judicial officer can be investigated, arrested and prosecuted directly, without recourse to the disciplinary or removal process. Accordingly, serious offences such as theft, fraud, arson, rape or murder fall in the latter category*

By way of illustration of this position, in 2008, Justice GBM Kariuki was arrested and charged with the offence of attempted murder and causing grievous bodily harm, contrary to sections 220 and 234 of the Penal Code in Nairobi Magistrate's Court Criminal Case No. 1655 of 2009,. He was a sitting judge of the High Court at the time of the alleged offence, and at his arrest and arraignment. While there was a removal process under section 62 of the former constitution, he was arrested, charged and prosecuted directly without recourse to the removal process."

94. The Respondents' in support of their submissions in favour of limiting the application of the doctrine of judicial immunity lay emphasis on the decision taken in **Abdulkadir Athman Salim Elkindy v Director of Public Prosecution and Another [2017] eKLR.** In this matter **Mativo J** takes the view that judicial officers are subject to the Constitution and the law and thus cannot be completely immune from criminal prosecution, in appropriate cases, for their acts and/or omissions in the exercise of their judicial functions. As I understand him, one must look at the circumstances of the case before reaching a determination on the criminal culpability of a sitting judicial officer. His decision is reasoned out as below:

"I am satisfied that a judicial officer cannot be held to be under any civil liability for actions done in the course of his judicial duties provided that the same are done in good faith. However, these provisions do not cover criminal liability.

34. However, this being so, the provisions of Article 160 of the Constitution compel me to conclude that the fundamental principle of judicial independence cannot simply be equated with a principle of immunity of judicial officers from criminal prosecutions for all acts and/or omissions in the exercise of their judicial functions, irrespective of the circumstances of the individual case.

35. It goes almost without saying that the criminal prosecution of judicial officers for such acts and/or omissions will – and must – remain an extraordinary and exceptional step. Any decision by the office of the DPP to prosecute a judicial officer must be taken with the utmost caution, due regard being had to the fundamental principle of judicial independence, but also to the related principle that judicial officers are subject to the Constitution and the law and thus cannot be completely immune from criminal prosecution, in appropriate cases, for their acts and/or omissions in the exercise of their judicial functions.[26]"

95. The framers of the constitution entrenched judicial independence which guarantees judicial immunity to guard Judges and Magistrates from being held to account for their official act done in good faith as stated in Article 160 (5) of the Constitution. Although, the judicial immunity is absolute it does not sanction criminal liability under the guise of immunity. In the instant case, the 1st respondent drew our attention to a purported legal error committed when the 1st petitioner was making a determination in Criminal Case No. 468 of 2019. It is trite that any order, decision, findings, oral directions made by the petitioner in performing the duties of his office are a matter to be corrected on appeal or review and does not rise to a criminal liability.

96. On the back of the foregoing, and with immense respect to the position taken by the Court in **Abdulkadir Athman Salim Elkindy [supra],** in answer to the question of whether the immunity envisioned under Article 160(5) is absolute, this Court returns the verdict that it is, albeit with the highlighted exception. In this regard, t**he** views espoused by the Court of Appeal Justices in **Bellevue Development Company Limited vs Francis Gikonyo and 7 Others [supra]** are not only binding to this Court but also reflective of the position adopted by this Court in the current instance. In that matter, on the question of criminal liability of members of the Judiciary vis a vis the judicial immunity accorded to them and envisioned for the protection of the independence of the Judiciary, **Kiage JA** expressed himself as follows:

*"I have no difficulty whatsoever in holding that judicial officers are under **Article 160(5)** immunized from any action or suit on account of their performance of a judicial function. I do not apprehend that the words "good faith" and "lawful" in the sub-article are a qualification or limitation of the immunity for the rather obvious reason that so long as a judge is acting in a judicial capacity and exercising his usual jurisdiction, there is a commonsensical presumption that he is acting lawfully and in good faith. There exists an implicit covenant of good faith binding judges. That has to be the a priori position for to hold otherwise would lead to the absurd position of the good faith bases of judges' actions being debatable points and open to an intolerable deluge of litigation, each unhappy litigant suing judges left right and centre as wounded pride dictates.*

I think that even though judges are fallible human beings like everybody else, a mechanism does exist in our laws for correcting whatever errors they may commit in the discharge of their juridical functions. Aggrieved parties are at liberty to appeal as a matter of course and that appellate system suffices to deal with ordinary errors of law and fact so that in the end justice is served. I also harbor no doubts that where a judge's conduct consists in egregious illegalities, violation of the judicial oath or outright illegalities and criminality, a mechanism for removal does exist and can be triggered in appropriate cases. I am satisfied that those mechanisms suffice to guard the integrity of the judicial process and to protect the rule of law and the rights of litigants. They ensure that judicial immunity, which is laudable and necessary for the protection of judicial independence does not morph into judicial impunity or some form of Frankenstenian tyranny against the law and the people."

