REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO 651 OF 2017

REPUBLIC.....APPLICANT

VERSUS

OFFICE OF THE DIRECTOR

OF PUBLIC PROSECUTION.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

CHIEF MAGISTRATE KIBERA LAW COURTS.....3RD RESPONDENT

AND

INTERNATIONAL CENTRE

FOR LAW AND POLICY.....1ST INTERESTED PARTY

Z E E & C N N.....2ND INTERESTED PARTY

MIKE NJERU.....3RD INTERESTED PARTY

EX PARTE:

SYLVIA WAIRIMU NJUGUNA

ALSO KNOWN AS SYLVIA WAIRIMU MULI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 15th November, 2017, the applicants herein, **Sylvia Wairimu Njuguna** also known as **Sylvia Wairimu Muli** seeks the following orders:

> **1) An order of prohibition directed at the Respondents, whether by themselves, their servants, agents, officers, successors and/or assigns, do issue prohibiting them from taking any steps which would result cumulatively or otherwise to arrest and prosecution of the ex parte Applicant pursuant to the decision of the 1st Respondent contained in the letter dated 19th October, 2017 or doing anything that would prejudice the rights and interests of the ex parte applicant.**
>
> **2) An order of prohibition directed at the Respondents, whether by themselves, their servants, agents, officers, successors and/or assigns, do issue prohibiting them from arresting, arraigning and/or prosecuting the ex parte applicant in relation to Traffic Case No. 6843 of 2017.**

3) An order of prohibition directed to the 3rd Respondent do issue prohibiting him/her from hearing and determining the Kibera Traffic Case No. 6843 of 2017 initiated by the Charge Sheet dated 13th November, 2017, against the ex parte applicant.

4) An order of prohibition directed at the Respondents, whether by themselves, their servants, agents, officers, successors and/or assigns, do issue prohibiting them from taking any steps which would result cumulatively or otherwise to arrest and prosecution of the ex parte Applicant pursuant to the road accident which occurred on 1st February, 2015 along the Southern By-pass or doing anything that would prejudice the rights and interests of the applicant.

5) An order of certiorari do issue to remove into the High Court and quash the 1st Respondent's directive to the 2nd Respondent and/or decision contained in the letter dated 19th October, 2017 purporting to re-open for trial of the ex parte applicant on account of road accident which occurred on 1st February, 2016 in total abrogation of the Applicant's right to fair administrative action.

6) An order of certiorari do issue to remove into the High Court and quash the Charge Sheet dated 13th November, 2017, commencing Traffic Case No. 6848 of 2017 at the Chief Magistrate's Court, Kibera Law Courts against the ex parte applicant.

7) Costs of this application be provided for.

Applicant's Case

2. According to the ex parte applicant herein, she is the Director-Consumer Business Unit, Safaricom Ltd and is the holder of a valid driving licence under classes COFC (HUF-12 6) which allows her to drive Class E motor vehicles and has been a driver for over twenty years with no history of a Traffic Offence.

3. According to the ex parte applicant, by virtue of her said employment, she is entitled to, among other benefits, a Company maintained motor vehicle and was, as at February, 2015, assigned a motor vehicle registration number KBU 483M, Toyota Prado which vehicle was involved in a road accident on or about 1st February, 2015 at around 11.35 a.m. along the Southern By-Pass as she drove from Ngong Road direction towards Lang'ata Road.

4. According to the applicant she reported the said accident the same day and recorded her statement on 2nd February, 2015. However as a result of the said accident, a female minor aged 8 years old, **M K E,** died.

5. It was averred that upon recording her statement the applicant was requested to furnish the police with all her contact details for future contacts, if need be. However, at the time of releasing the said vehicle, she was informed by a police officer at the station that after the initial investigations, it was obvious that the ex parte applicant was not on the wrong in relation to the said accident, since at the point of the accident there was a wall and road barrier preventing pedestrians from crossing over the by-pass and there was an underpass for pedestrian crossing and according to the road signs vehicles were not allowed to stop thereat.

6. It was however averred that the applicant was shocked when two years after the occurrence of the accident, a petition was filed by **International Centre for Policy and Conflict** (hereinafter referred to as "ICPC" or "the interested party"), against the ex parte applicant, her employer and the Respondents herein in Petition No. 313 of 2017 in which it was sough *inter alia*, an order compelling the Respondents to perform their constitutional duty and investigate and institute appropriate proceedings against the ex parte applicant. It was averred that whereas the ex parte applicant and her employer responded to the petition the 1st and 2nd Respondents despite being aware of the same did not do so though the substantial orders were directed at them.

7. However by a letter dated 19th October, 2017, the 1st Respondent directed the 2nd Respondent to charge the applicant with the offence of causing death by dangerous driving contrary to section 46 of the ***Traffic Act*** and a charge sheet was drawn and circulated to the media in accordance with the 1st Respondent's directions. It was averred that the 1st Respondent released to the social media all the information relating to the accident before contacting the Applicant on the same.

8. It was the applicant's case that the Respondents' conduct amounts to clear violations of the various provisions of the ***Fair Administrative Action Act*** and a contravention of the applicant's constitutional rights as enshrined in Articles 20, 27, 47 and 50 and amounted to a breach of the 1st Respondent's duties and excess of its powers under Articles 10, 157 and 232 of the Constitution.

9. It was the applicant's case that by reopening the case on social media where the applicant has been condemned unheard instead of responding to the petition, her constitutional rights have been violated. To the applicant that decision amount to capricious use of power by the State contrary to Articles 50 and 159 of the Constitution as read with Article 50(1)(e) thereof which provides that the accused person has the right to have the trial begin and conclude without unreasonable delay. It was her case that the wanton disregard of the rule of law and the laid down procedures in respect to fair hearing necessitates a grant of the orders sought herein.

10. According to the applicant, it is clear that the 1st and 2nd Respondents were fully aware of the circumstances leading to the death of the minor and procedure and/or process of the law to be adhered to in order to bring to close the case relating to the road accident reported on 2nd February, 2015 but refused and/or neglected to pursue the same. The applicant contended that the said failure to act within the prescribed law exposed her to public anger, slander and ridicule on social media hence contravened Article 27(1) and (2) of the Constitution with respect to the ex parte applicant's legitimate expectation to equal protection and enjoyment of all rights and fundamental freedoms.

11. It was the applicant's case that other than the said Petition, there is no new complaint filed against the ex parte applicant or new evidence in relation to the accident to warrant re-opening of the case. According to her, no explanation has been offered for the reopening of the investigations against her and the said action has been taken without notice or explanation as to discovery of new evidence which was not available in 2015 hence the said decision appears to have been motivated by malice and the desire to harass and humiliate her and besmirch her name by virtue of her position at Safaricom Limited.

12. It was contended that in filing the said Traffic Case at Kibera Law Courts for the purpose if plea-taking on 20th November, 2017 before the conclusion of the Petition No. 313 of 2017, the ex arte applicant was being subjected to dual proceedings at the same time and that the decision to arrest the ex parte applicant amounts to capricious abuse of the process on the part of the 1st Respondent, is oppressive and vexatious warranting the Court's intervention. The said decision, it was contended was at the behest of the Petitioner in Petition 313 of 2017 or other undisclosed persons who are creating an impression that either the ex parte applicant or her employer acted unlawfully in making payment to the parents of the deceased minor or influence the closure of the file.

