



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 7 OF 2015**

**IN THE MATTER OF THE CONSTITUTION OF KENYA AND ENFORCEMENT AND  
INTERPRETATION OF THE CONSTITUTION, RULES 2013**

**AND**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF ARTICLES 1, 10, 2, 23, 47, 49, 157 AND 265 OF THE CONSTITUTION  
OF KENYA 2010**

**AND**

**IN THE MATTER OF ADMINISTRATION ACT NO. 4 OF 2015**

**AND**

**MARTINA KEMUNTO ONCHANGU ..... PETITIONER**

**AND**

**IN THE MATTER OF LEGITIMATE EXPECTATION**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION .....1<sup>ST</sup> RESPONDENT**

**DCIO MALINDI ..... 2<sup>ND</sup> RESPONDENT**

**OCPD MALINDI ..... 3<sup>RD</sup> RESPONDENT**

**ETHICS AND ANTI- CORRUPTION COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**WINIE KAMENE PETER ..... 2<sup>ND</sup> INTERESTED PARTY**

**JUDGEMENT**

## **Background**

The petitioner herein is an advocate of the High Court of Kenya practicing in Malindi Town. On 18<sup>th</sup> January 2016, the petitioner filed an application in Malindi succession cause No. 44 of 2015 and obtained an order of injunction restraining the interested party from among other things occupying plot No. 11140 (Original Number 1794/7) Malindi. The OCS Malindi police station was to assist in enforcing the orders.

On 27<sup>th</sup> January, 2016 the petitioner in the company of two police officers, three civilians and Mr. Ogeto advocate went to the suit premises and effected the order. The interested party was evicted from the premises. On 29.1.2016 the interested party obtained orders from Mombasa High Court reinstating her to the premises. On 30.1.2016 the interested party made a report to the Malindi police station to the effect that during the time she was out of the house, several items including Kshs. 266,000 and four thousand (4000) Euros was stolen. This report led to the arrest of the petitioner on 26.3.2016 and the petitioner was charged with one count of house breaking contrary to section 304 (1) (a) of the penal code and a second count of stealing from a dwelling house contrary to section 279 (b) of the penal code. It is the above events which led to the filling of the current petition.

## **The Petition**

The initial petition is dated 29.3.2016. It was amended on 13.5.2016. The petition seeks the following prayers.

- 1. A declaration that the arrest pending arraignment in court charging and impending prosecution is unconstitutional and unlawful.**
- 2. A declaration that the petitioner's rights to fair administrative action pursuant to Article 47 (1) and (2) were infringed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.**
- 3. A declaration that the petitioner's right of being informed in advance of the evidence the prosecution intends to rely on against her have been violated.**
- 4. A declaration that the petitioner's rights under Article 49 (1) (a) (i) were contravened.**
- 5. The Honorable Court be pleased to order for compensation of the petitioner by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in all contravention or by any other person found culpable.**
- 6. That the respondents be prohibited from charging or proceeding with any prosecutions of the petitioner with the charge of breaking and or stealing arising from the execution of the orders issued by the court on 26.1.2016, or any other related charges.**
- 7. Costs of the petition.**

The petitioner contend that her constitutional rights were violated. This include her right to fair administrative action under Article 47 of the constitution. The right to be supplied with the prosecution evidence under Article 50 of the constitution. The right to information under Article 35 of the constitution. It is also stated that when the petitioner was arrested she was deliberately cut out from her contacts and her phone was confiscated.

## **Replies To The Petition**

The respondents filed a replying affidavit sworn by chief inspector Jacob Ngao on 24.5.2016. It states that the OCS Malindi police station was served with a court order on 27<sup>th</sup> January 2016. On the same date two police officers went to the suit premises with the petitioner and served the orders. On the same date the interested party and her family left the suit premises. On 29.1.2016 the interested party obtained court orders reviewing the earlier ones. These orders allowed the interested party to remain in occupation of the

suit premises. Once again two police officers were sent by the OCS to reinstate the interested party in the premises. On 30.1.2016 the interested party filed a report at the Malindi police station indicating that her property was stolen. The report was booked in the occurrence book as Number 25/30/1/2016. Investigations were done and on 26<sup>th</sup> of march 2016 the petitioner was arrested. She was released on reasonable cash bond and was to appear in court on 29.1.2016 for plea taking. It is stated that the normal processes were followed and no rights were violated.