97. As the bastion for the protection of the rule of law and administration of justice, this Court remains steadfast in its resolution that judicial officers are under **Article 160(5)** immunized from any action or suit on account of their lawful performance of a judicial function. This however, must not be misconstrued to mean that judicial officers are above the law. The golden thread in the retinue of authorities I have placed reliance on fashions judicial immunity as the bulwark for judicial independence. As such, this Court must be zealous in its protection. More so given the fact that in a fledgling constitutional democracy such as ours, the public will always look to the Judiciary to guard their interests and dispense justice. Judicial officers must always be put in a position where they are able to carry out their duties and deliver on their mandate without the fear of reprisals that subjecting their judicial acts to tests of good faith, thereby making them debatable points, would ultimately lead to. Having said that, where a judicial officer undertakes to his own machinations beyond what could ever be conceived as judicial function, he ceases to be clothed by the immunity. On this note, I must now consider the extent to which the 1st Respondent herein can exercise its mandate in the context of the Petitioners' case.

What are the powers of the 1st Respondent in relation to the investigation, arrest and intended prosecution of the Petitioners?

98. Naturally, having established the extent to which the Petitioners may find respite in **Article 160(5)**, it is only prudent that I address how their peculiar circumstances augur with the mandate of the office of the 1st Respondent.

99. The powers of the Office of the Director of Public Prosecutions are enshrined in the Constitution under **Article 157.** As outlined under **Article 157(6)** the 1st Respondent is empowered to institute and undertake criminal proceedings against any person and before any court in respect of any offence alleged to have been committed. In going about his duty, the DPP is not subject to seeking consent or authority from anyone and shall further not be directed by anyone, **Article 157(10)** guarantees this. While the DPP is not required to seek consent in the exercise of his powers and functions, **Article 157 (11)** ensures that due regard shall be paid to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.

100. Section 6 of the "Office of the DPP Act No. 2 of 2013 provides;

> *"6. Pursuant to Article 157(10) of the Constitution, the Director 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 or her powers or functions under the Constitution, this Act or any other written law; and*
>
> *(c) be subject only to the Constitution and the law."*

101. Before I go any further, I must caution myself to be wary not to intervene when a constitutional office is conducting its duty in accordance with the powers donated to it lest I usurp its constitutional mandate. This caution is emboldened by the decision which, incidentally was referred to this Court by the 1st Respondent. In **Francis Anyango Juma v The Director of Public Prosecutions and Another Petition No 160 of 2012 [2013] eKLR** where the Court observes that:

> *"28. The powers of the DPP are intended to be exercised independently. Article 158(10) provides as follows:*
>
> ***The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.'***
>
> *29. Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself*."

102. In **Republic v Director of Public Prosecutions& 2 others Ex parte Zablon Agwata Mabea [2017] eKLR,** the Court cites with approval **Njuguna S. Ndung'u –vs- EACC & 3 Others 2014, eKLR** where that court observes:

> *"The starting point is that the court ought not to usurp the constitutional mandate of the DPP or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office and the mere fact that he intended or ongoing criminal proceedings are in all likelihood bound to fail, it is agreed, is not without more a ground for halting those proceedings. That a petitioner has a good defence in a criminal process is a ground that ought not to be relied upon by a court in order to halt a criminal process undertaken bona fide since that defence is always open to the petitioner in those proceedings. However, if the petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the petitioner's constitutional rights, the court will not hesitate in putting a halt to such proceedings."*

103. The duties of the 1st Respondent are similarly well captured by the case of **Kenneth Kanyarati & 2 others v Inspector General of Police Director of Criminal Investigations Department & 2 others [2015] eKLR** as being:

> *"For starters, the 1st and 2nd Respondents have powers to investigate alleged criminal offences. Such powers are obtained under the Constitution and in particular Articles 157(4) and 245(4) of the Constitution. The powers to investigate may also be said to be obtain under Article 252(1) (a) of the Constitution, which is to the effect inter alia, that each holder of an independent office may conduct investigation of its own initiative or on a complaint made by a member of the public. There is no doubt that the offices of the Director of Public Prosecutions as well as of the Inspector General of Police are Independent offices outlined in and protected by constitutional provisions…*
>
> ***…****The Office of Director of Public Prosecutions Act, No. 2 of 2013 on the other hand too, and in furtherance of Article 157 (12) of the Constitution, has clearly spelt out the powers of the 2nd Respondent in investigating any allegation of criminal conduct. The 2nd Respondent also exercises independently the state powers of prosecution: See Article 157(6) of the Constitution."*

104. For this Court to come to the Petitioners' aid and interfere with the mandate of the 1st Respondent as is their request, then they must show that it is impossible for the trial court to accord them a fair trial; or that prosecuting them would amount to a misuse or 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. In addition, a criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. I can do no better

than to align myself with the views taken in ***Peter George Antony D'Costa –vs- AG & Another, Nairobi Petition No. 83 of 2010 (U/R)*** where the court states:

> *"The process of the court must be used properly, honestly and in good faith and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioner's fundamental rights as the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system."*

105. A similar sentiment had earlier been expressed in ***Kuria & 3 Others –vs- AG [2002] 2KLR 69*** where the court held:

> *"The court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal scare-settling or vilification on issues not pertaining to that which the system was even formed to perform*

106. In ***Mohamed Gulan Huseein Fazal Karmali & Another –vs- The Chief Magistrate's Court, Nairobi & Another [2006] eKLR,*** *Nyamu J.* states:

> *"Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any prosecution which is vexatious, oppressive, mala fides, frivolous or taken up other improper purpose such as undue harassment of a party or abuse of the process of the Court."*