13. It was the ex parte applicant's case that unless the order sought herein are granted, it will not be possible for her to be accorded a fair trial more so as the Charge Sheet has been circulated on social media and the public is convinced that she is guilty of the offence of causing death even before she is heard in contravention of Article 50(2) of the Constitution It was disclosed that though an Inquest No. 15 of 2017 was commenced at Kibera Law Courts, the office of the Director of Public Prosecution has now directed that the Traffic Offence Case be filed against the applicant irrespective of the pendency of the said proceedings arising from the same facts.

14. The ex parte applicant averred that in their statements, the parents of the deceased have intimated that they are not intended in pursuing any traffic charge against the ex parte applicant and that the investigation report has also absolved the ex parte applicant hence without any new evidence, the charges facing her are malicious and an abuse of the Court process.

15. It was further averred that the payment of Kshs. 950,000.00 to the family of the deceased child was made purely on humanitarian and compassionate grounds and did not amount to any admission of culpability on the applicant's part and that the said payment did not violate or infringe on any rights of the deceased child or her family. The applicant maintained that her conduct after the accident was lawful as she immediately reported the same at Lang'ata Police Station as per Occurrence Book (OB) Entry Number 3/01/02/2015 and instructed her employer's security team to follow the child to hospital to ensure that she was attended to promptly. However, her role regarding the investigation ended when she reported the accident and surrendered the motor vehicle to the police.

16. The applicant however accused the firm of Suyianka Lempaa and/or their principals of intention to direct the "thorough investigations" which they alleged the police failed and/or refused to undertake.

17. The applicant disclosed that she became aware that an Inquest into death of the child had been filed around August 2017 after the Petition filed by ICPC was served upon her.

18. As regards the letter dated 21st September, 2017, the applicant averred that it was an afterthought and was drafted long after the filing of the Petition by ICPC and that its contents were contrary to the initial findings contained in the Police Report in which it was clear that she was not to blame for the accident and therefore was not issued with the Notice to attend Court. The applicant contended that the allegations contained in the said letter that she was over-speeding were baseless and not supported by any evidence. In her view, the said letter must have been written on directions and/or pressure from third parties and is thus not a product borne of exercise of lawful discretion by the 1st or 2nd Respondent. She noted that the said letter was written long after she had filed her response to the Petition No. 313 of 2017 filed by ICPC on 22nd June, 2017.

19. The applicant revealed that immediately after the accident, she alighted from her motor vehicle with the intention of picking up the injured child and taking her to hospital. However, a rowdy and riotous crowd started to build up at the scene and she was constrained to drive off to the nearby Lang'ata Police Station since she feared for her safety and that of her children who were in her motor vehicle. She therefore denied that she fled the scene of the accident and maintained that she acted reasonably and sensibly in the circumstances.

20. The applicant insisted that she was not notified of the intention to charge her with the offence of causing death by dangerous driving contrary to section 46 of the ***Traffic Act*** or any other offence and neither was she notified of the decision to withdraw the Kibera Chief Magistrates Court Inquest No. 8 of 2017. According to her she first became aware of the decision to charge her with the said offence of causing death by dangerous driving on 13th November, 2017 through social media when the 1st Respondent posted the charge sheet and the related correspondence on social media, an act which in her view was an outright abuse of the court process. Based on legal advice that ex parte applicant believed that the sequence of events would have been as follows;-

a) She would have been notified of the 2nd Respondent's intention to re-open the investigation which had previously been concluded and she had been absolved of any culpability;

b) She would have been notified of any new evidence obtained and given an opportunity to respond to any adverse allegations made against her in such new evidence;

c) If a decision was ultimately made to charge her, she would have be notified accordingly in the manner prescribed under the law. The said notification would be clear on the charge preferred against her, the maximum penalty imposed under the law and the date/time when she would be required to appear in the relevant Court of law.

21. However, the ex parte applicant averred that the 1st and 2nd Respondents failed to follow the procedure outlined above and instead engaged in grossly unprofessional conduct which violated her fundamental rights, including the right to a fair trial. Accordingly, the failure of the Respondents to adhere to the set procedure and then resorting to posting the charge sheet on social media amounted to further breach

of her fundamental rights and freedoms guaranteed under the Constitution.

22. The ex parte applicant however confirmed that the Petition No. 313 of 2017 filed by ICPC was marked as withdrawn on 15th November, 2017 with no orders as to costs, though her advocates were not informed of the fact of the said withdrawal, but were only ambushed with the Application to withdraw the Petition before the Court on 15th November, 2017. The ex parte applicant insisted that at the time of preparing these proceedings and filing of the same, her lawyers did not have prior knowledge of the intended withdrawal of Petition. However, it was her view that the withdrawal of the said Petition does not in any way exonerate the Respondents or justify their conduct in relation to the accident which occurred in February, 2015 but is a further manifestation that the 1st Respondent lodged the charges against her and circulated the same on social media to circumvent the scrutiny of the Court.

23. It was the ex parte applicant's case that the belated decision to charge her was instigated **Mike Njeru**, who has for a long period of time blamed her unreasonably and unjustifiably for his failure to clinch commercial contracts with the applicant's employer, Safaricom Limited. She averred that currently, one of **Mike Njeru's** Companies, namely Transcend Media Group has sued the ex parte applicant and her employer along with other employees of Safaricom Limited seeking over Kshs. 1 billion in damages for unsuccessful tenders.

24. While citing the pleadings in HCCC No. 466 of 2016 - **Transcend Media Group Limited vs. Safaricom Limited and Others**, in which it was alleged that alleged that the applicant along with her colleagues unlawfully induced breach of employment contract and pressured a competitor to work with Transcend Media's former employees. It was the ex parte applicant's evidence that the said **Mike Njeru** has publicly declared his intention, based on a vengeful and vindictive objective to punish her for his commercial failings with the applicant's employer and to eventually cause her to lose her job. The applicant disclosed that the 1st Interested Party has greatly demonstrated its interest in the traffic charges against her as is shown by its filing of Petition Number 313 of 2017 and its admission of role in the directing the 1st Respondent to commence the investigations which led to the filing of the Traffic Case Number 6843 of 2017 and its Application seeking leave to cross-examine her in these proceedings. According to the ex parte applicant, given the 1st Interested Party's unquestionable identification of the 3rd Interested Party as their principal, the 3rd Interested Party cannot deny their involvement in the 1st Interested Party's actions as detailed above. In the applicant's view, the instigation of the Traffic Case amounts to one of the ways in which the 3rd Interested Party herein is pursuing his avowed intention to punish her for his commercial failings with regard to his transactions with her employers.

