



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

JUDICIAL REVIEW NO 9 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF AN ORDER FOR CERTIORARI AND PROHIBITION

AND

**IN THE MATTER OF NATIONAL ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, THE WATER ACT
AND THE NATIONAL GOVERNMENT ADMINISTRATION OFFICERS ACT OF 2013**

BETWEEN

JOHNSON KAMAU NJUGUNA.....1ST APPLICANT

LUKA KIPYEGEN.....2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

Background

1. On 10th May, 2018, Kenyans woke up to the shocking news splashed in all news media of the collapse of Milmet Dam – also known as Solai Dam – in Nakuru County. Farms and villages had been washed away in the on-rush of the water's break. Hundreds of people were caught up in the consequent muddy sludge, claiming 47 lives in the downstream flood chaos.
2. Stunned Kenyans tried to come to terms with the collapse of the dam and to fathom its cause leading to such grave losses and deaths. The tragedy was the talk of the nation for weeks, in and outside government and in Parliament. Since the incident was generally not perceived as a natural disaster, there were numerous agitated calls countrywide for action to be taken against those responsible in any way for the tragic incident.
3. Eventually, on 4th July, 2018, the Director of Public Prosecutions issued a press statement on the Solai Dam disaster. He stated that following investigations prosecutions would be instituted. The 1st Applicant, Johnson Kamau Njuguna, was named amongst many others as one of the persons who would be charged. The second petitioner, Luka Kipyegen, was not named in the press statement but was nevertheless also charged.
4. On 9th July, 2018, the two applicants were arraigned in Naivasha Chief Magistrates Court in **CMCR 977 of 2018 Republic v Perry Mansukh Kasangara & Others**. The charges they face are numerous counts of manslaughter, neglect of official duty, and failing to prepare an environmental impact assessment report, contrary to provisions of the Penal Code, the Environmental Management and Co-ordination Act, and the Water Act, respectively.
5. It was indicated by all parties during the hearing of this petition, that pleas had been taken and the lower court case was scheduled for hearing on 10th September, 2018. Consequently, the determination of this petition should be completed expeditiously so as to give guidance

on whether the lower court case will proceed on that date.

6. The charge against the applicants is specifically that between 2007 and 9th May, 2018, as water resources authority employee and Subukia Sub-County Administrator, respectively, they wilfully neglected to perform their duties; that they were bound to perform such duties under the Environmental Management and Control Act, the Water Act 2016, and the National Government Administration Officers Act, 2013.

Parties' Cases and submissions

7. The applicants seek the following reliefs from this court:

“(a). An order of Certiorari calling for and quashing the decision of the Director of Public Prosecution to prefer charges against the Applicants for neglect of duty contrary to Section 128 as read with Section 36 of the Penal Code as per the charge sheet of 5th July, 2018 Count XLIX.

(b). An order of Prohibition prohibiting the Respondents from prosecuting the charges abovementioned as against the Applicants.

(c). Upon the order of Prohibition as stated in prayer (b) being granted, an order of Certiorari be issued quashing the charge of manslaughter as preferred against the Applicants and the Counts II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI, XXXVII, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV, XLVI, XLVII and XLVIII of manslaughter.

(d). Costs of and incidental to the application be provided for.”

8. In their statement of facts in the petition, the 1st applicant states that he is County Director, Water, Nakuru County. The 2nd Applicant states that he is the Sub-County Administrator, Subukia Sub-County.

9. The Respondent's replying affidavit was sworn by Inspector Joseah Maritim. In essence, he asserts that the 1st and 2nd applicants were obligated under the County Government Act, 2012, to ensure that the environmental resources were compliant with the law, in particular paragraph 10 in Part 2 of the Fourth Schedule to the Constitution. He also stated that section 50 of the County Government Act, 2012, makes a Sub-County Administrator responsible for co-ordination management and supervision of the general administrative functions in the sub-county, including coordination of citizen participation in development of policies.

Applicants' case

10. Mr Karanja appeared for the Applicants. In the substantive application, the applicants assert that: the 1st applicant is the County Director of Water, Nakuru County, having been appointed by the County Public Service Board in October 2014; that the functions of his office do not involve any of the duties which he is accused of neglecting.

11. For the second applicant, it is asserted that he was transferred to Subukia Sub-County on 12 March 2018, and that although he was required to report to his new duty station on 16th March, 2018, he was granted leave from 26th March, 2018, and was due to resume duties on 7th May 2018. Consequently, the second applicant had not discharged any duty in respect of his office to warrant a charge of neglect of duty. Further, that there is no indication in the charge sheet of what the second applicant specifically did that gave rise to the offence as there is no neglect of duty charge under the County Government Act In the charge sheet.

12. The applicants attached copies of their employment letters in their affidavits in support of the application. They argue that the decision to prefer criminal charges against them is devoid of merit as there was no formal mandate vested on them by virtue of their employment letters in respect of inspection and licensing of the Solai Dam.

13. Counsel stated that it is not in dispute that Count Number 49 on manslaughter emanates from neglect of duty. He argued that the applicants will only face manslaughter if they had a specific duty to do which they neglected. He pointed out that the duties they allegedly neglected are under:

The Water Act 2016; the Environment Management and Coordination Act (EMCA) and the National Government Coordination Act, which must have a duty provided for under these statutes which they neglected.

14. Counsel referred to the **Constitution 4th Schedule Paragraph 22 (c)** – The “Safety of Dams” which he noted was a function of National Government. Further, he argues, **Schedule 4 Part 2 Paragraph 11** of the **Constitution** places the function of provides as “County Public Works and services” on County Government. In the present case the Solai Dam was private and therefore not under the functions of the County Government.

15. It was also argued that **Section 5** of the **Water Act 2016**, takes into account the 4th Schedule of Constitution in that every water resource is vested in and held by the National Government. Under Sections 6 and 11, the body vested with overall authority is the Water Resources Authority, which issues permits under **sections 12** and **36**. Further, Environmental impact assessments are conducted by National Environment Management Authority under **Section 40 (4)** pursuant to the **Environmental Management and Co-ordination Act, 1999**. Water Permits are issued by the Water Resources Authority.

16. Counsel emphasised that construction of works such as dams is regulated by **section 41(2)** of the **Water Act** and the **Second Schedule** to the Act which provides for conditions for permits. Accordingly, Counsel argues that the County Government has no role yet the applicants are charged under the Water Act.

17. It was argued that **Section 50** sets out functions of County Government Administrators. These are development facilities and so on, but that none of the functions include the issue of water. Counsel therefore argued that prosecution not founded on a statute is an abuse of process of the court. The court's role is to safeguard the rule of law.

18. Several authorities were cited by Counsel some of which I refer to here. In **Republic v CS In-charge of Internal Security & 3 Others Exparte Jean Eleanor Margaritis Otto [2015]**, the court held that the object of judicial review is to uphold the rule of law promote the public interest, the police the parameters and duties imposed by Parliament, to guide public authorities and secure that the act lawfully, to ensure that they are accountable to the law and not above it, and to protect the rights and interests of those affected by the exercise of public power. Accordingly Counsel argued that the DPP's decision must be procedurally fair (i.e. he must have investigated) and that it must be justifiable in relation or reasons given. The court will therefore quash decisions which are in excess of powers.

19. Counsel also relied on **section 43** of the **Interpretation and General Provisions Act** by which it is provided that where a written law imposes duties in a certain office those duties must be performed by the holder of that office for the time being. In this case, he argues, the charge against the applicants of neglect of duty contrary to **section 128** as read with **section 36** of the **Penal Code**, is baseless on the ground that the applicants had no duties imposed on them by statute.

20. With regard to the kernal aspects of the case, counsel urged that in instituting the criminal case the DPP acted capriciously and on a whim in charging the applicants. He urged that there was absence of clear evidence or any nexus linking the applicants with the licensing, inspection and authorisation of Solai Dam as a water resource. Consequently there was no reasonable cause to institute criminal proceedings, and the absence of such reasonable cause is primer fancy indicated with of abuse of legal process.

21. Counsel cited **R v Attorney General Exparte Kipngeno Arap Ngeny High Court Civil Application No 406 of 2001**, where the court held:

“A criminal prosecution which is commenced in the absence of proper factual foundation of 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 criminal prosecution otherwise the prosecution will be malicious and actionable.”

22. Asking the court to stop the DPPs intended prosecution, Counsel cited **Githunguri v Republic [1986] KLR 1** where the court stated:

“A prosecution is not to be made good by what turns up to 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 is proposed”

23. Counsel averted to and dismissed the DPPs response which stated that what the applicant had filed was a defence of the criminal charges. We have filed a defence part. He urged that there was no basis to prosecute, if on the basis of the available evidence, the result will be an acquittal. Counsel finally questioned whether, even if there is a duty imposed on the County Government, there was no basis given or rationale for picking on the Petitioners.

Respondent's Case

24. Mr Makori and Mr Kinyanjui appeared for the DPP, each making submissions. Counsel argued that the two applicants are obligated to ensure that environmental resources are compliant to the law. He referred to the **Constitution** at the **4th Schedule Part 2 Section 10**, which he urged imposes the implementation of specific national government policies including soil and water conservation upon the County Government, and **Section 11 4th Schedule Part 2** under which County Public Works services are devolved to the County Government.

25. Further Mr Makori referred to **Article 174 (g)** of the Constitution on the objects of devolution, one object of which is to ensure equitable sharing of national and local resources. He pointed out that there is a sharing of roles between national and county governments. At **Article 189 (1)** of the **Constitution** the government at either level shall perform its functions in a manner that respects constitutional integrity of government. This brings into play **Section 50** of the **County Governments Act** under which the County Government Administrator is responsible for facilitation and coordination of citizen participation of policy plans and delivery of services.

26. Counsel stated that according to the investigations and as averred in the affidavit of Inspector Maritim, the applicants were aware of existence of the dam in their jurisdiction. However, they wilfully neglected their duties of conducting inspections and ensuring that the dam had the necessary permits, and was compliant to the law. According to paragraphs 7 and 8 of Joseah Maritim's affidavit, the applicants were required to carry out inspections and or supervisions of the dam. Their failure was a clear dereliction of duty amounting to recklessness that led to loss of forty eight lives.

27. It was argued that what the applicants had filed was evidence in defence of the case instituted in the lower case. As such, it was submitted, it was not for this court to go into the merits of the evidence in the Judicial Review application.

28. According to counsel, the County Government ought to have inspected the dam, as the stream watering the river on which the dam is built is a water resource that broke its banks. It was supplying the dam. Had the County Government been diligent, it should have inspected the stream. EMCA Section 30 County Environment Committee shall be responsible for proper management of the environment within the

county. This is not the right time or place to supply evidence of the criminal case. It is not for the court to examine the evidence to establish substantial merit of the case.

29. Counsel concluded by stating that the issues in Applicants affidavit are for trial in lower court, and the Applicants have not demonstrated that the DPP's decision was tainted with illegality or irrationality.

30. Mr Kinyanjui, also for the DPP, referred to several authorities: In **Republic v National Environment Management Authority & Another Exparte Philip Kisia & City Council of Nairobi [2013] eKLR** the court held that local authorities and government ministries, departments and agencies must work together to manage the environment. Counsel argued that in this case all agencies failed to enforce the law. Consequently, all agencies and relevant executing staff had all been charged.

31. Counsel also cited the case of **Beatrice Ngonyo Kamau -Vs- Commissioner of Police and DPP & Others [2013] eKLR** where Lenaola, J, declined to interrogate the merits of the case. Counsel urged that the DPP's role is to present prima facie evidence of neglect/negligence, and that it is for the trial court to consider the value of the evidence.

32. According to counsel, the role of the High Court as a Judicial Review court is to weigh the rights of the applicants and not to weigh the evidence. As such, the DPP's decision to charge is itself unfettered but not unaccountable. Reference was made to the case of **Peter Ngunjiri Maina v Director of Public Prosecutions [2017] eKLR** where the court stated:

“The decision of the DPP is unfettered but it must be accountable. The discretion of part of the court to interfere with the decision of the DPP is untrammelled but it is not to be exercised whimsically.”

33. Finally, counsel submitted that it is in the public interest that the court allows the trial to proceed to its logical conclusion to allow the victims of the tragedy access justice without unnecessary hindrance. The court should be cautious in weighing the matter so as not to interfere with DPPs constitutional functions. In this case, DPP has not been shown to have abused his discretion, has not frustrated the applicants, and no irrationality on the part of the DPP has being demonstrated.

Issues for determination

34. The court finds the following to be the issues for determination in this case:

- a) Whether the Applicant's application amounts to a defence suitable for determination in the lower court and thus not amenable to Judicial Review.
- b) Whether the Respondent's actions in charging the applicants are tainted with irrationality unreasonableness and procedural impropriety necessitating the intervention of the court

Analysis and Determination

Whether the Applicant's application amounts to a defence suitable for determination in the lower court and thus not amenable to Judicial Review

35. The respondents hold the view that the applicants' application is basically an assortment of facts and evidence seeking to establish a defence to the prosecution's indictment of them. As such, it is the DPP's view that the matter should be dismissed as the applicants will have a full opportunity to defend themselves and adduce whatever evidence they deem necessary in their defence; that, in determining a Judicial Review application, it is not the Court's province to consider the detailed evidence which the applicants have availed to show that they could not be culpable.

36. The evidence alleged to have been submitted by the applicants concerns the detailed statements they have made in relation to their appointment letters. In the case of the first applicant, it is stated that he was appointed a District Water Officer Nakuru North District in 2007, was appointed County Director of Water and Irrigation in 2013, and Nakuru Director of Water in 2014. The first applicant has detailed the functions of his office, none of which he states, imposes on him the duties which he is accused of neglecting.

37. The second applicant alleges that he was appointed as the Sub-County Administrator in April 2015, and posted to Kuresoi South Sub-County. In March 2018, he was transferred to his present duty station in Subukia, but was on leave and had not reported to the station, when the Solai Dam incident occurred.

38. Further the applicants allege that it was not their responsibility to inspect the dam, nor to issue any licences, and therefore the criminal charges against them are devoid of merit.

39. As clearly seen from the authorities provided by the parties, it is settled law that the role of the court in a judicial review application of this nature is to ensure that an applicant is not dragged willy-nilly into court on criminal charges when there is no substantial evidence to sustain an indictment. The DPP has the authority and discretion to decide who, when and how to prosecute within the bounds of legal reasonableness. That role cannot be usurped by the court. If the DPP acts outside the bounds of legal reasonableness, however, he acts ultra vires and the court can intervene, because it is the court's high responsibility and inherent power to secure fair treatment for all persons brought before the court, and to prevent an abuse of the court's process.

40. Several principles are applicable as follows: the court is not permitted to delve into the merits or otherwise of the criminal process as that

would amount to unnecessarily trespassing into the arena specially reserved for the criminal trial court, and ought not to usurp the constitutional or statutory mandate of the respondents (**R v CS In charge of Internal Security & 3 Ors Ex parte Jean Eleanor Margiritis Otto** supra; the court should not act as if it were the Court of Appeal which would involve going to the merits of the decision itself as to whether or not there was sufficient evidence to support the decision (**Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No 185 of 2001**); even where an applicant has a seemingly plausible comeback to each of the charges made against him and that they may be persuasive, it is the factual disputes in the case that necessitate a rational actor to conclude that there is sufficient evidence to take the case to trial in a criminal case (see **Patrick Ngunjiri Maina v Director of Public Prosecutions & 2 Ors [2017]eKLR**).

41. In the case of **Beatrice Ngunyo Kamau -Vs- Commissioner of Police and DPP & Others [2013] eKLR** Lenaola, J, (as he then was) declined to interrogate the merits of the case before him stating:

“In the instant case I am not going to delve into the merits of the case, the evidence tendered before me is sufficient at a prima facie level to show that the DPP had reasonable grounds to suspect that the ex parte applicant and the interested party may have been by negligent criminal action caused collapse of the building on LR Number 149.... And this court cannot purport to turn into a trial court to determine their value”

42. In light of the foregoing, I do not consider it necessary at this stage to make any decision as to whether the applicants have put forth evidence which bars the court from looking at it in determining this review application. I am prepared to hold, however, that the evidence together with the circumstances of the entire case, will be taken into account in deciding whether or not the application is successful. It would be improper to dismiss the judicial review application merely because there was a heavy dose of evidence in it if, taking the overall picture into consideration, there was a meritorious basis to avail the evidence to enable a conclusion to be reached that the actions of the DPP were improper or otherwise.

Whether the Respondent’s actions in charging the applicants are tainted with irrationality unreasonableness and procedural impropriety necessitating the intervention of the court

43. It is not in dispute that this court has powers to issue judicial review orders in a large variety of cases where it can be shown that there has been an abuse of power by public authorities. This is settled by a long string of authorities. In this particular case, the applicants’ core allegation is that the prosecutorial powers exercised by the DPP were both misdirected and untenable on grounds that he had no evidential basis to commence a prosecution against the applicants, since they had no legal duties which they allegedly neglected leading to the collapse of the Solai Dam.

44. In the case of **Kuria & 3 Others v Attorney General [2001] 2 KLR 69**, the court stated as follows:

“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 criminal prosecution otherwise the prosecution will be malicious and actionable”

45. **Section 202** of the **Penal Code** concerns the offence of manslaughter. The provision is to the effect that:

“(1) Any person who by unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm”

46. The alleged absence of a proper factual foundation based on alleged duties imposed on the applicants, is precisely the complaint the applicants have raised. In the case of **Peter Ngunjiri Maina v DPP & 2 Others [2017]eKLR**, Prof Ngugi, J, aptly summarised eight scenarios where the duty and authority of the court in reviewing the exercise of the discretion of the executive is warranted relative to the unfettered discretion of the DPP. Rephrasing Odunga, J, in **R v DPP & 2 Others Ex parte Nomoni Saisi [2016]e KLR**, he stated:

“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. Whether decision-maker is in breach of the duty to act fairly;***
- 4. Whether 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.”

47. It is upon these criteria that the actions of the DPP in this case must be tested.

48. The applicants are charged with the offence of manslaughter contrary to section 202 of the Penal Code read together with Section 205 (prescribing the punishment). In addition, there is a charge under Section 128 Penal Code which concerns neglect of official duty by a public servant which he is bound either by common law or written law to perform. This is, clearly, a broader charge than that under section 202 in terms of the scope of the ingredients of the offence and the elements which must be proved. Under section 128 Penal Code, the public duty alleged to have been omitted or neglected indeed need not be statutory, and facts constituting common law elements of evidence are adequate to justify the institution of the charges.

49. In the present case, the prosecution has not disclosed the substantial evidence they have because, as they said, such evidence will be availed at the criminal trial. The question that arises is whether on the basis of the existing information, the DPP can be said to have acted without any reasonable and probable cause for mounting the criminal prosecution. If so, it is the solemn and sacred duty of this court to intervene and stop the continued prosecution by the DPP.

50. The affidavit of Inspector Maritim depones that the applicants were aware of the existence of the Solai Dam. That in itself does not give rise to anything actionable. However, this must be juxtaposed with the fact that there is a constitutional responsibility on the County Government as set out in the **Fourth Schedule Part 2 Section 10** of the **Constitution** with regard to the:

“Implementation of specific national government policies on natural resources and environmental conservation including-

(a) soil and water conservation;...”

51. Further, there was the argument borne out of **Article 189 (1) (a) (b) and (c)** of the **Constitution** that national and county governments must at either level, function in such a manner that they ensure institutional integrity, that they respect the constitutional status of institutions of government at the other level, and liaise with each other to exchange information and co-ordinate policies.

That argument resonates with the fact that there is a responsibility of officers at county and sub-county level to be closely engaged with policies relating to issues of natural resources – whether it be works or services – at county level. Indeed, **Article 189(1)(b)** specifically obligates governments at either level to:

“assist support and consult and, as appropriate, implement the legislation of the other level of government”

52. Simply put, there is an overarching constitutional responsibility placed on county officers to be alive to the content of legislation, and to assist, support and implement the same as may be appropriate. In the context of the environment, there is no doubt in my mind that a county or sub-county water officer has a responsibility to engage with the local people in the county by way of public participation and implement government policies and legislation within that county.

53. Accordingly, I agree with Korir J, in **Republic v National Environmental Management Authority & Another Ex parte Philip Kisia & City Council of Nairobi [2013]eKLR** where he said that:

“I have considered the arguments on this issue and I agree with the applicants that lead agencies (government ministries: departments: parastatals and state corporations: and local authorities) which are by law mandated to control or manage the environment or natural resources should cooperate with NEMA in the preservation and protection of the environment....”

54. If this were not so, chaos would quickly result in the day to day activities in a county or sub-county with every officer opting to remain benign where more than one organ or entity appears to have a specific statutory mandate but which mandate can only be efficaciously, effectively and appropriately executed when there is cooperation and complementarity between various agencies with coordinate mandates. I am therefore of the view that in this case the officers of the County Government had a functional and coordinating role in matters environment.

55. Thus, it cannot be escaped that water officers at sub county level represent the face of the county in respect of the constitutional mandate of co-ordinating and implementing matters water in the county and ensuring that constitutional integrity is maintained in the implementation of specific national government policies on natural resources and environmental conservation.

56. I have also considered the provisions of the Water Act which the parties specifically pointed out to me. It is clear that issuance of various types of permits is the responsibility of both the Water Resources Authority and NEMA.

Under Sec 38 (1)(b) a person who employs works in contravention of the conditions of a permit commits an offence. Under the **second schedule** to the Act **paragraph 7** it is the responsibility of every permit holder to maintain and retain his or her works in good and proper workman-like manner the satisfaction of the Water Resources Authority or the Water Regulatory Board. Clearly the distinct responsibilities for works are vested in the Water **Resources** Authority and the Water Regulatory Board.

57. Under **section 9(k) and (l)** of the **Environmental Management and Coordination Act No 8 of 1999**, it is the responsibility of NEMA to initiate and evolve procedures and safeguards for the prevention of accidents which may cause environmental degradation and involve

remedial measures where accidents occur. It is also their responsibility to monitor and assess activities to ensure that the environmental management objectives are adhered to and an adequate early warning on impending environmental emergencies is given.

58. Whilst these are true, to the extent that the Water Officer and the Sub-county administrator have co-ordinating roles and the function of ensuring that the requisite laws are implemented, it cannot be categorically said that there can be no suspicion of neglect of such duties on their part.

59. I agree with the statement of the court in **Republic v Commissioner of Police and Another Ex parte Michael Monari & Another 2012[eKLR]** where the court opined:

“ 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 referring charges. The rest is left 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”

60. I also agree with the position taken by Ngugi, J in the **Peter Ngunjiri case** (supra) where he stated as follows:

“ The task of this court is only to determine, based on the facts and the evidence before it whether there is any sense in which one could say, in context, the decision by the DPP to charge the applicant in this case is irrational, an abuse of discretion, a failure to act fairly in the exercise of discretion, [was] actuated by malice or other relevant considerations, against public interests, does not cohere with the interests of the due administration of justice, is oppressive, or is an abuse of the legal process.”

61. Here, we have a situation where the chief water officer in a sub-County and the administrator of the sub-County, both of whom represent the sub-County in matters of water and the implementation of legislation and policy, have stated that they had no responsibility in respect of a dam within their jurisdiction. This is in the circumstances where, it is deposed by Inspector Maritim, and not controverted by them, that they were aware of the existence of the dam prior to its breaching its banks and flooding out with the disastrous consequences and death already indicated. To my mind, public interest would naturally require that an explanation be given borne out of investigations carried out in the matter, to bring to account the persons responsible or complicit for the incident.

Disposition

62. Taking all the aforesaid into account, and in light of the grave consequences that the collapse of the dam had, I find that it would be in the interests of the public, the applicants, the complainants and the respondents for the criminal prosecution not to be stopped, but to indeed proceed and be determined expeditiously so that the matter can be laid to rest.

63. This court therefore declines to grant any of the orders sought by the applicants, with the result that the chamber summons application for judicial review is hereby dismissed with costs.

64. Orders Accordingly

Dated and Delivered at Naivasha this 3rd Day of September, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Wairegi holding brief for Kinyanjui for the Applicants

2. Makori and Kinyanjui for the Respondent

Court Clerk – Quinter Ogutu