107. The light shone by the above decisions illuminates a path where the prosecutorial authority attributed to the Office of the 1st Respondent is circumspect to *intervention to prevent any prosecution which is vexatious, oppressive, mala fides, frivolous or taken up other improper purpose such as undue harassment of a party or abuse of the process of the Court*. In my considered view, the institution of criminal proceedings against judicial officers for engaging in their judicial functions would definitely fall in the realm of absurdity worthy of being termed as an abuse of the process and militating against the interests of the public and administration of justice. Such a scenario demands that the scales tilt in favour of safeguarding the independence of the judiciary as against the mandate of the 1st Respondent to undertake their prosecutorial mandate undisturbed. Consequently, the conclusion to be drawn is that if I am to find that the Petitioners' actions that were the precursor to their arrests and pre-arraignment constituted judicial acts done in exercise of judicial function, the inevitable corollary finding would be that the 1st Respondent is precluded from instituting criminal proceedings against the Petitioners and I shall thus stop their prosecution forthwith. However, if my finding is that the Petitioners actions were beyond the purview of judicial function, the 1st Respondent shall be at liberty to flex the powers contemplated under **Article 157,** hence the Petitions would ultimately fail.

Whether the arrest and pre-arraignment of the Petitioners, being members of the judiciary in the meaning of Article 161(1) of the Constitution, goes against the doctrine of judicial independence as contemplated under Article 160 (1) and judicial immunity sanctioned under Article 160(5) of the Constitution?

108. This issue for determination ties in with preceding discussion by juxtaposing the facts alluded to in the consolidated petitions with my findings on judicial immunity vis a vis the mandate of the 1st Respondent under **Article 157** as outlined above. Put differently therefore, the resolution of this issue will result in an answer to the Petitioners' gravamen.

109. Article **161(1)** outlines the membership of the Judiciary to consist of the judges of the superior courts, magistrates, other judicial officers and staff. The 1st Petitioner being a Principal Magistrate falls under this category and so do the 2nd, 3rd and 4th Petitioners who are staff at the Mombasa Law Courts. On the face of it therefore, the immunity accorded to judicial officers under Article 160(5) is applicable to the Petitioners.

110. The case against the 1st Petitioner revolves around the allegation that the failure by the 1st Petitioner to make any written directions on 4th December 2018 as to how and where to store the purportedly lost exhibits facilitated their loss and the said decision was contrary to the mandatory provisions of part F 65(F) and 68(a) of the Registry Manual that requires Courts to give appropriate directions on storage of exhibits. In addition, according to Mr. Muteti for the 1st Respondent, the order in the judgment issued on 11th June 2019 directing that the money amounting to over Kshs. 600,000/= that had been taken in as exhibits be returned to the convicted **Mr. Hussein Massoud Eid** breached **Sections 36 and 78 of the Narcotics Drugs and Psychotropic Substance (Control) Act No.4 of 1994** which obligated the 1st Petitioner upon convicting the accused to have him forfeit the seized money exhibits.

111. For the 2nd, 3rd and 4th Petitioners, Mr. Omari by his affidavits in Petition No. 143 and Petition No. 145 of 2019 avers that these petitioners were arrested on the 6th September 2019 to be charged with the offence of **stealing by person in the public service contrary to Section 268 as read with Section 280 of the penal code** in relation the 10.022kg of Heroin valued at Kshs. 30,066,000/=. He makes the case that these Petitioners are merely collateral damage in a fight between the 1st Petitioner and the 1st Respondent. He further contends that the charges against these Petitioners are bereft of any legal or factual backing as their roles in the loss of the stolen exhibits are limited.

The question is whether there is a line between Judicial Act and Ministerial Act and their applicability to judicial immunity.

112. At its core, the principle of judicial immunity is premised on the inherent doctrine of the judicial independence whose function is for the rule of Law to flourish, the Judiciary must remain to be the fortress between other arms of government in exercise of their power or abuse of it and the constitutional rights of individual citizens.

113. The in **Corpus Juris Secundum, Vol. 38, at page 807** 'ministerial act' has been defined as follows;

> "***The term 'ministerial act' has been defined as meaning one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or exercise of his own judgment on the propriety of the acts being done. What is said to be the legal definition of a ministerial act is an act that is mandatory on an officer, under given circumstances and calls for the exercise of no judgment or discretion on the part of such officer. It is well recognized that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial."***

114. A judicial Act has been illustrate in the Indian case of **Mohd Akber Yaseen vs. Rizwan Sulthana (Aph)-2010-7-129.**

> *"Taking cognizance of an offence and issuing summons in a criminal case is certainly a judicial act, and the Magistrate while performing the said judicial act, has to apply his/her mind on the material placed before the Magistrate and then only take cognizance of the offence, in case ingredients for that particular offence are made out and thereafter order issue summons to the accused. Since issuing of summons under Section 204 Cr.P.C. involves exercise of judicial mind and passing a judicial order, issuing of summons thereunder is construed as an order which is revisable under Section 397 Cr.P.C."*

115. While a ministerial Act was defined in ***Yaseen vs. Rizwan Sulthana (supra)***

> *"Therefore, while issuing notice in domestic violence case filed by respondent Nos.1 to 5, the Magistrate is not expected to apply or exercise his/her mind before issuing notices to the respondents therein. No summonses are issued in a domestic violence case, but only notices are issued. Issuing notices to the respondents in a domestic violence case, in my considered opinion, is not a judicial act but is only a Ministerial act performed by the Magistrate. As against a Ministerial act, no revision is maintainable "*