25. In her submissions, the ex parte applicant reiterated the foregoing and averred that actions of the hidden hands of the third parties concerned are not motivated by the pursuit of justice or by the interests of the deceased minor and/or her family. Far from it. The malicious and illegal intent is to inflict the greatest possible damage to the reputation and standing of the Applicant. This collateral purpose targets both the Applicant personally and her employer, Safaricom Limited with whom the third parties have an axe to grind. In this respect the applicant relied on this Court's decision in **R v. Chief Magistrate's Court at Kibera Law Courts Nairobi & 3others Exparte Qian Guo Jun, China Young Tai Engineering Company Limited [2013] eKLR.**

26. It was the applicant's case that the irregular and unprocedural action of posting the Charge Sheet and related material compromised the Applicant's inherent right to dignity (Article 28 of the Constitution) and her privacy was similarly invaded in violation of Article 31 of the Constitution. At the core of any administrative action is the notion of **Fairness** which in this case was disregarded completely, in violation of the requirements of Article 47 of the Constitution and Section 7(2) of the ***FAA Act***.

27. The applicant averred that her right to be availed an opportunity to comment on any new evidence unearthed was disregarded with impunity and high-handedness and in this regard she relied on **R v. Attorney General & 4 Others *Exparte* Diamond Hashim Lalji and Ahmed Hasham Lalji[2014] eKLR.** As regards the inordinate and unexplained delay of almost three (3) years, reliance was placed on **Ronald Leposo Musengi vs. Director of Public Prosecutions & 3 Others [2015] eKLR.** Based on the same decision, it was submitted that the prosecution of the Applicant is an abuse of the Court process as no evidence has been produced disclosing any wrong-doing on the part of the Applicant. It was reiterated that the letter dated 21st September, 2017 indicating that the Applicant was driving at a high speed down Raila Slum is not evidence and was not backed by any evidence. This Honourable Court was urged not to countenance such an abuse of the Court process and not to hesitate to terminate the impugned proceedings.

28. It was the applicant's position that her prosecution would neither serve the public interest nor the criminal justice system and she supported this position by citing the decision of the Court of Appeal in **Orweyo Missiani v. R [1979]KLR 285** cited in approval the decision in **Govid Shanji vs. R (Criminal Appeal No. 30 of 1975 (Nairobi)**. According to the applicant, the public interest would best be served by leaving the matter as it was prior to the illegal intervention of the third parties who instigated the charging of the Applicant with the extra-ordinary offence of causing death by dangerous driving. Prior to that intervention, the matter had been resolved to the mutual satisfaction of the Applicant and the family of the deceased minor and there having been no evidence upon which the Applicant could be charged, the file had been closed. Confirmation of the impugned charge would only reward the third parties instigating an illegal prosecution. Public interest and the interests of the criminal justice system would best be served by reverting to the position aforesaid. In this regard, the applicant relied on the decision of the Court of Appeal in **Civil Application No. 43 of 2006, Christopher Ndarathi Murungaru vs. Kenya Anti-Corruption Commission & Another [2006] eKLR.**

29. According to the applicant, the 1st and 2nd Respondents' move to file and prosecute traffic offence charges against the Applicant is in clear contradiction of the previous position taken by the 2nd Respondent that there was no evidence to support any charges being preferred against her. In the absence of any charges against the Applicant since February, 2015, the 1st and 2nd Respondents created a legitimate expectation on the part of the Applicant that the inquiry file in relation to the road accident had been closed and that the matter was at an end. To her the said legitimate expectation aforesaid was grounded on the absence of any evidence blaming her for the occurrence of the accident. However, in releasing the Charge Sheet on social media on 13th November, 2017 with a note that the Applicant should attend Kibera Law Courts on 20th November, 2017 for the purpose of taking plea for an offence of causing death by dangerous driving contrary to section 46 of the ***Traffic Act***, the Respondents have violated the Applicant's legitimate expectation as aforesaid, particularly given the fact that no fresh evidence has been produced incriminating the Applicant. To the contrary, the purported new evidence is concocted and flies in the face of clear facts established by the initial investigation.

30. The applicant submitted that an administrative action will be reviewed by the courts where it goes against the legitimate expectation created in the mind of the aggrieved party, by the public body and relied on Cr. Appl. No. 271 of 1985 - **Githunguri vs. Republic [1986] KLR 1.** and **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] KLR 240,** cited by this Court in **Judicial Review No. 81 of 2013 - Town Council Of Kikuyu vs. The National Social Security Fund Board Of Trustees & Others**.

31. It was therefore submitted that the violation of the Applicant's legitimate expectation as aforesaid entitles the Applicant to an order of judicial review as provided by section 7(2)(m) of the ***FAA Act*** which empowers this Court to review an administrative action or decision that violates the legitimate expectations of the persons to whom it relates.

32. According to the applicant, to the extent that there is no reasonable or justifiable basis for the sudden change in course taken way back in February, 2015, and none has been shown by the Respondents, the decision of 19th October, 2017 is clearly an abuse of process. Consequently, the 1st Respondent's decision contained in the letter dated 19th October, 2017 and the Charge sheet dated 13th November, 2017 commencing Kibera Traffic Offence Case number 6843 of 2017 against the Applicant is amenable to judicial review pursuant to section 7(2)(o) of the ***FAA Act***.

33. For the reasons set out above, the Applicant prays that the Orders of Prohibition as set out in prayers 1, 2, 3 and 4 of the Application be granted.

34. As regards the prayer for certiorari, the applicant relied on **Misc. Civ Appli 1638 of 2004 - Total Kenya Limited vs. Permanent Secretary, Ministry of Energy & 14 Others [2006] eKLR** and submitted that to the extent that the 1st and 2nd Respondents have succumbed to pressure from third parties and decided to file charges against the Applicant for purposes other than those envisaged under the criminal justice system, they have violated the Applicant's rights to fair administrative action and also demonstrated bias in their entire decision-making process. In the process, they have trampled under-foot fundamental rights and freedoms guaranteed to the Applicant under the Constitution.

35. In this case it was submitted that the Applicant had demonstrated that her prosecution is manipulated so as to deprive her of the protection provided for under the Constitution, publicly humiliate and disgrace her. As such the Orders of judicial review sought ought to be granted.

36. In support of its submissions the ex parte applicant further relied on Article 157(6) of the Constitution which vests upon the DPP the power to *institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.* She also relied on section 6 of the ***Office of the Director of Prosecutions Act.*** While not disputing the power of the 1st Respondent herein to institute proceedings, the ex parte applicant however submitted that in exercise of his duty, the DPP must act in accordance with the Constitution of Kenya, as is stated in section 6(c) of the ***ODP Act*** and referred to **Paul Ng'ang'a Nyaga & 2 Others vs. Attorney General and 2 Others [2013] eKLR** and **Francis Anyango Juma –vs- The DPP & Another Petition No. 160 of 2012 [2012] eKLR.**

37. It was the *Ex-Parte* Applicant's submission that whereas as a state officers, the 1st and 2nd Respondents herein are bound to act in accordance with the principles of national governance as stipulated under Article 10 of the Constitution of Kenya, 2010, the conduct of the 1st and 2nd Respondents herein was in violation of the *Ex-Parte* Applicant's Constitutional rights as elaborated hereinabove. She reiterated that no explanation has been offered to justify circulation of the charge sheet on social media. The DPP's office was the first the publish the charge sheet on twitter on 13th November, 2017 instead of first contacting the *ex-parte* Applicant. By the same medium, the 1st Respondent purported to notify the *ex-parte* Applicant of the plea taking. To her the Respondents have not demonstrated the mode adopted to the prescribed means of handling traffic offences. It therefore confirms malice and abuse of power by the 1st and 2nd Respondent in handling the traffic case.