The interested party filed a replying affidavit sworn on the 11.8.2016. It is stated that on the 27.1.2016 at about 7.00am she was woken up by the petitioner who was in the company of armed police officers. The interested party made consultations and found out that the orders that were served on her by the petitioner did no provide for her eviction. She later made a report to the police station. Her properties were stolen and it was normal for her to make the report.

### **Petitioners Submissions**

Parties agreed to determine the petition by way of written submissions. The petitioner submits that the criminal charges against her have been instituted out of malice for the sole purpose of frustrating and scaring her away from representing the objector in the succession cause. The succession cause is between the interested party who was married to the late Pietro Rossini. The petitioner is representing the deceased's son by the name Omar Rossini. When the interested party took possession of the property on the 29.1.2016 in the presence of the police, she did not complain of any loss. The following day she made a report alleging that several of her items including 4000 euros, Kshs. 266,000, Gold bracelet worth 300 euros, Gold necklace worth 4500 euros and a Rolex watch were missing. The petitioner was to present when the interested party was reinstated into the premises.

The petitioner submit that she was summoned by chief inspector Ngao and when she went there she was not told as to who or what the complaints were against her. The petitioner recorded a blanket statement on 14.2.2016 and since then did not hear anything until 26.3.2016 when she was arrested in her office by police officers who were in a convoy of three vehicles and in the company of the interested party, her mother, sister and other people. She was arrested in the presence of her clients. The interested party and her family were jeering at her. While at the police station she was kept incommunicado for some time until her fellow lawyers went there and managed to persuade the police to release her on a bond of Ksh.30,000.

It is submitted that the interested party made the complaint of lost property with the sole purpose of settling scores with the petitioner who had removed her from the suit premises. The prosecution is not brought in good faith and is an abuse of the court process. The conduct of the complainant in the criminal case gives a systematic picture of why the proceedings were commenced. It is also contended that the investigating officer Mr. Ngao went as far as inquiring about the petitioners practicing status. The interested party alleges that the petitioner is not a court bailiff and could not execute court orders. In her replying affidavit, the interested party state that the mode of execution and the manner of execution of the court order was criminal in nature and criminal sanctions are the appropriate remedies. It is also submitted that the interested party is using the criminal process to punish the petitioner for allegedly misusing her powers as an advocate.

The petitioner further submits that when the court order was served upon the interested party and her family in the presence of police officers. She did not indicate that she had left valuables. Initially it was alledged that Kshs. 260,000 had been stolen. That amount was later hiked to Kenya Shillings 266,000. The manner in which the petitioner was arrested was dramatized by a convoy of three vehicles and the interested party's family members who kept on jeering and giggling. According to the petitioner, the police know her office and she was not a fugitive. It was possible for the police to summon her instead of going to arrest her at her office. The arrest was made to ensure that there was maximum humiliation and embarrassment. When the court order was effected on the 27.1.2016 there were police officers present. None of them has been charged with any offence. The prosecution is being used to harass, intimidate, punish and settle scores against the petitioner for executing a lawful court order.

The petitioner also maintains that she was made to record a statement without knowing what the complaint against her was. The cash bail was granted after a long struggle and pleas from the petitioner's colleagues in the legal profession. The DPP's office did not analyze the case but simply agreed with the police investigations. There was no offence committed. There was no actual or constructive breaking-in so as to sustain the charges.

The petitioner relies on the case of **TITUS BARAZA MAKHANU -VS- POLICE CONSTABLE SIMON KINUTHIA GITAU & 3 OTHERS Nairobi High Court Constitutional Petition No.463/2015**. In that case, it was held that an arrested person has the right to certain minimal information as to the reasons of the arrest under article 49 of the constitution. The petitioner also relies on the case of **REPUBLIC -VS- JAMES MWANGI GICHUKI & 3 OTHERS Nyeri High Court Criminal Case No. 7 of 2007**. In that case, it was reiterated that the law of the land has to be obeyed especially by those entrusted to enforce it. The police should be at the forefront of obeying the law and enforcing it. Reference is also made to the case of **MOHAMMED GULAM HUSSEIGN FAZAL KARIMALI & ANOTHER -VS- THE AG AND ANOTHER Nairobi High Court Misc Civil Application No. 367 of 2005**.

### **Response By The Director Of Public Prosecution**

It is submitted that the petition is misplaced and bad in law. The petitioner ought to have come to court by way of Judicial review instead of a constitutional petition. The petition is flawed. It was amended without the input of the first respondent. It is submitted that the affidavit of chief inspector Ngao clearly elaborates the sequence of events. The petitioner was afforded ample time and opportunity to tell her side of the story. She was dully informed that the matter was under investigation. She can now not purport that she did not know why she was recording a statement. She was released on reasonable bond terms. The sufficiency or otherwise of the investigations or evidence cannot be a matter for this Honorable court to determine. These are issues for the trial court to deal with.

After investigations were conducted, the file was forwarded to the office of the DPP. After evaluating the evidence and facts, the DPP found the petitioner culpable and exonerated Mr. Ogeto Advocate. It cannot be held that the DPP merely agreed with the recommendations of the investigating officer. It is further submitted that the petitioner is yet to take the plea and cannot claim that her right to information has been violated. The witness statements and documentary evidence will be provided to the petitioner once the trial date is set. The petitioner could not have filed the current petition and thereafter seek material to support her petition from the first respondent. The petition was pre-mature and all the issues being raised are matters to be determined by the trial court. There was no violation of Articles 35, 47, 49 and 50 of the constitution. The respondents are not parties to the succession cause between the interested party and the petitioner's client. It is submitted that the petitioner has not placed any material before this court to show any iota of ill will, malice or otherwise present or past against her. Public interest called upon the investigating officer to forward the file to the DPP for recommendations. The rights of victims of crime are recognized under Article 50 of the constitution as well as by the Victim Protection Act No. 17 of 2014. A complaint was reported to the police and investigations were conducted. The claim by the petitioner for damages amounting to Kshs. 2 million is misplaced.

### **Submissions By The Interested Party**

It is submitted that before the petitioner obtained eviction orders on 26.1.2016, the interested party was residing in the suit premises. The interested party was hurriedly thrown out of the suit property and had no time to pack her personal belongings. When she went back to the house, she noted that she had lost several items. The police commenced investigations and charges were preferred against the petitioner.

It is further submitted that there are no constitutional rights violated. The authorities being relied upon by the petitioner are irrelevant. The interested party rely on the case of **REPUBLIC -V- COMMISSIONER OF POLICE & ANOTHER Ex-parte MONARY & ANOTHER [2012] eKLR**. In that case, the court emphasised the right of the DPP to commence criminal proceedings and not to be under the direction or control of any person as stated in Article 157 (1) of the constitution. The court in

that case emphasized that it is not the duty of the High Court to determine the veracity and sufficiency of the evidence to be tendered against the accused person. That is the duty of the trial court.

### **Analysis & Determination**

The essence of the petition is that the petitioner's constitutional rights were violated. The sum total of the petitioner's complaint is that her constitutional rights were violated and that the respondents be prohibited from prosecuting the petition. Ordinarily the prayers for prohibition would have been brought under a Judicial Review application. However, taking into account the issue in dispute in cases involving prosecution of a petitioner, the distinction between a constitutional petition and a Judicial Review becomes blurred. The end result is whether the petitioner or an ex-parte applicant in a Judicial Review application should be prosecuted or not. A constitutional petition deals with violation of constitutional rights while a Judicial Review application deals with orders of mandamus, certiorari and prohibition. Whenever the High Court is called upon to stop, prohibit or quash a prosecution process, the court has to evaluate the circumstances of each case and make its own decision. Such a decision is made irrespective of whether the applicant has approached the court by way of judicial Review or Constitutional Petition. There is no fixed route for the accused to follow.

The office of the DPP is a constitutional office mandated to direct and undertake prosecution of cases in the entire Republic. Article 157 of the constitution create the office of the DPP and gives it powers to institute and undertake criminal proceedings. Such powers are to be exercised independently without the consent or permission of any person.

Article 157 (11) of the Constitution states as follows: -

**“In exercising the powers conferred by this Article, the Director of Public Prosecutions 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.”**

The petition herein raises the following issues: -

1. Whether the petitioner's constitutional rights were violated.
2. Whether the prosecution of the petition is intended to enhance public interest or it is for oppressing the petitioner.
3. Whether the prosecution of the petitioner should be stopped for being improper.

The guidelines as to whether a prosecution is improper or not were settled in the case of **MACHARIA & ANOTHER -vs- REPUBLIC 2001 KLR 448**. The court stated the following: -

**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;**
- f) **It is in contempt of court;**
- g) **It is oppressive, illegitimate, vexatious harassment of applicants and contrary to public policy.**

The dispute herein can be traced from succession cause number 44 of 2015. The petitioner obtained orders restraining the interested party from among other things occupying the house which is the subject of litigation in that cause. The orders were obtained ex-parte before the Mombasa High Court. The same orders instructed the Malindi OCS to facilitate in their execution. The orders were duly enforced on 27<sup>th</sup> January, 2016. They were executed in the presence of two police officers one being corporal Okumu. Similarly, the interested party obtained orders from Mombasa High Court on 29.1.2016 which orders enabled her to be reinstated in the house. The OCS Malindi complied with the second orders and indeed the interested party was put in occupation on 29.1.2016:

The petitioner is facing a criminal case. She is charged with the offence of house breaking and stealing. The particulars of each count are as follows: -

Count 1

**ONCHANGU MARTINA KEMUNTO** : On the 27<sup>th</sup> day of January, 2016 at Casuarina area Malindi Township, within Kilifi County, jointly with others not before court, broke and entered the building used as a dwelling house by Winnie Kamene Peter, with intent to commit theft therein.

Count 2

**ONCHANGU MARTINA KEMUNTO** : On the 27<sup>th</sup> day of January, 2016 at Casuarina area Malindi Township, within Kilifi County, jointly with others not before court, stole one pair of Diamond Earrings, one Necklace, one Bracelet, Rolex wrist watch and a Swatch watch valued at 21,900 Euros' equivalent to Kshs. 454,362/= and cash Kshs. 266, 000/=. Total valued at Kshs.2, 968,595/= the property of WINNIE KAMENE PETER from the dwelling house of the said WINNIE KAMENE PETER.

The general principle and policy is that courts should not interfere with the discretion of the DPP to prosecute an accused person. That right is to be exercised independently without any limitations. In the case of **DIRECTOR OF PUBLIC PROSECUTIONS -vs- HUMPHREYS (1976) ALL E.R 497**, Lord Viscount had this to say: **“A judge must keep out of the arena. He should not appear to have any responsibility for the institution of a prosecution. The function of prosecutors and of judges must not be blurred. If a judge had powers to decline to hear a case because he does not think it should be brought then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval”**.

It is true that the sufficiency or otherwise of the evidence to be adduced before the trial court cannot be the reasons for the High Court to stop criminal prosecution. It should however not be lost that for the High Court to determine whether the prosecution is proper or not, whether the prosecution is intended to enhance public interest, whether the prosecution is simply meant to bring pressure to the accused to settle a civil dispute or whether it is oppressive, vexatious or simply harassment of the applicant, the court will pay regard to the circumstances of each case and this at times include evaluation of the charges and the supporting information. Such information will be analyzed in the content of the entire complaint before a decision is made as to whether the prosecution should be stopped or should be allowed to proceed. Such a decision to stop the prosecution cannot be based on the sufficiency of the evidence to be adduced in the criminal trial. There is a possibility of an appeal being preferred to the same High Court either by the prosecution or the accused after the criminal case is determined.

The circumstances of the offence are that the petitioner broke and entered into the interested party's dwelling house. This was on 27.1.2016. The truth of the matter is that the petitioner went into the house armed with a court order duly issued by the High Court in Mombasa. There was no breaking into the house. The petitioner recorded her statement with the police on 14.2.2016 and she narrated the entire process of effecting the court orders. If there was any breaking in, then it was done in the presence of two police officers. It is not clear why the two police officers who include Corporal Okumu did not arrest the petitioner during the breaking in. The charge sheet does not indicate the specific time of the offence. According to the petitioner, it is only Corporal Okumu who went upstairs with the interested party when

she was parking her goods. Thereafter the house was locked and the petitioner kept the key. A watchman was retained to secure the premises. It's not clear whether the breaking in occurred immediately or after Corporal Okumu had left. Why would the petitioner opt to break in yet she had the keys for the house? What is the position of the watchman who was retained at the house? For the court to make its decision, it should not be limited to considerations of the DPP's decision to prosecute and the fact that such a decision has been made independently. The court should be in a position to tell the applicant to go and face his/her accusers in court as the prosecution is not vexatious, out of malice, is made in public interest and that there is no violation of his/her constitutional rights. To so, the court has to evaluate the petitioner's complaint against the response by the respondents as well as the sequence of events.

By analyzing the circumstances of the case. The court is not assessing the sufficiency of the evidence. The court has to be satisfied that there is a proper and valid prosecution. If the petitioner was effecting a lawful court order, can it be taken that she took the law into her own hands and opted to break into the house? According to the interested party, court orders are executed by court bailiffs and not lawyers and that the mode and manner of execution of the said orders was criminal in nature and criminal sanctions are the appropriate remedies in the circumstances. Her position is that she was entitled to make a complaint.

The position of the DPP is that a complaint was made to the police. Investigations were done and the petitioner was found culpable. The late Pietro Rossini died on 28.2.2015 in Italy. The interested party was in Italy that time. According to the interested party's statement to the police recorded on 13.1.2016, the deceased's former wife and son chased her away while in Italy. When she came to Kenya on 18.3.2015, Omar Rossini threatened to kill her while speaking on the phone. This incident was reported to the police and it is not clear whether Omar Rossini was charged in court or not. That was way back in January, 2016.

The second count against the petitioner as per the charge sheet relates to stealing of money and other items from the dwelling house that was broken into. The investigations does not reveal what time the house was broken into. If the breaking in was at the time of effecting the court order, then the stealing took place in the presence of the two police officers, the three bouncers as well as Mr. Ogeto advocate. There is no indication from the DPP that statements from these other people were obtained. They too ought to be suspects. According to the interested party as per paragraph six (6) of her replying affidavit, the petitioner was the right person to complain against before the police.

The petitioner called for witness statements. The response from the DPP is that witness statements can only be given after one has taken a plea. Article 49 of the Constitution provides for the rights of arrested persons. Article 49 (1) (a) (1) provides that an arrested person has a right to be informed the reason for the arrest. The word "**reason**" under Article 49 implies the justification for the arrest. The arrested person is supposed to be told that he/she has been arrested because of having committed a certain offence. Ordinarily, as is the current practice, the police would tell the arrested person in simple term like "**you are a murderer**" "**you committed robbery with violence**". "**You are a thief**", "**you defiled a child**" and so on and so forth. Such explanation does not fulfil the provisions of Article 49 of the Constitution. When someone is arrested, it is the duty of the police to sit down with that person, inform him in details why he has been arrested, the charge he is likely to face. The complainant's name if the case involves a complaint by someone; show him the statements of the witnesses and exhibits if already recovered. Article 49 also provides for the right to remain silent and to be informed the consequences of not remaining silent.

According to Article 47, there is the right not to remain silent. This right entails explanation to the police by the arrested person how innocent he is. This explanation can only be done after the arrested person has been given or informed in detail the reasons of his arrest. Such a person has the right under Article 49 to call an advocate and other persons whose assistance is necessary. This does not entail simply calling the advocate and telling him that one has been arrested. The advocate or relative would like to know the nature of the complaint. Who is the complainant. What time was the offence committed and who witnessed the incident. This is a fair interpretation of Article 49 of the Constitution. The police need not incur expenses at this time but should the arrested person be ready to incur costs by photocopying the

witness statements before he is charged in court, then the arrested person has a right to that information whether he is ultimately charged or not. There is a presumption that before the police make the final decision to arraign the arrested person in court, they would hear the arrested person's side of the matter. The arrested person cannot be expected to give detailed information if he is simply told he killed so and so. Due to lack of detailed interaction with an arrested persons, innocent people have been charged in court and their cases subsequently withdrawn or ultimately dismissed due to lack of evidence or poor investigations.

There is Article 50 which provides for fair hearing. It does not mean that an arrested person has to wait until he/she is arraigned in court for him to be provided with adequate time and facilities to prepare a defence. The right to information in relation to the arrest is triggered immediately one is arrested. Before one is arrested, there must be a complaint. There are those cases where the police on patrol stop someone, search him and recover drugs or weapons. That is quite different from cases where a complaint is lodged by a member of the public. In the latter cases, the police and by extension the office of the DPP is supposed to carry out thorough investigations of the complaint and inform the arrested person that he is being charged because their investigations show that he is the one who committed the offence. Such investigation entail detailed interrogation of the complainant. My view is that witness statements cannot simply be provided at the time one is charged in court. If an arrested person would like to confess, he might require to read the witness statements to satisfy himself that indeed he was seen committing the offence. He can be allowed to make copies of those statements so that he can consult his advocate before he is charged in court. The 2010 Constitution requires under Article 20 (3) (b) that the court adopts the interpretation that must favour the enforcement of the right or fundamental freedom. It is a narrow interpretation of the Constitution if one is to hold that an arrested person is not entitled to be provided with witness statements and should wait until he/she is charged in a court of law. While under arrest, there is a possibility of the arrested person providing the police with information that will call upon them to carry out further investigations. Such information can be given to the police after the arrested person is given access to the information the police is holding against him. There are certain exception such as cases involving terrorism and where the witness is under protection.

My view is that the DPP ought to be in the frontline of ensuring that investigations by the police are properly conducted and the accused are fairly treated before being arraigned in court. The statement by the petitioner of 14.2.2016 does not indicate that the petitioner did not break into the house or steal money. The petitioner was not told in detail as to why she had to record her statement. The charge sheet indicate that the petitioner was arrested on 26.3.2016, a Saturday. It is the petitioner's contention that she was not informed the reasons of her arrest. From 14.2.2016 upto 26.3.2016, there was no communication to the petitioner that she was being investigated for house breaking and stealing. All people are equal before the law. This is a fundamental concept of justice. The petitioner is an advocate who had already recorded her statement with the police. She was available for further questioning. She attends court to represent her clients. Nothing would have been easier than to summon her to the police station and inform her what charges were going to be preferred against her. There was no need for the complainant to be present during the arrest with a view to identify the petitioner as she was known to the police and had gone there with the initial court order as well as record her statement on 14.2.2016. I do agree with the petitioner that the manner in which the arrest was effected was meant to ensure that there was maximum embarrassment to the petitioner. It should not be thought that the petitioner ought to have been given special treatment. The circumstances of the case did not warrant a convoy of three vehicles going to arrest someone who deals with court matters on daily basis and who has been to the police station on several occasions. It is the petitioner's averments that she used to receive several calls from the DCIO until she had to report to the office of the DPP. These are not mere allegations.

Given the circumstances of this case, I do find that the prosecution of the petitioner is not conducted with a view to enhancing public interest. It is conducted with a view to settle scores and the ulterior motive is to revenge against the petitioner. The prosecution is improper. The petitioner was not accorded fair administrative action. Allowing the petitioner to record a statement without knowing the intention for that statement is improper. The police who went to effect the second order which reinstated the interested party to the house was a crucial person to narrate whether during the second time the house was found to have been broken into. The petitioner was not present when the second order was being effected. The

interested party took over the premises on 29.1.2016 only to complain the following day on 30.1.2016. Were the stolen items just lying on the table for anyone to see?

The investigation diary under O.B. 25/30/1/2016 reads as follows: -

**To the station is one WINNEY KAMENE PETER c/o Box 1991 Malindi Tel. No. 0720458903 and resident of Casuarina and report that on 27.1.2016 at 7.00 am they alleged that they were given eviction order and today 30.1.2016 they alleged that they found the house was closed and found the following items were missing (1) diamond rings and 4000 euro were not found and the bedroom were closed. They also alleges that Kshs.266,000/= for Winney's mother were kept in the bedroom were not found. She also claims of gold bracelet worth 300 euro and gold neck less worth 4500 euro and watches, Rolex and swatch were also missing now to station and needs police assistance.**

The complaint was made on 30.1.2016. The investigation diary indicates that the report was made at 1035 hours at the Watamu police station. The assumption is that the dwelling house in dispute is located at Malindi and any complaint ought to have been reported at the Malindi police station. The replying affidavit by Chief Inspector Jacob Ngao (paragraph 12) indicate that the interested party made a report at the Malindi police station vide the same O.B number 25/30/01/2016. It is not clear why the investigators' document give two different police stations. The arrest was done two months later. The petitioner went to the police station and was not shown the complaint as per the occurrence book. Even the investigation diary does not indicate that the dwelling house was broken into. It indicates that the house was closed. This is the picture painted by the first report to the police. By 14.2.2016 when the petitioner was recording her statement that information was not revealed to her. The investigation diary is typed and the original O.B handwritten information where the report was made has not been extracted to verify whether indeed the report was made on 30.1.2016. Who was present during the reinstatement of the interested party to the house? Did the police who accompanied the interested party on 29.1.2016 notice any break in or sign of interference with the premises.

All in all, I am of the considered view that the criminal charges are not brought against the petitioner in public interest. The prosecution has been turned into pure vexatious harassment of the petitioner and is a total abuse of the court process contrary to the provisions of Article 157 (11) of the Constitution. To allow the prosecution to proceed will be tantamount to the old school concept of the student undertaking the punishment first and then complain later. Such prosecutions should not be allowed in a democracy founded on social justice, equality, human dignity and transparency. It is the sequence of events and the conduct of the complainant with that of the investigators which make me arrive at the above conclusion. The High Court has not business in protecting a suspected criminal. However, where the whole picture reveals that the prosecution is not for the purpose of upholding the criminal law, the High Court ought to stop it. By so doing, the court will not be dealing with the sufficiency or otherwise of the evidence but the entire investigation and prosecution process. The police should not stop too law and make the prosecution process to be a simple arraignment of suspect sin court so that the court can sift for itself those who are guilty and those who are not.

The upshot is that the petition herein is merited and the same is granted as prayed. The respondents are hereby stopped and prohibited from preferring any criminal charges in relation to the interested party's complaint. There shall be no orders as to costs.

**Dated, signed and delivered in Malindi this 1<sup>st</sup> day of March, 2017.**

**S.J. CHITEMBWE**

**JUDGE**