116. Similarly in the ***State ex rel. Curry v. Gray,*** 726 S.W.2d 125**, 128 (Tex.Cr.App.1987),** we held that:

> ***"[A] Ministerial act is one which is accomplished without the exercise of judgment or discretion. If there is any discretion or judicial determination attendant to the act, it is not ministerial in nature. Nor is a ministerial act implicated if the trial court must weigh conflicting claims or collateral matters which require legal resolution."***

117. Similarly, in ***State ex rel. Thomas v. Banner,*** 724 S.W.2d 81, **83 (Tex.Cr.App. 1987**) (emphasis added), it was stated,

> "***The question we must then answer, to decide if the instant cases involves a ministerial act, is whether the respondent had the authority to" act as he did.***

118. *Black's Law Dictionary (6th ed. 1990) (citations omitted) defines "ministerial act" as follows:*

> ***An act is "ministerial" when its performance is positively commanded and so plainly prescribed as to be free from doubt. [An official's duty is "ministerial" when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts. [A "ministerial" act is o]ne which a person ... performs under a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his ... own judgment upon the propriety of the act being done."***

119. **Thus it is clear that a "ministerial" act is the antithesis of a "discretionary" act. See.Stearnes v. Clinton, 780 S.W.2d 216**

120. A "ministerial" act is one which is clearly compelled by the facts and legal authority extant in a given situation. Moreover, a so-called "discretionary" function may become "ministerial" when the facts and circumstances dictate but one rational decision: "When it is decided that a trial judge exercising a `discretionary' authority has but one course to follow and one way to decide then the discretionary power is effectually destroyed and the rule purports to grant such [discretionary] power is effectively repealed." ***Jones v. Strayhom,*** 321 S.W.2d 290, 295 (Tex. 1959), quoted in *Johnson,* supra at 917.

121. The question in need of answering then is whether each of the above rendition of facts represents a judicial act. To make this possible I look to **Stump v. Sparkman 435 U.S. 349 (1978)** where the United States Supreme Court established what constitutes a judicial act for purposes of judicial immunity. Two conditions are precedent in their view. The first looks at whether the act was a function normally performed by a judge and the other examines whether the parties dealt with the judge in his judicial capacity. A judicial act requires the kind of discretion or judgment closely connected to the adjudication of controversies. For S. De Smith, in **Judicial Review Of Administrative Action (1959)**, Judicial functions are typically characterized by the exercise of the power to make a binding and conclusive decision, the exercise of power to hear and determine a controversy, the application of objective standards for the determination of an issue, the declaration or alteration of the rights and obligations of individuals, and certain procedural attributes. On the other end of the spectrum, legal scholars and jurists have characterized non-judicial conduct as conduct not requiring judicial discretion, or highly aberrational behaviour and conduct not requiring determination of parties' rights and includes ministerial, administrative, and legislative acts. The purpose behind the doctrine of judicial immunity is to assure independent judicial decision making. The judicial act requirement of judicial immunity is a basic tenet of the doctrine. If there is no judicial act performed, absolute immunity does not apply. This further buttresses the notion that judicial officers are not above the law.

122. Going by the definitions given above, the 1st Petitioner's actions that form the basis of the charge against him are unsustainable. From the evidence adduced, it is clear that all that the 1st Petitioner did was apply his judicial discretion in denying an oral application and further he delivered the judgment of 11th June 2019 imprisoning the accused person in **Mombasa Chief Magistrate Criminal Case No. 468 of**

2019 R v Hussein Massoud Eid & 2 others but at the same time ordering the release of the foreign currency found in the accused person's possession. The said decisions have to the best of my knowledge neither been Appealed against nor has an application for revision been made to the High Court in relation to the same. When this fact was put to the 1st Respondent, their response was that it would have been an exercise in futility to appeal or seek to have the decision reviewed as the foreign currency exhibits had already been released to the accused person in **Mombasa Chief Magistrate Criminal Case No. 468 of 2019 R v Hussein Massoud Eid & 2 others** and the heroin exhibits had disappeared from the exhibit store. This position is one I cannot abide.

123. It is my finding that in handling of the exhibits, the 2nd 3rd and 4th Petitioners were exercising a ministerial Act in obedience to the mandate of legal authority, without regard to or exercise of their own judgment on the propriety of the acts being done and the law on handling of exhibits is clearly prescribed and there is no room left for the exercise of discretion, Therefore, such an Act is not covered under the judicial immunity guaranteed under Article 160(5) of the Constitution.