38. It was the applicant's case that the issues raised by the 1st and 3rd Interested Parties in these proceedings are more geared towards justifying the alleged need for the traffic charge to proceed for plea taking and trial which justifications are directed towards the merit of the decision and not the decision making process. In that respect the applicant relied on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** and submitted that the 1st and 3rd Interested Parties respectively have not tendered any defence to Motion filed. Instead, the 1st Interested Party has raised allegation of cover up of the accident through the alleged bribery of police officer without proving evidence of the same. It was therefore the ex parte applicant's case that the 1st and 2nd Respondents have sought to have this Court analyse and examine facts and evidence on the basis of which guilt, innocence or otherwise should be determined. On the other hand, the *ex parte* Applicant has sought to review the steps taken before the decision to charge her with the offence of causing death by dangerous driving was made on or about 19th October, 2017 was made.

39. According to the ex parte applicant, the 1st Interested Party has greatly demonstrated its interest in the traffic charges against the *Ex-Parte* Applicant by filing of Petition Number 313 of 2017, its admitted role in the directing the 1st Respondent to commence the investigations which led to the filing of the Traffic Case Number 6843 of 2017 and its Application seeking leave to cross-examine *Ex-Parte* Applicant in these proceedings. Since the 1st Interested Party, in paragraph 39 of its Replying Affidavit sworn on 15th February 2018, identifies and refers to the 3rd Interested Party herein as its "principal", this therefore, draws a connection between the 1st and 3rd Interested Parties hence the 3rd Interested Party cannot deny his involvement in pressuring the 1st Respondent to file the charges against the *ex-parte* Applicant.

40. While appreciating that the general public knowledge of the charges may not influence the judicial officer, the *ex parte* Applicant submitted that the rights to equal treatment and equal protection was compromised when the 1st Respondent unjustifiably published on social media the charge sheet together the related correspondence without first contacting the *exparte* Applicant on the same.

41. It was contended that the 1st Interested Party is categorical in its Replying Affidavit that the *exparte* Applicant must face trial and that as an organization, they are interested to see that she is charged and prosecuted especially on account of her position at Safaricom and social standing. In this respect the ex parte applicant relied on **Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] eKLR.**

42. It was therefore submitted that the Respondents have violated several principles of fair administrative action as well as provisions of the ***FAA Act*** and the Constitution hence the Application is ripe for the granting of the orders of prohibition and certiorari sought which should be allowed.

2nd Interested Parties' Case

43. The substance of the 2nd interested parties' case was that they were in support of the application. The 2nd interested parties were the parents of the deceased.

44. According to them, following the subject accident,, they made a report at Langata Police Station and recorded their statements. Subsequently they arranged for the funeral and the burial of their daughter. They disclosed that following the death of the deceased there was a meeting between them and the driver of the subject motor vehicle, the ex parte applicant herein, who was remorseful and conveyed her condolences to them and requested to assist them with the funeral arrangements.

45. It was the interested parties' case that the applicant explained to them how the accident occurred and based thereon they felt the under the circumstances, they did not wish to pursue the traffic charges against the ex parte applicant. Accordingly, they informed the investigating officer that they were not interested in pursuit of the case and wished to have the matter closed.

46. The interested parties averred that subsequently, the ex parte applicant gave them Kshs 950,000.00 on compassionate and humanitarian grounds and that they were grateful for the gesture.

47. The interested parties reiterated that they were not interested in the traffic case and did not intend to press the charges against the applicant.

48. It was their case that they had not received any communication from the investigating officer or the ODPP of the intention to charge the applicant since as far as they were concerned the case was closed as they had neither filed a fresh complaint nor been required to record fresh or further statements in regard to the said accident.

49. The interested parties' position was that they had moved on and wanted the case to rest.

50. It was the 2nd interested parties' submission that the reopening of the case was contrary to their legitimate expectation.

The Respondents' Case

51. The application was opposed by the Respondents.

52. According to them, this matter came to the attention of the Office of the Director of Public Prosecutions for the first time vide a letter dated 28th February 2017 from Suyianka Lempaa & Company Advocates, acting on behalf of a victim of crime an 8 year old **M K E** (the deceased), who was knocked down and fatally injured by one **Sylvia Wairimu Njuguna** also known as **Sylvia Wairimu Mulinge** along the Southern Bypass near Raila Slums on 1st February, 2015.

53. It was averred that the said firm in the complaint averred that the police had failed, neglected and/or refused to take any legal action or conduct thorough investigations into the matter despite *prima facie* evidence of case of causing death of a minor **M K E** by dangerous driving which constitute a serious offence. They further averred that the suspect had purportedly entered into an agreement with the parents of the deceased to have a settlement of Kshs. 950,000 so as not to pursue the criminal case, which they stated is a violation of the deceased's rights and an infringement of the law. They therefore requested the Office of the Director of Public Prosecutions to direct investigations and make an appropriate decision on the matter.

54. According to the Respondents, in an attempt to circumvent the reference of the matter to the Office of the Director of Public Prosecutions for directions, investigations revealed that the matter was referred by the investigating officers for inquest vide Kibera Inquest No. 8 of 2017 without the directions of the Office of the Director of Public Prosecutions. This issue was discovered by the trial magistrate presiding over the inquest and upon this realization that the matter had been referred for inquest without reference or directions from the Office of the Director of Public Prosecutions the trial court directed that the duplicate police file be submitted to the Office of the Director of Public Prosecutions for perusal and directions.

55. It was deposed that upon receipt of the complaint, the Office of the Director of Public Prosecutions wrote to the Directorate of Criminal Investigations 6th March 2017, 10th July 2017 and 28th August 2017 calling for the duplicate police file to be submitted to the Office for perusal and directions and that consequently, the duplicate police file was submitted to the Office of the Director of Public Prosecutions as directed vide a letter dated 21st September, 2017 from Directorate of Criminal Investigations with recommendations that **Sylvia Wairimu Njuguna also known as Sylvia Wairimu Mulinge** be charged with the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act Cap 403 Laws of Kenya. It was the Respondents' case that upon perusal of the file, the evidence revealed that the suspect in the matter, **Sylvia Wairimu Njuguna** also known as **Sylvia Wairimu Mulinge** had knocked down 8 year old **M K E** (the deceased) along the Southern Bypass near Raila Slums on1st February, 2015 and that after the accident the suspect drove off and fled the scene of

accident leaving the deceased on the scene and that the deceased was rushed to St. Mary's Hospital in Lang'ata by a Good Samaritan, where she was pronounced dead on arrival.

56. Further investigation revealed that the suspect herein got into an out of court settlement with the parents of the deceased, **Z E A** and **C N N** for the death of their daughter for which the parents of the deceased received an amount of Ksh.950,000/= as compensation for the civil wrong. The negotiations were conducted by the firm of Ongweny & Moibi Advocates, acting on behalf of the Applicant. A further perusal of file indicated that the postmortem carried on 3rd February, 2015 at Chiromo Mortuary by the Government Pathologist **Dr. Njeru** opined that the deceased died as result of head injury due to blunt force trauma consistent with a motor vehicle accident.