124. If for the reasons being advanced herein the 1st Respondent was disillusioned with the judicial decisions made by the 1st Petitioner, the correct forum would have been to either appeal the said orders or to seek a review of them. These fora are what would have been appropriate to address and correct any error of commission or omission as averred by the 1st Respondent. It bears reiteration that in the Court of Appeal decision of **Bellevue Development Company Limited vs Francis Gikonyo & 7 Others [supra], Kiage J** cites with approval the interpretation of **Article 160(5)** of the Constitution espoused by Gikonyo, J in **Moses Wamalwa Mukamari Vs. John O. Makali & 3 Others [2012] eKLR** where he had occasion to opine thus:

> *"The protection offered to judicial officers in Article 160(5) of the Constitution is inherent in the independence of the judiciary as a state organ within the doctrine of separation of powers. The protection encapsulates protection from being sued in a personal capacity in a cause of action based on an act or omission emanating from the lawful performance of a judicial function. I am convinced; this is intended to make the cover against personal liability complete, especially to prevent the essential substance of the protection from oozing out. If it were to be the contrary, that kind of interpretation will result into an absurdity, because, allowing the officer to be sued and appear in his personal capacity in a suit based on an act he did in the lawful performance of a judicial function, will already have blown away the very constitutional cover for the officer's fallibility provided under Article 160(5) of the Constitution."*

125. In totality, the 1st Petitioner was exercising his judicial function in good faith and therefore, under Article 160(1) and 160(5) of the Constitution he is not liable in an action or suit in respect of anything done or omitted to be done in good faith in lawful performance of his judicial function.

126. The letter and spirit of Article 160 (5) of the Constitution is espouses the concept of good faith in the lawful performance of the Judicial function. These words of good faith have no definitive functional definition but it is a sense which imports honesty, trust and integrity. In the theory of constitutionalism good faith is a fundamental principle for it is borne out of the duty that Judges take an oath of office to support and defend the constitution without fear, bias or ill will. That when exercising discretion to interpret the constitution and any Laws every Judge has a duty to employ good faith. In my view the concept of good faith as it relates to work of a judicial officer is more of an instrument of interpretation in the adjudication of disputes as provided for under Article 50 (1) of the Constitution. The role of good faith as a notion in the administration of justice is designed to sufficiently apply the legal tools and the resources as a means and not an end in the determination of the competing rights of the citizenry. Further, the concept imposes a general standard of behavior and the right to the legitimate expectation. Making reference to the principle legitimate expectation the Supreme Court in this case **Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others** where the Supreme Court stated that:

> **"***Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."*

In my view taken together with the other many factors ostensibly employed in the administration of justice the test of good faith, is when a Judge or Magistrate decides only in accordance with the evidence and arguments properly and openly put before him or her without any external influence.

127. It follows that the 1st petition constituted a criminal court and the 1st respondent endeavored to present the necessary evidence and material to discharge the burden of proof beyond reasonable doubt in *Criminal Case No. 468 of 2018 Republic versus Hussein Massoud Eid and two others.* In the said Judgement it is essential to bear in mind that the prosecution obtained a conviction against accused persons who were subsequently sentenced in terms of Section 4 (a) of the Narcotic Drugs & Psychotropic Substances (Control) Act No. 4 of 1994. The 1st respondent contends that the Judgment so delivered gave birth to a series of Criminal Act committed by the 1st petitioner which became a subject of criminal proceedings in *Nairobi Chief Magistrate's ACC No. 140 of 2019 – Republic vs Kagoni Edgar & 3 Others*. The circumstances of the submissions by the 1st respondent when examined within the four corners failed to show existence of any shred of evidence that the petitioner carrying out his function as a judicial officer acted in bad faith. The Law is well settled that mens rea may be inferred from the fact on spoken words or conduct which from an objective point of view plainly constituted a criminal offence. The purpose of judicial immunity and good faith is to protect the fountain of justice by preventing the litigants to a case or any other person preferring a civil or a criminal liability calculated to vilify, cause fear, despondence, ridicule, calculated to undermine the administration of justice.

128. The Respondents' buttress their assertion that the 1st Petitioner is engaged in outright criminal conduct by contending that his decision to release the foreign currency exhibits breached **Sections 36 and 78 of the Narcotics Drugs and Psychotropic Substance (Control) Act No.4 of 1994**. These Sections provide:

> *36. Forfeiture of property*

Subject to this Part, where any person has committed a specified offence, all the property owned by him on the date of the commission of that offence or acquired by him after that date shall be forfeited to the Government.

While **Section 78 provides:**

78. Condemnation of seized things

"Where a person is convicted of an offence under this Act and any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or any other article or thing, liable to forfeiture to the Government under this Act in respect of that offence has been seized under this Act, the court convicting him may, in addition to any other penalty imposed on him, order that the narcotic drug, psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or other article or thing be condemned and forfeited to the Government."

129. As a general principle no person shall be deprived of his property without due process of Law.

130. A proper interpretation of these sections returns a verdict that while the section contemplates forfeiture and condemnation of seized things, it must be noted that forfeiture is not automatic. Pointing to this fact is Section 41 of the same Act which outlines in great detail how forfeiture ought to be conducted.

131. Where then does that leave the 2nd, 3rd and 4th Petitioners? It is beyond the shadow of doubt that they are judicial officers by virtue of **Article 161(1).** Ostensibly then, they ought to be able to enjoy a similar privilege of judicial immunity as the 1st Petitioner. However, this in my well thought out view is not the case. See, as I have mentioned, absolute immunity is concomitant with engaging in a judicial act. As I see it, the 2nd Petitioner in his capacity as the court assistant, the 3rd being in charge of exhibits and the 4th Petitioner a member of the support staff, could not be engaged in judicial acts. Storage and handling of exhibits is a function of administrative staff in the judiciary. This is distinguishable from the defining characteristics of judicial functions including the exercise of the power to make a binding and conclusive decisions, the exercise of power to hear and determine a controversy, the application of objective standards for the determination of an issue, the declaration or alteration of the rights and obligations of individuals, and certain procedural attributes.