57. It was therefore the Respondents' position that upon satisfying itself that the crime of causing death by dangerous driving contrary to section 46 of the ***Traffic Act*** had been committed, the Office of the Director of Public Prosecutions gave directions to the Directorate of Criminal Investigations vide a letter dated 19th October 2017 to immediately withdraw Kibera Chief Magistrates Court Inquest no. 8/2017 and proceed to charge the suspect with the offence of causing death by dangerous driving contrary to section 46 of the ***Traffic Act*** Cap 403 Laws of Kenya and that the case was registered on 13th November 2017 in Kibera Chief Magistrates Court as Traffic Case No. 6843 of 2017, ***Republic versus Sylvia Wairimu Njuguna***, where she has been charged with the offence of causing death by dangerous driving contrary to section 46 of the ***Traffic Act***, Cap 403 Laws of Kenya.

58. According to the Respondents the said inquest No.8 of 2017 has been duly withdrawn.

59. It was the Respondents' position that upon lodging the complaint to the Director of Public Prosecutions, as stated above, and being apprehensive that despite several requests by the Director of Public Prosecutions, the Police were delaying to forward the file to DPP for directions, the Petitioner, a Public Interest litigant lodged petition on 22nd June, 2017 challenging closure of police file involving causing of death by dangerous driving without reference to DPP and seeking to compel the DPP to direct investigations and institute appropriate proceedings vide High Court Petition No.313 of 2017. The Respondents filed their response in the said Petition on 14th November, 2017 disclosing that they had already taken an appropriate action by directing the Applicant to be charged and a charge sheet has been registered in Court on 13th November, 2017. Consequently, on 15th November, 2017 in the presence of the Counsel for the Applicant herein who was named as a 2nd Respondent, the Petition was marked as withdrawn without any order as to costs.

60. It was the Respondents' case that the prosecution and decision to charge the Applicant was done with due regard to the Constitution, written laws, rules of natural justice.

61. According to them it is telling that at the date on 15th November, 2017 immediately upon withdraw of Constitutional Petition No. 313 of 2017, the Petitioner who was present in the said Court appeared ex-parte in this case JR No.651 of 2017 and misled the court into being granted an ex-parte order of stay of prosecution without full disclosure of material facts to the Court.

62. In their submissions, reiterated the foregoing and maintained that the decision to charge was made independently based on the sufficiency of evidence and the public interest underlying prosecution of criminal offences It was their position that the applicant had not demonstrated that in making the decision to charge, the Director of Public Prosecutions had abrogated any provision of the Constitution or any written law or any rules made thereunder or that the said decision was arrived at in breach of rules of natural justice and therefore the application lacks merit and ought to be dismissed with costs.

63. According to the Respondents:

a) the 2nd Respondent is mandated to investigate all possible criminal offences and an attempt to stop such execution of mandate would result to an even greater injustice in the criminal justice system;

b) the Respondents are not acting under the direction or control of any person or authority;

c) the Applicants have not demonstrated that in executing their mandate, the Respondents have acted without or in excess of the powers as conferred by the law or acted maliciously, infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution or any other provision thereof.

64. It was the Respondents' position that the ODPP is an independent prosecution authority established under Article 157 of the Constitution and clause (6) thereof vests upon the said office the power to institute any criminal proceedings which decision is discretionary and is pursuant to Article 157(1) not subject to the direction or control by any authority and under section 6 of the ***ODPP Act*** does not require consent of any authority to commence any criminal proceedings and is not under the direction or control of any person or authority in the exercise of its powers or functions under the Constitution.

65. The Court was therefore urged not to usurp the constitutional mandate of the Director of Public Prosecution conferred pursuant to Article 157 of the Constitution and they relied on **Kenya Commercial Bank Limited & 2 others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) eKLR.** As to the circumstances under which the court will grant an order prohibiting the commencement or continuation of Criminal Proceeding, the Respondents relied on **George Joshua Okungu and Another vs. Chief Magistrate Court Anti Corruption Court at Nairobi and Another (2014) eKLR.** and **Republic vs. Commissioner of Police and Another exparte Michael Monari & Another (2012) eKLR.**

66. It was the Respondents' position that the prayers in the Application for determination thereof require the court to analyze and examine facts and evidence on the basis of which the guilt, innocence or otherwise of the Applicant shall be determined and the proper forum for consideration and resolution of the factual and evidentiary matter is the trial court and relied on **William Ruto & Another vs. Attorney General HCC No. 1192 of 2004** where it was held that analysis of evidence should be done at the trial and not in the constitutional Court.

67. The Respondents therefore submitted based on **Paul Ng'ang'a Nyaga & 2 Others vs. Attorney General and 2 Others [2013] eKLR**, **Francis Anyango Juma –vs- The DPP & Another Petition No. 160 of 2012 [2012] eKLR** and **Kuria and Others vs. AG [2002] 2 KLR 69**, that the Applicants failed to prove violation of his fundamental freedoms and rights and/or infringement of any law or regulation or abuse of discretion and breach of Rules of Natural Justice and the Application should therefore be dismissed with costs.

The 1st Interested Party's Case

68. The 1st interested party herein, **International Centre for Law and Policy,** averred that it is non-profit making organization whose mandate is to champion the rule of law, good governance and advancement of human rights and fundamental freedom.

69. According to it, after the accident, the ex parte applicant fled the scene of the accident and that the deceased was taken to hospital by other people. It was its case that the applicant did not bother or concern herself to know who took the deceased to the hospital . It was its case that the ex parte applicant's conduct amounted to negligence and that the police who tearetd her with soft gloves did not even inform er that the minor had died.

70. It was the 1st interested party's case that after the accident the ex parte applicant through her advocates embarked on a concerted effort to cover up the matter of the death of the deceased by making payments to her parents and having the ex parte applicant discharged from liability.

71. It was its case that police files are never closed and that 3 years since the accident happened is not an inordinate delay in serving justice and therefore the decision to charge the applicant does not in the circumstances amount to capricious use of power by the State as pleaded.

72. It was its case that at no point did the police inform the 1st Respondent of the out of court settlement and that secretly compromising a police officer or station cannot be used as an excuse or reason for blaming the Respondents.

73. To the said interested party the inquest was part of the wider scheme of covering the crime and that in any case causing death by dangerous driving is an offence against the state and the family's view is immaterial. It was its case that it was only discharging its civic duty by ensuring that the rule of law is adhered to and that it had the right to file memoranda on behalf of the public and more so vulnerable members of the society. According to it, the issues raised by the applicant amount to a defence in the criminal proceedings.

Determinations

74. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties thereto.

75. It is, in my respectful view, important to understand the principles which guide the grant of the orders in the nature sought herein before applying the same to the circumstances of this case. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. In these matters the High Court does not transform itself into a trial court and is not permitted to delve into the merits or otherwise of the criminal process as that would amount to unnecessarily straying into the arena exclusively reserved for the criminal or trial Court. This Court in determining the constitutional issues raised therefore ought not to usurp the Constitutional and statutory mandate of the Respondents to investigate and undertake prosecution in the exercise of the discretion conferred upon them.

76. As was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

> **"The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…"**

77. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."**

78. However, according to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority or power.

79. Under the current Constitution, this Court is empowered to invoke its judicial review jurisdiction in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In other words judicial review jurisdiction has now been fused with the

remedies under the Constitution and this is clearly discernible from the remedies crafted under section 11 of the ***Fair Administrative Action, Act, 2015***. As was held by the South African Constitutional Court in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99** that:

> **"The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action," "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law…Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter". This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction."**

80. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that the grounds in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity.

81. Therefore, the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police or the Director of Public Prosecutions intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

82. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

> **"It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."**

83. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High 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 score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer....."**

84. In **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

> **"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour,**

there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

85. As was aptly put in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court…As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

86. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in such proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

87. Therefore the determination of this case must be seen in light of the foregoing decisions. However, it is upon the applicant to satisfy the Court that the discretion given to the Respondents to investigate and prosecute ought to be interfered with.

88. The applicant's case, as far as I can see is whether the manner in which the criminal proceedings, which proceedings had been closed were opened was procedural. Accordingly this Court is not concerned with the innocence or otherwise of the ex parte applicant.

89. It must, however, be appreciated that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial. Article 50 of our Constitution accordingly provides *inter alia* as follows:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

(5) An accused person—

(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

90. I have reproduced the relevant provisions of Article 50 in order to show that our Constitution has provided extensive safeguards to accused persons when charged with criminal offences and therefore unless there is material upon which the Court can find that the applicant is unlikely to receive a fair trial before the trial Court, the Court ought not to interfere simply because the applicant may at the end be found to be innocent.

91. As was held in **Jago vs. District Court (NSW) 106**:

> **"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is not abuse of process...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."**

92. The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicant demonstrates that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquittal are high. In other words the High Court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.

93. It is also my view that in determining whether or not to halt criminal proceedings, the Court must consider the dominant motive for bringing the criminal proceedings. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the ***predominant*** purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene. See **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another** (supra) and **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).

94. Where it is not the predominant purpose the Court ought not to interfere. Where the ground relied upon to halt the same is some collateral motive which on its own does not warrant the halting of the said proceedings, the Court ought not to take such exceptional step of bringing to an end criminal proceedings where there possibly exist other genuine motives.

95. In this case the ex parte applicant's case is that at the time of releasing the said vehicle, she was informed by a police officer at the station

that after the initial investigations, it was obvious that the ex parte applicant was not on the wrong in relation to the said accident, since at the point of the accident there was a wall and road barrier preventing pedestrians from crossing over the by-pass and there was an underpass for pedestrian crossing and according to the road signs vehicles were not allowed to stop thereat.

96. This statement has not been seriously contested by any of e parties apart from an allegation from the 1st interested party that the decision not to charge the applicant was as a result of collusion between the applicant and the police. One would have expected the 1st and 2nd Respondents to depose as to what happened after the initial report in order to allay the fears of collusion and to challenge the ex parte applicant's position that she had in fact been informed that she was not culpable. There was no such evidence emanating from the said Respondents, yet the ex parte applicant's position was supported by the 2nd interested parties.

97. Without any serious averments challenging the ex parte applicant's position that she was informed that the initial investigations revealed that she was not on the wrong, and as no attempt has been made by the Respondents to explain what led to the change of view and the decision to charge the a with the offence, the next issue for determination is whether the Respondents could later on arbitrarily change their position and charge the applicant.

98. I must however restate that mere delay in commencing criminal proceedings, unless the delay is not favourable to a fair trial may not justify the halting of criminal proceedings. However, where the applicant has been given an assurance that he is not going to be prosecuted to make an abrupt about turn without any convincing reasons to decide to prosecute the applicant based on the sane facts cannot be countenanced in any judicial system that adheres to the rule of law. Where such a move is to be taken the prosecutor must place evidence before the Court that due to fresh evidence or a consideration of a different angle of the evidence his change of decision is justified.

99. I therefore associate myself with the observation by the Supreme Court of Ireland (**Denham, J**) in the case of **Carlin vs. DPP Appeal No. 105/2008; [2010] (IESC) 14** that:

> **"7. The Director is an important independent office in the State and independent in the performance of his functions: Prosecution of Offences Act, 1974. A clear policy of non-intervention by the courts in the exercise of the discretion of the prosecutor, except in particular circumstances, has been stated in cases over the last few decades. An independent prosecutor is an important part of the fabric of a fair justice system. The prosecutor must not only be independent but be seen to be independent. If the Director is seen to change his decision where there are no new factors but simply after representations by a victim or his family, it raises issues as to the integrity of the initial decision and the process, and thus may impinge on confidence in the system. It is important that a prosecutor retain the confidence of society in his process of decision making.**
>
> **8. It is entirely appropriate that the Director have a process wherein he may review an earlier decision. The fact that he may review his decision is now a matter in the public domain.**
>
> **9. It is essential that the Director remain independent. However, he is subject to the constitutional requirement of fair procedures. While the fair procedures appropriate at the investigation stage of a prosecution are not equivalent to those at trial in a court of law the process requires to be constitutionally firm.''**

100. Whereas no one doubts the powers of the DPP to review a decision not to prosecute, such a decision, as opposed to the initial decision to prosecute ought to be exercised within certain parameters. In JR Case No. 381 of 2014 – **Republic vs. Attorney General, Korir, J** expressed himself as hereunder:

> **"77. The need to protect the interests of victims of crime is paramount hence the enactment of the Victim Protection Act, 2014 in compliance with Article 50(9) of the Constitution. The courts therefore have a duty to protect the power of the DPP to review his decision to prosecute, or not to prosecute. That, however, does not mean that the DPP's power can be exercised illegally, whimsically, capriciously, maliciously and unreasonably. There must be parameters to guide the DPP on when and how to exercise the power of review. Where the DPP fails to self-regulate and there is sufficient evidence that the power of review has been improperly invoked, the High Court will invoke its supervisory jurisdiction in favour of an aggrieved applicant.**
>
> **78. In the United Kingdom the Crown Prosecution Service has established a policy to guide investigators and the prosecutors on the exercise of the power to review a decision to prosecute or not prosecute. When exercising such power, the prosecutor must start from the presumption that once a suspect is informed of a decision not to prosecute, she or he is entitled to rely on that decision. Section 10 of the Code for Crown Prosecutors of the United Kingdom explains that occasionally there are special reasons why the prosecution service will overturn a decision not to prosecute.**
>
> **79. In a document titled: Reconsidering a Prosecution Decision: Legal Guidance" the Crown Prosecution Service on its website (www.cps.uk – 8th February, 2016) states that the reasons for review of a decision not to prosecute as set out at Section 10.2 of the Code for Crown Prosecutors include:**
>
> **'a)cases where a new look at the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, a prosecution should be brought despite the earlier decision;**
>
> **b. cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the prosecutor will tell the defendant that the prosecution may well start again;**

c. cases which are stopped because of a lack of evidence but where more significant evidence is discovered later; and

d. cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought, notwithstanding any earlier decision not to prosecute.'