132. To this court, bereft of the requirements of judicial discretion, or highly aberrational behavior, the 2nd, 3rd and 4th Petitioners functions can only be construed as non-judicial conduct that is typically not requiring of determination of parties' rights and includes ministerial acts. Ministerial acts are those that only require for the person upon whom a duty is imposed either y law or by a superior administrative official, to perform that duty without employing any judgement or discretion. Per the Court in **Grider v. Tally, 77 Ala. 422** : *"The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion."*

133. In **Flournoy v. Jeffersonville 28 7 Ind. I69, I74 (1861** a ministerial act is regarded as: *"A ministerial act perhaps, be defined to be one which a person performs in a state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his judgment upon the propriety of the act being* done."

134. Since the functions of the 2nd, 3rd and 4th Petitioners cannot qualify to be described as judicial acts, it follows therefore that the absoluteness of the immunity encapsulated by Article 160(5) dissipates and leaves them liable to prosecution for acts or omissions that do not constitute judicial functions that they engage in absent good faith. Being of the above persuasion, I hasten to add that while the 2nd, 3rd and 4th Petitioners may not have been clothed in the cloak of immunity that shielded the 1st Petitioner by virtue of his actions constituting judicial functions, our Constitution provides ample safeguards for the protection of their rights. Article 50(1) provides that every one of the Petitioners has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. **Onguto J.** (the late) stated in the case of **Paul Ongili vs Bernard Omondi Onginyo & 2 Others [2016] eKLR** as follows;

"This court has stated previously that it is always in the interest of the public that persons accused of criminal conduct are made to face the criminal justice process without hindrance. Further, that the same public interest also dictates that such offenders are fairly treated and not subjected to prosecutor's misconduct which would bring the criminal justice system to disrepute: See Godfrey Mutahi Ngunyi –vs- Director of Public Prosecutions and 4 Others [2015] eKLR. I come to the conclusion that the wider public interest would favour the petitioner facing the criminal justice system once the 3rd respondent gives his nod. I also hasten to add that the criminal justice system has enough constitutional and statutory safeguards to protect the petitioner's rights even as the 3rd respondent institutes prosecution."

Whether the manner of the arrest and pre-arraignment of the Petitioners' was conducted in violation of their human rights guaranteed under the constitution?

135. Under Article 49 of the constitution there are fundamental and primary rights of an arrested person which cannot be violated in the enforcement of any substantive or procedural penal Laws. The jurisprudential policy of Criminal Law is founded on a bundle of values and rights. At the heart of any suspect to criminal offence is the doctrine of presumption of innocence. The constitution being a living instrument with a sole and consciousness of its own see case of *Ndyanabo v Attorney General [2001] 2 EA 485* has coded fundamental rights of arrested persons in Article 49 which include:- to be informed promptly the reason for the arrest, the right to remain silent, to communicate with an advocate and other persons whose assistance is necessary not to be compelled to make any confession or admission clear stipulation of the Law of arrest and detention is provided for in the international instruments which form part of our laws as expressly provided for in Article 25 of our constitution. The universal declaration of human rights Article 9, the African Charter on human and peoples' rights in Article 6, the international covenant on civil and political right provide for the right to presumption of liberty and freedom from arbitrary arrest or detention. Further, Article 29 of the constitution recognizes that every person has the right to freedom and security of the person

which includes the right not to be:- a). deprived of freedom arbitrarily or without just cause. b). detained without trial except during a state of emergency. The concept of arbitrariness has been defined by the human rights committee to mean: "Arbitrariness is not to be equated with against the Law, but must be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of Law.

136. In many ways the state is obliged to guarantee every arrested person full protection of this right by their nature more specifically right to liberty is sacrosanct and fundamental to a human being. The Supreme Courts India which shares a Common Law heritage with our country in the case of **Neeru Yadav vs State of U. P & Another Criminal Appeal No. 2587 of 2014** held:

> *"… we are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bedrock of constitutional right and accentuated further on human rights principles. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the function of any civilized society. It is a cardinal value on which the civilization rests. It cannot be allowed to be paralyzed and immobilized. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order."*

137. At this juncture, I now turn to the other substantive issue of whether the Petitioners' rights and freedoms were violated by the Respondents. My point of departure is the holding in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** where the court commenting on the why a petition ought to be precise in outlining alleged violations of rights had this to say:

> *"(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."*

138. It is trite law that the burden of proving violation or threat of violation is upon the Petitioners as was established in **Anarita Karimi Njeru Vs- Republic (1976 – 80) I KLR 1272**. Further to this, it is also settled that the Petitioners must patently express the manner in which the Respondents have violated their rights as established in **Matiba v Attorney General [1990] KLR 666.**

139. It is averred that the arrest and pre- arraignment was orchestrated in a manner that militates against the provisions of Article 28 on human dignity. They further charge that their right under Article 29 on freedom and security of the person was infringed as they were deprived of freedom arbitrarily and without just cause. Secondly, in so far as under the provisions of Article 49 the right to be released on reasonable bail unless compelling reasons have been demonstrated by the state is a right to be accessed by the Petitioners.

140. The view of the constitutional foundation is for government functionaries to exercise their authority in consonant with Article 10 on national values and the principles of governance. While I recognize the respondents have a measure of discretion. However, the jurisdiction should be exercised in manner which inspires public confidence and fair administration of justice.

141. Though the Petitioners were arrested in Mombasa on the 6th September 2019 ostensibly for offences committed within the precincts of Mombasa Law Courts, they were ferried over 500 kilometers away to Nairobi to be arraigned at the Jomo Kenyatta International Airport Law Courts. This action by the 1st Respondent it is contended, is a calculated violation of the Petitioners right to access Justice as guaranteed under Article 48 of the Constitution.

142. Access to justice is a necessary condition to a right to a fair hearing in Kenya this aspect of access to court as provided in Article 48 does not make provision or access to Court at state expense. It therefore means for purposes of the pending trial the Petitioners are to pay for the litigation pending its determination. This is so as the said decision did not factor in the proximity of that Court from the Petitioners' physical residences and neither does it account for the cost that would be incurred by the Petitioners during their trial bearing in mind that the petitioners are domiciled in Mombasa County.

143. The court in *Ndyanabo (supra)* observed as follows on right of access to justice:

> *"A person's right of access to justice was one of the most important in a democratic society and, in Tanzania, that right could only be limited by legislation that was not only clear but which was also not violate of the Constitution. The fundamental right of access to justice was what linked together the three pillars of the Constitution, that is, the rule of law, fundamental rights and an independent, impartial and accessible judicature.*

144. From my vantage point in these proceedings, I am inclined to take the position that the Petitioners' rights to human dignity, freedom from cruel treatment, physical and psychological torture as guaranteed under **Articles 25, 28 and 29** were violated. This court agrees with Counsel for the Petitioners on this front. My decision is based on the holding in **Moses Tengeya Omweno v Commissioner of Police & another Civil Appeal 243 of 2011 [2018] eKLR** where it was held that:

> *"39. As regards violation of the right to human dignity, the East African Court of Justice in **Samuel Mukira Mohochi -v- Attorney General of Uganda, EACJ Reference No. 5 of 2011** expressed that detention is indeed deprivation of liberty. When it is illegal, it is*

not only an infringement of the freedom of movement, but also an act that undermines one's dignity. In the instant appeal, the appellant contended that his detention at Embakasi Police Station in Nairobi Kenya and subsequent detention in Amsterdam and Kosovo were a violation of his fundamental rights."

Whether the Petitioners are entitled to the reliefs sought?

145. The Petitioners' seek judicial review orders quashing the decisions of the 1st Respondent and precluding them instituting criminal proceedings or continuing with already initiated proceedings' Courts have held, as they did in **Kimunai Ole Kimeiwa & 5 others v Joseph Motari Mosigisi (The then District Commissioner, Rongai District) & 3 others Petition 38 of 2014 [2019] eKLR** that a suit characterized by abuses of power by the investigative and prosecutorial agencies can be properly founded under the Constitution. In this case it was held:

"This argument would work if this was a suit sounding only in torts. However, looking at the pleadings, the substance of the suit can only be called a Constitutional Tort. Almost always a suit for malicious prosecution involves some allegation of deprivation of liberty as guaranteed in the Bill of Rights. This, then, implicates the concept of a Constitutional Tort in cases such as this one. As Prof. Michael Well explains, the prime objective of a constitutional tort is to protect a broad range of common law interests encompassed within the Bill of Rights' liberty interests in circumstances where the official's conduct is fairly characterized as an abuse of power."

146. Similarly, in **John Atelu Omilia & another v Attorney General & 4 others Petition 447 of 2015 [2017] eKLR,** faced with a case that had allegations of violations of human rights by investigative agencies, the court held:

"…In cases of violation of fundamental rights, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the actions complained of. The court should examine the case in light of the provisions of the Constitution…"

147. Going further it was stated:

"…Even though, the petitioners could properly have sued for malicious prosecution, to me, the above issues are justiciable controversy appropriate and ripe for judicial determination, hence, the need for this court to determine the constitutionality or otherwise of the said allegations their acquittal notwithstanding."

148. Finally, in the Court of Appeal decision of **Gitobu Imanyara & 2 Others vs The Attorney General Civil Appeal 98 of 2014 (2016) eKLR** it was held that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court. However, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case.

"…It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is ***"appropriate and just"*** *according to the facts and circumstances of a particular case.* ***As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements****. (****emphasis supplied)*** *The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration..."*

149. For a determination on what concerns to keep in mind in awarding damages for constitutional violations, I find solace in **Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004** where the Privy Council held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense. Per Lord Nicholls at Paragraphs 18 & 19:

"When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.

All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. ***Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award." (emphasis supplied)***

150. A similar position is established by the Constitutional Court of South Africa in **Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291** where it held that:

"...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

"...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

151. Keeping in view the above principles there is a sense that fundamental rights as defined under the Bill of Rights of our constitution are for every citizen who must claim them as of right and are binding upon every organ, person, authority and state. The enforcement of the right incase of infringement or violation is the scheme provided for under Article 23 of the Constitution. It is this jurisdiction I endeavor to invoke to award damages under the doctrine of a constitutional tort. The question of liability here is not to punish the primary function of a state officer but to grant a relief for contravention of a fundamental right insulated under the constitution. I remain persuaded by the guidelines in the case of *Byrne v Ireland and the Attorney General [1972] IR 241,* a decision of the Supreme Court of Ireland. **Walsh J** stated at 281:

"Where the people by the Constitution create rights against the State or impose duties upon the state, a remedy to enforce these must be deemed to be also available. There is nothing in the Constitution envisaging the writing into it of a theory or immunity from suit of the State stemming from or based upon the immunity of a personal sovereign who was the keystone of a feudal edifice. English common-law practices, doctrines, or immunities cannot qualify or dilute the provisions of the constitution."

152. I have conclusively reckoned with the issues which were raised before me in the consolidated Petitions. What remains is to summarize my findings in this judgment and my disposition of the petition. Of consequence to the deliberations above and findings thereto, the resultant are the orders that recommend themselves:

a. As a general principle judicial immunity to all Judicial Officers is absolute and not liable to any civil or criminal action for any judicial act done in good faith within their jurisdiction.

b. There is a difference in structure of the judiciary with regard to the staff exercising discretion on a constitutional or a statutory cause of action and a class executing the Ministerial Act.

c. Judicial independence is critical to the maintenance of the rule of Law. In addition, egregious judicial behavior, such as corruption and other breach of Criminal Law must remain and will be dealt with through the criminal process as provided for under the constitution as every person is equal before the Law.

d. A declaration hereby issues that the act of the Directorate of Criminal Investigations of the National Police Service to investigate, arrest and pre-arraignment detention of the 1st Petitioner because of the judicial orders and directions that he made in the course of his judicial duties in Mombasa Chief Magistrates Court Criminal Case Number 468 of 2018 is a violation of Articles 160(1) and 160(5) of the Constitution and such investigation, arrest, and pre-arraignment detention were all invalid within the meaning of article 2(4) of the Constitution of Kenya, 2010.

e. A declaration that the decision of the 1st Respondent to authorize the arrest, pre-arraignment detention and prosecution of the 1st Petitioner because of the judicial orders and directions that he made in the course of his judicial duties in Mombasa Chief Magistrates Court Criminal Case Number 468 of 2018 is a violation of articles 160(1) and 160(5) of the Constitution and therefore invalid within the meaning of article 2(4) of the Constitution of Kenya, 2010.

f. An order of Certiorari does bring forth into this Honorable Court and issue quashing the recommendations of the Directorate of Criminal Investigations to the Director of Public Prosecutions and the consequential decision of the Director of Public Prosecutions to charge the Petitioner contained in the Press Statement dated 07th September, 2019 to charge Kagoni Edgar Matsigulu, the 1st Petitioner herein with obstruction of justice contrary to Section 117 of the Penal Code, Aiding the commission of an offence contrary to Section 8(c) of the Narcotic Drugs and Psychotropic Substances (Control) Act or any other charge that may be founded on the facts of the 1st Petitioner's conduct as a judicial officer in Mombasa Chief Magistrates Court Criminal Case Number 468 of 2018.

g. An order of Prohibition does remove from this court and issue forthwith prohibiting any Magistrates Court in Kenya from taking plea or any further criminal proceedings arising from the recommendations of the Directorate of Criminal Investigations to the Director of Public Prosecutions and the consequential decision of the Director of Public Prosecutions to charge the 1st Petitioner contained in the Press Statement dated 07.09.2019 to charge Kagoni Edgar Matsigulu, the Petitioner herein with obstruction of justice contrary to Section 117 of the Penal Code, Aiding the commission of an offence contrary to Section 8(c) of the Narcotic Drugs and Psychotropic Substances (Control) Act or any other charge that may be founded on the facts of the Petitioner's conduct as a judicial officer in Mombasa Chief Magistrates Court Criminal Case Number 468 of 2018.

h. A declaration is hereby made that the arrest, pre-arraignment detention of the 1st, 2nd, 3rd and 4th Petitioners in the circumstances of this case was a violation of their right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause, and, the right to inherent dignity and the right to have that dignity respected and protected and contravenes articles 27 (1), 28 and 29 of the Constitution of Kenya, 2010.

i. General damages for violation of the Petitioners' fundamental rights and freedoms are awarded at the sum of Ksh.2,000,000.

j. Each party shall bear their own costs of the litigation.

153. For the avoidance of doubt, save for the orders explicitly made hereinabove, all the other reliefs sought in Constitutional Petition 143 of 2019, Constitutional Constitution Petition 144 and 145 of 2019 are hereby disallowed.

154. Before penning off, I would be remiss not to recognize the immense contributions made by the Advocates Mr. Havi, Mr. Ongoya, Mr. Wambui, Mr. Okoko, Mr. Simiyu, and for the state Mr. Muteti and Mr. Okelo both Senior Assistant Directors in the Office of the DPP seized of the conduct of this matter. Your efforts are truly commendable.

It is so ordered.

Dated, Signed and Delivered at Malindi this 3rd day of December, 2019.

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R NYAKUNDI

JUDGE

In the presence of

1. Mr. Havi for the 1st petition

2. Mr. Binyenya

3. Ms. Wamotsa

4. Ms. Aoko

5. Mr. Igunga for the 1st Respondent - DPP

5. Mr. Okoko for the Petition No. 145 of 2019

6. Mr. Makuto for the Attorney General

7. Mr. Kirui holding brief for Nyongesa for LSK