80. In my view, those are some of the reasons that should guide the DPP in making a decision whether or not to reopen a matter that is already closed. The victim of crime should make the application for review timeously. On his part the DPP should make the decision to review without unreasonable delay.

81. In order to arrive at the conclusion that the decision not to prosecute was wrong, the DPP will consider whether there was a significant misinterpretation of the evidence; an incorrect application of the law; or an unjustifiable failure to consider relevant prosecution policy.

82. In making his decision the prosecutor "shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process" as required by Article 157(11) of the Constitution. The DPP ought to bear in mind that there is need for the public to have confidence in his office. Public confidence in the office of the DPP will diminish when a decision not to prosecute is haphazardly reversed only for the court to conclude that the revision was an abuse of process.

83. In order for a decision to be reviewed as a result of the discovery of new and important matter or evidence, the evidence ought not to have been available to the investigator or prosecutor at the time the decision not to prosecute was taken. The evidence must be significant. The new evidence should convince the prosecutor that had the same been available at the time the decision not to prosecute was made such a decision could not have been made. Forensic or other complex evidence which may not have been available at the time the decision was made will form a good basis for the review of the decision.

84. Where the prosecutor decides not to prosecute because the evidence is not available at that time, the suspect ought to be cautioned that although a decision not to charge had been made, the decision could be reviewed once evidence became available. The power given to the DPP to review a decision not to prosecute takes care of the public interest which requires that no crime should go unpunished.

85. In exercising the power to revisit a decision not to prosecute, the DPP needs to ensure that there has not been a substantial delay since the original decision not authorise the institution of proceedings. Delay on the part of the prosecutor would substantially prejudice the accused in advancing his or her defence. The decision to reopen a prosecution should be made in good faith and should not prejudice an accused person."

101. In **Ronald Leposo Musengi v Director of Public Prosecutions & 3 Others [2015] eKLR,** this reminded the DPP that prosecutorial power belonged to him and no one else and that the DPP must be able to own and explain whatever decision he makes. In that case this Court observed at paragraph 89 that:

"It is therefore clear that whereas the discretion given to the respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the Respondent is shown not to be acting independently but just reading a script prepared by someone else or that he has been pressurised to go through the motions of a trial, the Court will not hesitate to terminate the proceedings as in such circumstances, the powers being exercised by the Respondent would not be pursuant to his discretion but at the discretion of another person not empowered by law to exercise such discretion.''

102. It is therefore clear that to permit the prosecutor to exercise his constitutional powers arbitrarily would amount to the Court abetting abuse of discretion and power. It was therefore held in **Regina vs. Ittoshat [1970] 10 CRNS 385 at 389** that:

"this Court not only has the right but a duty to protect citizens against harsh and unfair treatment. The duty of this Court is not only to see the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner."

103. Similarly in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003**:

"I do not think that our Constitution which is one of a democratic state would condone or contemplate abuse of power...The Attorney General in some of his constitutional functions does perform public duties and if he were to be found wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional duties. A monitoring power by the court by way of judicial review would have the effect of strengthening the principles and values encapsulated by the Constitution. To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the International Conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction the court would not be sitting on appeal on the decisions of the Attorney general, he will still make the decisions himself but the lawfulness, etc. of his decisions should be within the purview of the courts..."

104. This Court therefore has the powers and the constitutional duty to supervise the exercise of the Respondents' mandate whether

constitutional or statutory as long as the discretion falls foul of section 4 of the ***Office of the Director of Public Prosecution Act*** and Article 157 of the Constitution.

105. In **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

> **"Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."**

106. A similar view was held in **George Joshua Okungu & Another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another** (supra) in which this Court cited with approval the holding in **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323** and held:

> **"Under Article 47(1) of the Constitution, "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic*, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself. "**

107. It is therefore clear that whereas the discretion given to the respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the Respondent is shown not to be acting independently but just reading a script prepared by someone else or that he has been pressurised to go through the motions of a trial, the Court will not hesitate to terminate the proceedings as in such circumstances, the powers being exercised by the Respondent would not be pursuant to his discretion but at the discretion of another person not empowered by law to exercise such discretion.

108. **Korir, J** clearly appreciated this in **Republic vs. Attorney General** (supra) when he held that:

> **"The power to review a decision to prosecute or not to prosecute belongs to the DPP and the courts will only interfere with a decision to reopen a matter where the decision has no basis at all. It was incumbent upon the DPP to demonstrate to this Court that after an independent analysis of the circumstances surrounding the closure of SCB's file, he had reached a conclusion that the matter merited a reconsideration of the decision not to prosecute. There was need for the DPP to show the existence of the conditions for review of the decision not to prosecute. It was not enough for the DPP to simply state that the Judge had commented that he could reopen the matter. I therefore conclude that his first reason for reviewing the decision not to prosecute SCB did not meet any of the conditions required for exercising his power of review."**

109. In my view where the prosecutor has given an assurance that based on the evidence presented before him, no prosecutable case is disclosed, the High Court would be entitled to presume existence of extraneous purposes, if such a decision was arbitrarily overturned without any explanation for change of heart. This was the position in **Githunguri vs. Republic KLR [1986] 1** in which the Court expressed itself as follows:

> **"We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in absence of any fresh evidence, the right to change the decision**

to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious…If we thought, which we do not, that the applicant by being prosecuted is not being deprived of the protection of any of the fundamental rights given by section 77(1) of the Constitution, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent this prosecution in the public interest because otherwise it would similarly be an abuse of the process of the Court, oppressive and vexatious. It follows that we are of the opinion that the application must succeed in either event…A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed. "

110. I also associate myself with **R vs. Crown Court at Derby, ex parte Brooks [1984] 80 Cr. App. R 164** to the effect that:

"The power to stop a prosecution arises only where it is an abuse of the process of the court. It may be an abuse of the process if either (a) the prosecution have manipulated or misused the process of the courts so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality; or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable."

111. This Court has had an occasion to deal with the discovery of fresh evidence after the closure of an inquiry file in **Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** and held that:

"Where a decision has been made to close an inquiry file, it is my view that before reopening the investigations resulting from discovery of new evidence the people sought to be charged ought to be given an opportunity to comment on the fresh evidence."

112. With due respect, in the absence of any reasonable explanation coming from the Respondents why they have, two years down the line and have decided to prosecute the applicant after the investigative authorities made a decision that there was no justification to charge he applicant, the decision to charge the applicant has no justification. I associate myself with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".

113. In exercising its mandate, section 4 of the ***Office of the Director of Public Prosecutions Act*** enjoins the DPP to take into account the provisions of the said section of the said Act which provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) The need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

114. In promoting constitutionalism it is my view that the DPP ought to adhere to the national values and principles of governance in Article 10 of the Constitution under which he is bound by *inter alia* the principles of transparency and accountability. Where the investigators have directed a file to be closed, and a considerable period of time has lapsed, he cannot arbitrarily reopen the same without any reason for doing so without violating the aforesaid values and principles and hence failing in his duty to promote constitutionalism. Therefore whereas there is no bar to the Respondents reopening the case against the applicant, the manner in which they have gone about doing so in this case cannot be justified.

115. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2**

KLR (EP) 565 to the effect that :

> **"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system…In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."**

116. Whereas this is not the forum to determine the applicant's innocence or culpability, the DPP owes this Court a duty of placing before this Court material upon which this Court can feel that he is justified in mounting the prosecution. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

> **"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."**

117. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

118. It is clear that in exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in Nairobi HCCC No. 1729 of 2001 – **Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

> **"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".**

119. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, whereas it is alleged in this case exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.

120. In my view, the correct prosecution policy is the one expounded in ***Code for Prosecutors of the Crown Prosecution Service of the United Kingdom*** ("the Code") as reflected in our own prosecution policy, ***The National Prosecution Policy***, revised in 2015. The ***Code***, provides, *inter alia* that:

4.4 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

4.5 The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty."

121. In **Githunguri vs. Republic [1986] KLR 1** at page 18 and 19 a three Judge bench High Court constituted of Ag. Chief **Justice Madan** and **Justices Aganyanya** and **Gicheru** expressed themselves as follows:

"But from early times… the Court had inherently its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse…The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure...every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court…Mr Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section 26 of the Constitution. This argument of his compels us to say that he kept freewheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General's powers under section 26 can be interfered with. What this application is questioning is the mode (emphasis ours) of exercising those powers…No one will succeed in convincing us that the Court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity…A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed."

122. Similarly, in **Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another [2006] eKLR** where **Nyamu, J** examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of **M. Devao vs. Department of Labour (190) in sur 464** at 481 as:

"The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice…the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression."

123. Based on the decision of **Musinga, J** (as he then was) in **Paul Stuart Imison Another vs. The Attorney General & 2 Others Petition No. 57 of 2009**, the circumstances which the Court should take into consideration in grant of stay were laid out in the following manner:

"The instances in which a court can declare a prosecution to be improper were well considered in *Macharia & Another –vs-Attorney General & Another (2001) KLR 448*. A prosecution is improper if:

(a) It is for a purpose other than upholding the criminal law;

(b) It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;

(c) It is an abuse of the criminal process of the court;

(d) It amounts to harassment and is contrary to public policy;

(e) It is in contravention of the applicant's constitutional right to freedom.

124. In ***Bennett vs. Horseferry Magistrates' Court (1993) 3 All* E.R. 138, 151, HL**, it was held that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

a) where it would be impossible to give the accused a fair trial; **or**

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

125. The National ***Prosecution Policy***, revised in 2015 provides at page 5 that:-

Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the

suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?

126. It must be appreciated that the investigatory and prosecutorial agencies may have to consider a lot of factors in deciding whether or not a prosecution is prudent as long as the said factors are relevant. In the course of making such a decision there may even be differences in opinion between the investigatory agencies and the prosecutorial agencies. However, the mere fact that the DPP's decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted. Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP. As is rightly recognised by **Sir Elwyn Jones** in ***Cambridge Law Journal*** – April 1969 at page 49:

"The decision when to prosecute, as you may imagine is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that t is desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration."

127. I associate myself with the decision of the High Court of Uganda in the case of **Uganda vs. Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013,** to the effect that:

"...the DPP is mandated by the Constitution (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously…Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP… such opinion is merely advisory and not binding on the DPP (See Article 120(6) Constitution). Unless invited as witness or amicus curiae (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP."

128. In my view, the exercise of discretion though quasy-judicial, the decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must under our constitution be considered in deciding whether or not to institute prosecution. See ***The International and Comparative Law Quarterly*** Vol. 22 (1973):

129. However, it is upon the DPP to consider those factors and not upon this Court to determine for him/her when such factors militate against the institution of criminal proceedings.

130. This position was similarly appreciated in **Charles Okello Mwanda vs. Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR** in which **Mumbi Ngugi, J** held that:

"I would also agree with the 4th Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st Respondent has no power to 'absolve' a party and thereby stop the 4th Respondent from carrying out his constitutional mandate. Article 157(10) is clear…However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent set out in Article 157(10) set out above, the 1st respondent (EACC) has no authority to 'absolve' a person from criminal liability…so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4th Respondent (DPP) …"

131. However the discretion is given to the Director of Public Prosecution and where it is shown that what he is exercising is not his own discretion but another's discretion he shall have abdicated his duty and this Court will be entitled to intervene. This must be so because section 7(2)(a) of the ***Fair Administrative Action Act*** empowers a court or tribunal to review an administrative action or decision, if the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions; the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant; the administrative action or decision was made in bad faith; or that the administrative action or decision is taken or made in abuse of power.

132. I must however emphasise that where the investigators have undertaken an investigation of a complaint and have returned a decision that I is not proper to charge the applicant, and as a result considerable period of time has lapsed, there ought to be some explanation as to why the DPP has decided to reopen the matter, if he is to escape from accusations that the change in mind is at the instigation of a third party, as is the case in this matter. That course would definitely amount to an abuse of power and dealing with abuse of power, **Nyamu, J** (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** while citing **Reg vs. Secretary of State for the Environment Ex Parte NottinghamShire Country Council [1986] AC** expressed himself as hereunder:

"A power which is abused should be treated as a power which has not been lawfully exercised…A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers...Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston,* reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals."

133. It is therefore clear that power ought to be properly exercised and ought not to be misused or abused. According to **Prof Sir William**

Wade in his Book *Administrative Law*:

> **"The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"**

134. In **Liverside vs. Anderson [1942] AC 206 at 244**, **Lord Atkin** held that:

> **"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law."**

135. To paraphrase ***Githunguri vs. Republic***, the inescapable conclusion I come to, both under the Constitution and the inherent powers of this Court is that "***it is not right to prosecute the Petitioner as proposed."***

136. Accordingly, it is my view and I hold that the criminal proceedings ought to be halted.

Order

137. In the premises, while I am not amenable to permanently prohibiting the 1st and 2nd Respondents from preferring charges against the ex parte applicant, the orders which commend themselves to me and which I hereby issue are as follows:

> **1. An order of prohibition directed at the 1st and 2nd Respondents, whether by themselves, their servants, agents, officers, successors and/or assigns, do issue prohibiting them from arresting, arraigning and/or prosecuting the ex parte applicant in relation to Traffic Case No. 6843 of 2017.**
>
> **2. An order of prohibition directed to the 3rd Respondent do issue prohibiting him/her from hearing and determining the Kibera Traffic Case No. 6843 of 2017 initiated by the Charge Sheet dated 13th November, 2017, against the ex parte applicant.**
>
> ***3.*** **An order of prohibition directed at the 1st and 2nd Respondents, whether by themselves, their servants, agents, officers, successors and/or assigns, prohibiting them from taking any steps which would result cumulatively or otherwise to arrest and prosecution of the ex parte Applicant pursuant to the road accident which occurred on 1st February, 2015 along the Southern By-pass unless the said Respondents have satisfactory evidence that the circumstances have changed to warrant review of the initial decision not to charge the applicant with the subject offence.**
>
> **4. There will be no order as to costs of these proceedings.**

138. It is so ordered.

G V ODUNGA

JUDGE

Delivered at Nairobi this 11th day of May, 2018

J M MATIVO

JUDGE

In the presence of: