



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.631 OF 2014

BETWEEN

ERICK MWIRIGI MBAABU.....1ST PETITIONER

EDENSWIN TRADERS LIMITED.....2ND PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS

DEPARTMENT.....3RD RESPONDENT

CPL SAMUEL WAHOME.....4TH RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....5TH RESPONDENT

OFFICER IN CHARGE

(INVESTIGATIONS CID HEADQUARTERS)6TH RESPONDENT

AND

WU-JI.....EX-PARTE RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Eerick Mwirigi Mbaabu, is the Managing Director of the 2nd Petitioner, Edenswin Traders Limited (ETL), a company registered under the **Companies Act** and it is also registered in Hong Kong under the Companies Ordinance. It is an exporter of *inter-alia* hides, skins and leather products.

2. In their Petition dated 29th December 2014, the Petitioners are seeking orders *inter alia* to quash the criminal proceedings at the City Court in criminal case **No.702 of 2012**. In that case, the 1st Petitioner was charged with the offence of obtaining money by false pretense contrary to **Section 313** of the **Penal Code** and it has been alleged that on diverse dates between 30th March and 3rd November 2011 at Nairobi County with intent to defraud, he obtained USD 205,363 from a Mr. Wu-Ji (the ex-parte Respondent) by falsely pretending that he was in a position to export hides and skins from Kenya to China, a fact he knew to be false.

3. The Petitioners now claim that in charging the 1st Petitioner in the aforesaid criminal case, the Respondents violated the Petitioners' fundamental rights and freedoms as provided for under **Article 40, 47, 48 and 50** of the **Constitution**.

Factual background

4. Sometime in March 2011, the 1st Petitioner, through his company ETL, entered into a joint venture agreement with Investedq Capital which was to finance his existing business of exporting hides, skins and leather products to China and other countries. As a result, he opened a joint account at Chase Bank with other persons namely, Daniel Ngau, Elsie Ouko, Daniel Muchika and Alan A. Ogendo as signatories representing the interests of Investedq capital. The account was in both USD and KES and was in the name of Edenswin Traders Ltd.

5. Mr. Wu-ji was one of the 1st Petitioners' clients and was introduced to the financiers as such. The Petitioners now claim that on the basis of the above arrangement, they exported hides and skins to Mr. Wu-ji in Hong Kong and China between March and November 2011 and in particular, the Petitioners claim that in June 2011, they exported one container with a total of 2000 dozen wet blue goat skins to Mr. Wu-ji in China. The container departed from the Mombasa port on 8th June 2011 and was released to Mr. Wu-ji on 13th July 2011. Two more containers with a total of 2000 dozen wet blue goat skins were exported to Mr. Wu-ji in Hong Kong. The containers allegedly departed Mombasa on 24th July 2011 and were released to Mr. Wu-ji on 22nd August 2011. Further, that between March and November 2011, the Petitioners allegedly exported a container of wet blue goat and sheep skins to Mr. Wu-ji in China and in September 2011, he exported two more containers to Mr. Wu-ji in China and in September 2011, they exported two more containers to Mr. Wuji in Hong Kong.

6. The otherwise cosy business relationship between the Petitioners and Mr. Wu-ji turned sour when the latter allegedly refused to pay for the wet blue goat skins supplied to him amounting to USD 2,444,026.40. The Petitioners also claim that Mr. Wu-ji resorted to unorthodox means of coercing the 1st Petitioner to drop his claim and eventually instigated the institution of **Criminal Case No.702 f 2012** aforesaid. The Petitioners thereafter decided to institute the present Petition.

The Petitioners' case

7. It is the Petitioners' case that the investigations and decision to charge the 1st Petitioner in **Criminal Case No.702 of 2012** violates the law in that he was denied the right to an expeditious, lawful reasonable and procedural process contrary to **Article 47** of the **Constitution**. The reason for that argument is that in their view, had the Police heard him and read the documents in the 1st Petitioner's possession relating to the transactions involving Mr. Wu-ji, they would not have charged him with any criminal offence at all. That the decision to charge him was therefore irrational and unconstitutional.

8. In addition to the above, it is the Petitioner's case that in **HCCC. No.239 of 2012**, Judgment was against Mr. Wu-ji in the sum of USD 2,444,026.44 being the value of the wet blue goat and sheep skins supplied to him but which he never paid for and it amounts to double standards and a violation of the Rule of Law to charge the 1st Petitioner with a criminal offence on the same facts for which he holds a valid decree. That no investigative authority could reasonably reach such a decision which is in violation of the Wednesbury Principle as enunciated in **Associated Provincial Pictures Houses Ltd v**

Wednesbury Corporation [1948] 1 KB 223.

9. With regard to the right to a fair trial, the Petitioners have contended that during the 1st Petitioner's trial, the Presiding Magistrate, Hon. Kurumbu exhibited lack of competence, unfairness and abuse of the Court process by threatening to jail him unjustifiably and conducted the criminal trial with the sole intention of denying him a fair trial contrary to **Article 50** of the **Constitution**.

10. Further, that the trial Magistrate declined, without giving reasons, to substitute the 1st Petitioner's bond terms as had been ordered by her predecessor, Hon. Kiarie wa Kiarie and thereby violated his right to reasonable bail and bond terms contrary to **Article 49(h)** of the **Constitution**. He is further aggrieved by the trial Magistrate's failure to recuse herself despite her alleged obvious hostility to the 1st Petitioner.

11. It is his further contention that he was discriminated against by the investigating officer and the decision to charge him in the criminal case with fraud charges was irrational and unconstitutional. He states that he indeed exported several containers of wet blue goat and sheep skins to the Mr. Wu-Ji between March and November 2011 contrary to the allegations made by the investigator.

12. He contends in addition to the above, that the proforma invoice dated 30th March 2011 used to charge him was not a contract and that Mr. Wu-Ji received not only two containers between March and November 2011 but about ten of them and he paid USD 530,000 on account for wet blue goat and sheep skins. It is therefore the 1st Petitioner's position that the criminal case against him has no basis and lacks merits because two containers are not worth USD 205,363. It is his case in any event that if any criminal proceedings had to be instituted, they could only be against the 2nd Petitioner since it is the body that was in the exporting business and not himself.

13. The 1st Petitioner also submits that the failure by the trial Magistrate to admit and mark cross-examination documents for production at the defense hearing and her direction that the Petitioner ought to supply the documents he had intended to rely on to the prosecution, shifted the burden of proof to him contrary to the principle of fair trial. It is also his contention that the trial magistrate is biased as she has failed to compel a certain witness to answer questions put to him by the 1st Petitioner and that the trial court has not allowed the 1st Petitioner the benefit of any of its processes. He avers therefore that he has suffered substantially at the hands of the trial magistrate, Hon. Kurumbu.

14. It is his further contention that when he was forced to proceed with a case involving international allegations in the absence of his lawyers and without any prior warning from the Court on 2nd May 2014, his right to legal representation as stipulated under **Article 50(2)(g)** of the **Constitution** was directly violated.

15. The Petitioner further submits that his right to property as stipulated under **Article 40** of the **Constitution** has been violated in that the Respondents have enabled Wu-Ji to fraudulently acquire the debt owed to him of USD 2,444,026 through the criminal trial. The Petitioner, for the above reasons seeks orders as in his Petition.

1st Respondent Case

16. In response to the Petition, the 1st Respondent, the Attorney General, filed a replying affidavit sworn by Hon. Margaret Kurumbu, Resident Magistrate, seized with the conduct of the criminal trial. She has in her affidavit explained how she has dealt with the trial and her decisions in the applications the 1st Petitioner has had to make during his trial aforesaid.

17. Hon. Kurumbu in particular avers that at all times, she has dealt with the 1st Petitioner as an accused person in accordance with the law and where she has had to make a decision, she gave reasons for the same and gave the 1st Petitioner an opportunity to appeal which he had failed to do. Regarding the claim

that she refused to release the cash bail deposited in Court, she states that at no time did the 1st Petitioner present to her any documents for consideration in that regard as provided by law and in her view, the Petition has no basis and ought to be dismissed.

18. In his submissions, the Attorney General stated that this Court has no jurisdiction in this matter because the Petitioner ought to have applied for revision or appeal against the various Rulings of the Magistrate's Court instead of filing this Petition. Ms. Muchiri for the Attorney General further submits that the Petition has been filed in the guise of an appeal against the various Rulings made by the trial Court and is therefore an abuse of Court process.

19. Learned State Attorney submits further that the Petitioner has not pleaded how his constitutional rights have been violated and also submits that in fact there is no violation of the Petitioner's right as alleged. That the institution of the criminal case against him was undertaken in accordance with the law and contends that the Petitioner is ventilating his criminal case in the guise of a Constitutional Petition.

20. It is her other submission that under **Section 24** of the **National Police Service Act**, the police have been charged with the function of investigating, detecting and preventing crime and thus submits that Cpl. Samuel Wahome who has been enjoined as the 4th Respondent acted within his statutory mandate and charged the Petitioner in the criminal case on the strength of the evidence available against him and that evidence ought to be tested by the trial Court and not this Court. On that submission, she relied on the case of **Meixner and another v Attorney General [2005] 2KLR**.

21. Ms. Muchiri therefore urges the Court to dismiss the Petition.

2nd to 6th Respondents' case

22. In response to the Petition, the 2nd to 6th Respondents filed a replying affidavit sworn by the 4th Respondent, Cpl. Samuel Wahome, a police officer attached to the 5th Respondent, the Directorate of Criminal Investigations. He states that on 13th April, 2012 Mr. Wu-Ji together with Mr. Mohamed Hussein Mohamed reported that they had advanced the 1st Petitioner the sum of USD 205, 363 on diverse dates between 30th March 2011 and 3rd November 2011 to enable him ship hides and skins to Hong Kong and China on their behalf. That upon the complaint being lodged, he was instructed by the 6th Respondent to investigate the same, which he did, and upon completion of investigations, he charged the 1st Petitioner in **Criminal Case No.702 of 2012**.

23. He further states that the complainant, Mr. Wu-Ji has already testified in the criminal case and that the 1st Petitioner was granted a cash bail of Kshs.1,000,000 and in the alternative a bond of Kshs.2,000,000. That the bond terms were later varied by the trial Court and release of cash bail deposited was ordered in favour of the 1st Petitioner. That he failed to comply with the variation of orders by failing to avail a surety to the Court for approval and in the circumstances, the cash deposited as cash bail could not be released to him.

24. As regards the issue of legal representation, he stated that at the time of taking plea on 22nd May 2012, the 1st Petitioner was represented by Mr. Mbaabu Advocate who made lengthy submissions on release of the 1st Petitioner on bail/bond. He states further that thereafter other advocates namely Mr. Nyamweya, Mr. Kabari, Ms. Mutuku, Mr. Kahonge, Mr. Otundo and Mr. Ariyo all appeared for the Petitioner at different times and that all the said advocates were given an opportunity to make representations before the trial Court and contends that the trial Court has not forced the 1st Petitioner to proceed with the trial without representation except on 2nd May 2014 when the case came up for hearing and the trial Court declined to adjourn it having given reasons for the refusal. In any event, he states that the 1st Petitioner was able to cross-examine the witness who testified on that day, at length, and that he is at liberty to apply for that witness to be recalled for further cross-examination should he deem it appropriate to do so.

25. Mr. Mule who appeared for the above Parties, in addition, submitted that the Director of Public Prosecutions (DPP) has the powers to institute and undertake criminal investigations against any person in respect of any offence alleged to have been committed. That the 1st Petitioner in that regard has been charged with an offence known in law and that the prosecution had enough evidence to charge him. He thus contends that the issues raised by the 1st Petitioner in this Petition ought to be canvassed in the criminal trial and not through a Constitutional Petition.

26. It was Mr. Mule's further submission that the Police did not act under the control or direction of any party but in investigating the complaint against the 1st Petitioner, they were discharging their duty under **Article 244** of the **Constitution** and **Section 24** of the **National Police Service Act**.

27. It is for these reasons that Mr. Mule now contends that the Petition is frivolous and an abuse of the Court process and whose main purpose is to circumvent the cause of justice and he thus urged the Court to dismiss it since none of the prayers sought can be granted.

Ex-parte Respondent's case

28. The Ex-parte Respondent (so called for no clear reason known to me) did not file any response to the Petition neither was he represented during the hearing.

Determination

29. At the outset, I must state that the Petitioner is not represented and is acting in person and with respect to him, I have had difficulties in deciphering his claim out of the verbose and voluminous Petition and all the documents that he has filed. Nonetheless, I understood his case to be hinged on two fronts; first, he is challenging his prosecution in **Criminal Case No.702 of 2012** and second, he is aggrieved with the manner in which his case has been conducted by the trial Court.

30. As regards the first limb, his contention is that the Respondents, in mounting the charges against him, violated his right to fair administrative action, right to property and protection against discrimination. As regards the manner in which his criminal case has been conducted, he claims that the trial court has violated his right to fair trial by violating his right to fair and reasonable bond terms, right to legal representation and right to be tried by an impartial Court.

31. In my view therefore, there are only two issues for determination and they are as follows;

(a) Whether the Respondents violated the 1st Petitioner's rights to fair administrative action, right to property and protection against discrimination by charging him in **Criminal Case No.702 of 2012**.

(b) Whether the trial Court in the conduct of **Criminal Case No.702 of 2012** has violated the 1st Petitioner's right to fair trial.

32. Before I determine the above issues, Ms. Muchiri for the Attorney General, in submissions, contended that the Petitioners in their Petition have failed to plead with clarity the manner in which their fundamental rights and freedoms have been violated by the Respondents. I have in that regard stated elsewhere above that the Petition before me is not one that is elegantly drafted and of course if drafted by the 1st Petitioner who is not an advocate, it may well fail to meet the standards of elegant pleadings. Despite this finding, by a careful reading of the Petition, it is clear to me what grievances the Petitioners have against the Respondents and it is obvious to me as well that one is able to discern those grievances and respond to them adequately without shutting the doors of justice on the Petition.

33 It is also my view that whereas the test in the case of **Annarita Karimi v Republic (1976-1980) I KLR 1272** is that a claim for enforcement of fundamental rights must be clearly pleaded and that a Petitioner must state with some degree of precision what provisions of the Constitution has been violated, the manner in which they have been violated and the remedy which the Petitioner seeks from the Court, to

my mind, the Petitioner has been able to meet this test even with a Petition that was not one that can be said to be an epitome of good drafting hence my ability to distil the two issues for determination as indicated above.

34. Having disposed of this preliminary issue as I have, I must now turn to examine the merits of the Petition, if any.

Whether the Respondents violated the Petitioners rights in mounting Criminal case No. 702 of 2012.

Fair administrative action

35. It is the 1st Petitioner's contention that the Respondents, in charging him in **Criminal Case No.702 of 2012** violated his right to fair administrative action. He alleges in that regard that he was condemned unheard by the investigators and that he was specifically denied an opportunity to be heard before being charged in the criminal case. That the investigators did not also undertake fair investigations and the investigations undertaken were incompetent as they omitted the 2nd Petitioner's export records before a decision to prosecute the 1st Petitioner was made.

36. In that context, the **Constitution** at **Article 243** establishes the National Police Service and its objects are set out in **Article 244** which states that;

“ The National Police service shall –

- (a) Strive for the highest standards of professionalism and discipline among its members;*
- (b) Prevent corruption and promote and practice transparency and accountability;*
- (c) Comply with constitutional standards of human rights and fundamental freedoms;*
- (d) Train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and*
- (e) Foster and promote relationships with the broader society.”*

37. The functions of the police are found at **Section 24** of the same **Act**, and they are as follows;

- “a) Provision of assistance to the public when in need;*
- b) Maintenance of law and order.*
- c) Preservation of peace;*
- d) Protection of life and property;*
- e) Investigation of crimes;*
- f) Collection of criminal intelligence;*
- g) Prevention and detection of crime;*
- h) Apprehension of offenders;*
- i) Enforcement of all laws and regulations with which it is charged; and*

j) Performance of any other duties that may be prescribed by the Inspector-General under this Act any other written law from time to time.”

38. Looking at the law above, it is clear that the National Police Service is the body mandated by the **Constitution** to investigate crimes committed within the Republic of Kenya and this may be done through the various organs and personnel of the said National Police Service which include the 3rd, 4th and 5th Respondents. Upon completion of investigations, the 2nd Respondent is then the agent vested with the State’s prosecutorial powers as is seen under **Article 157** of the **Constitution**. The relevant part provides as follows;

“157 (6) The Director of Public Prosecution shall exercise State powers of prosecution and may-

(a) 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.”

The decision to institute criminal proceedings by the DPP is however discretionary and is not subject to the direction or control by any authority because **Article 157 (10)** stipulates that;

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

These provisions are also replicated in **Section 6** of the **Office of the Director of Public Prosecutions Act. No. 2 of 2013** in the following terms;

“Pursuant to Article 157(10) of the Constitution, the Director shall-

(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law.”

39. The law above is clear therefore that the National Police Service and the Office of the DPP are the bodies mandated to investigate and prosecute crimes, respectively, and at the core of the dispute before me is whether, in carrying out the investigations and before prosecution, the Respondents were obliged to give the 1st Petitioner a hearing.

40. In that regard, the *audi alteram partem* Rule is a revered rule of natural justice and has been the subject of litigation in various Courts in this jurisdiction as well as in various Commonwealth Countries and it has been interpreted to mean that a person against whom there is a complaint must be given a just and fair hearing before a decision can be made against him - See cases such as those of the **Supreme Court of Uganda in The Management of Committee of Makondo Primary School and another v Uganda National Examination Board, HC Civil Misc Appl No.18 of 2010**, and the High Court of Kenya case of **Republic v The Honourable The Chief Justice of Kenya & Others Ex Parte Justice Moiwo Mataiya Ole Keiwa Nairobi HCMCA No.1298 of 2004**.

41. In that context, Cpl. Wahome in his Affidavit stated that on 13th April, 2012, Mr. Wu-ji, a Chinese national and the main complainant in **Criminal Case No.702 of 2012** reported that he had advanced to the Petitioner the sum of USD 205, 363 on diverse dates between 30th March and November 2011 to enable him ship hides and skins to Hong Kong and China. That upon receipt of the complaint, he was instructed by the 3rd Respondent to investigate the same, which he did, and was satisfied that the Petitioner had committed an offence hence the commencement of **Criminal Case No. 702 of 2012**. The

1st Petitioner on the other hand contends that had the 3rd Respondent heard him by examining his documents and evidence, he would not have made a decision to charge him. Was Cpl. Wahome entitled to give the 1st Petitioner a hearing before instituting the charges?

42. I do not think so. I say so because, first, I have already stated elsewhere above, it is within the power of the police to investigate crimes. They must however do so within set out parameters including invoking **Section 52 of the National Police Service Act**, and compel the attendance of witnesses at a police station to aid in investigations. Such a power, while it may extend to a suspect and may require the police to hear a suspect before recommending prosecution, is neither the rule nor the demands of the Law. This is why we even have in our realm charges being laid against suspects who are absent at the inception of criminal trials.

43. Secondly, the DPP, before instituting a criminal charge must be satisfied that the evidence available would be sufficient to sustain a prosecution and I say so well knowing that the decision to prosecute is serious and one that should not be taken lightly. The DPP in choosing to prosecute must therefore exercise his discretion within constitutional limits, and independently, as is required of his office. His decision must always be made for the interest of enforcement of criminal law and it must not be forgotten that an accused person is deemed innocent until proven guilty. It is however not for the investigators or the DPP to determine a person's innocence because their mandate is to gather evidence and present it in Court and it is for the trial Court to determine whether such a person is guilty or not.

44. Thirdly, my understanding of the criminal trial process and its tenets is that it is only at the trial where the accused can challenge the validity of the evidence against him. It is also during the criminal trial that he can present his defence including the evidence he has that proves his innocence. The fact that an accused person has his day in Court during the criminal trial ensures that he has been heard before a determination is made one way or the other. The 1st Petitioner cannot therefore be heard to complain that he was not heard at the pre-trial stage because the trial Court is the place where the right to be heard under **Article 50(1) of the Constitution** can properly be invoked. That is why in **Prof. Tom Ojienda v Ethics and Anti-Corruption Commission and 6 Others, [2016] e KLR** this Court determined that where warrants of attachment and search were obtained from a Magistrate's Court by Investigators, the proceedings, being judicial in nature, required that the Petitioner ought to have been heard. In this case, the Investigations were not judicial in nature and **Article 50(1) and (2)** could not be invoked. For avoidance of doubt, that Article provides 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;

(i) 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;

(j) to adduce and challenge evidence;

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

(l) 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.”

45. Fourthly, the principle that the accused is innocent until proven guilty is one of the tenets of a fair trial envisaged under **Article 50(2)** of the **Constitution** above and in my view therefore, all the grounds raised by the 1st Petitioner, including the allegation that he has documents and or evidence proving that the ex-parte Respondents owes him money, can only be evidence to be tendered before the trial Court as that is the Court designed to test the veracity and sufficiency of the evidence against or in his favour. In so finding, I am guided by the Court of Appeal decision in **Meixner & Another v Attorney General (2005) 2 KLR** held that;

“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court”.

46. Lastly, it was the Petitioners’ contention that the Respondents acted with gross unreasonableness in instituting criminal proceedings against him. He states in that regard that no reasonable authority addressing itself to the facts of the law before it would have made such a decision. For this Court to determine whether the Respondents acted reasonably or not will necessitate it having to delve into the merits of the decision to investigate and prosecute the 1st Petitioner. I will not and for good reason carry out an analysis of that decision because it will lead to me making findings that may prejudice the on-going trial. In any event, this Court does not have the evidence that the Prosecution intends to use to support the charges preferred against the Petitioner. At this point, this Court is not to be concerned with the sufficiency of the evidence available to support the charges facing the Petitioner as that is at the core of the criminal trial. To my mind therefore, all that the Respondents are entitled to demonstrate at this stage is that they have a reasonable basis to believe that an offence has been committed and the Petitioner should therefore stand trial - See **William S. K. Ruto & another v Attorney General (2011) e KLR**. The Petitioner on his part has the burden of proving that the charges mounted against him have been

instigated by an ulterior motive and in abuse of the power by the Respondents, a fact he has failed to do.

Protection against discrimination

47. It is the 1st Petitioner's contention that he was discriminated against by the investigating officer in the making of the decision to charge him in the criminal case. He states that he indeed exported several containers of wet blue goat and sheep skins to the complainant between March and November 2011 contrary to the allegations made by the complaint and that the charges therefore have no basis.

48. In that regard, I have already found that the police have a duty to investigate a complaint once it has been made and after such investigations, the police are entitled to take appropriate action. Based on the investigations undertaken, the Petitioner was charged in **Criminal Case No.702 of 2012** and I have also found that it is not the place of this Court to determine whether the 1st Petitioner committed the alleged offence or not, as that is the duty of the trial Court.

49. It is obvious to me however that there cannot be discrimination arising from the fact that the Police in their investigation and decision to charge, did not take action against other persons whom the Petitioner deems should have also been charged because it is not in the place of the Petitioner to decide who should be charged or not. The DPP has the discretion to prefer charges against any person in respect of whom he finds sufficient evidence to prefer charges and that decision cannot be said to be discriminatory for that reason alone - See **Joshua Chelelo Kulei v Republic Petition No.66 of 2012**.

Right to Property

50. In this regard, is the 1st Petitioner's further contention that his right to property was violated as the criminal case against him exposes him to arbitral deprivation of his right to property without just cause contrary to **Article 40** of the **Constitution**.

51. In that context, it is not contested that **Article 40** of the **Constitution** protects every person against deprivation of property but to my mind, a criminal trial *per se* can't deprive a person of his property. The Petitioner has merely been charged with the offence of obtaining money by false pretence and he was thereafter granted bail. He deposited cash as bail and later, when the same was revised to bond, he was unable to obtain a surety and so his bail terms remained. Cash bail is not lost money. It is a security to ensure attendance at the criminal trial. How then can it be said that he has been deprived of it? Once he gets a surety, the money will be returned to him and that would be the end of the matter.

52. I see no merit in the claim for loss of property and I so find. I should only add that since he claims to be holding a decree for USD 2,444,026.40, he has other lawful ways of obtaining that money by executing the decree. This Petition is not concerned with that aspect of his right to property at all.

Whether his rights have been violated by the conduct of the criminal trial.

53. It is the 1st Petitioner's contention that **Criminal Case No.702 of 2012**, is being conducted in violation of his right to fair trial. In that regard, he alleges firstly, that his right to fair and reasonable bond terms have been violated by the trial Court by its refusal to review the surety made and release of cash bail of Kshs.1 million.

54. In that regard, the trial Court record produced in this Court indicates that the 1st Petitioner was arraigned in Court on 22nd May 2012 where he was charged with the offence of obtaining money by false pretence contrary to **Section 313** of the **Penal Code**. He pleaded not guilty and his advocate Mr. Mbaabu made an application for bond and cash bail. On 23rd May 2013, the Court granted him cash bail of Kshs.1 million and in the alternative, a bond of Kshs.2 million with one surety of a similar amount. On 7th June 2012, he made an application for review of the bond terms. The Court declined to review the terms of the bond and on 11th June, 2012, the Court examined the proposed surety and he was approved to be a surety

for and on behalf of the 1st Petitioner. On 11th June 2013, he applied for the release of his cash bail on grounds that he needed the money to pay hospital bills and legal bills. Hon. Kiarie W. Kiarie delivered a ruling on the issue and ruled that the 1st Petitioner should deposit a bond of Kshs.2 million with two sureties in like sum and upon satisfying the new conditions his cash bail would be released. He was unable to meet those terms.

55. On 12th August 2013, the 1st Petitioner made another application for review of bond on the grounds that he was unable to get a second security and he pleaded that the Court does find that the security deposited was enough. Hon. Murigi refused to grant the application and ruled that the set terms were reasonable. On 17th December 2013, a fourth application was made before Hon. Kurumbu for the review of the bond on the grounds that the Petitioner was in need of cash to salvage his business and he requested for a bond of Kshs.500,000. On 20th December 2013, the Court made its ruling and held that the bond terms were to remain as set on 11th June 2013 by Hon. Kiarie W. Kiarie. On 2nd May 2014, the 1st Petitioner made a further application for the release of cash bail so he could pay legal fees. Hon. Kurumbu delivered her ruling in which she declined that prayer and held that the 1st Petitioner ought to comply with the orders of Hon. Kiarie W. Kiarie made on 11th June 2012.

56. It is clear from the above chronology of events that a ruling was made varying the bond terms by Hon. Kiarie W. Kiarie. The 1st Petitioner did not appeal against that ruling and Hon. Kurumbu declined to interfere with the discretion exercised by Hon. Kiarie W. Kiarie and rightfully so because he was appealing against that ruling in the guise of a new application in a Court of similar jurisdiction. It is therefore my finding that the refusal to vary bond terms by Hon. Kurumbu could not amount to a violation of the 1st Petitioner's bond terms.

57. As regards the application for recusal, the 1st Petitioner contends that he had made an application for Hon. Kurumbu to recuse herself from presiding over his trial but she declined to do so. It is his contention therefore that he is not getting a fair trial since she has already threatened him with a jail term. He is also dissatisfied with the refusal by the trial magistrate to release his cash bail and to place a surety in its place.

58. From the record produced as annexure "MWK 4", the allegation that Hon. Kurumbu threatened the 1st Petitioner with a jail term is not on the record. That being so, I will only deem it to be an allegation that has not been proved.

59. It is however true that by a letter dated 2nd May 2014, the 1st Petitioner requested Hon. Karumbu to disqualify herself. In a ruling dated 28th August 2014, she found that there were no sufficient grounds to justify her recusal and it is notable that nothing on record can demonstrate that the trial magistrate is biased against the 1st Petitioner so that he can have a lawful basis to claim that he may not have a fair trial. He is only unhappy with the rulings that have been made by the learned magistrate against him but an unfavourable ruling made by a judicial officer against a litigant cannot be a sufficient ground for recusal. When a litigant is aggrieved by a decision, he has the option of reviewing or appealing against that decision. The 1st Petitioner has not done so and this Petition cannot be such an appeal.

60. Lastly, on this limb, it was the 1st Petitioner's contention that he has been denied legal representation and that the trial Court allowed the trial against him to proceed without his advocate. From the record, it is clear that when the case came up for hearing on 2nd May 2014, the 1st Petitioner applied for an adjournment on the ground that his advocate was not in Court. The application was opposed by the Prosecution on grounds that its two witnesses were in Court and were ready to testify. The Court declined to allow the application on grounds that the 1st Petitioner had been represented by several advocates at different stages and the change of advocates had delayed the case. The accused was then given time to prepare for his trial which commenced two hours later and he participated fully in it.

61. In that context, An accused person has a right to legal representation by an advocate of his choice under **Article 50(2)(g)** of the **Constitution** That right cannot be limited under **Article 25** of the

Constitution. In her ruling dated 28th August 2014, Hon. Kurumbu explained that she had declined the prayer for an adjournment since the prosecution witnesses were in Court and that it was the second time the trial was being adjourned on the ground that the 1st Petitioner was not ready for trial. On that day, only one witness actually testified and he was cross- examined by the 1st Petitioner acting in person.

62. Without belabouring the point, the 1st Petitioner had the unlimited right to legal representation and while the trial magistrate may have acted in good faith, the fact that the 1st Petitioner was literally forced to conduct his own trial in the absence of his advocate cannot negate the fact that a fundamental right was violated. The learned magistrate had other means of securing the attendance of the advocate on record than forcing the 1st Petitioner to proceed with two hours' preparation only. On this issue I must find in favour of the 1st Petitioner.

Conclusion

63. On all the issues raised by the Petitioners, I have found against them save on the issue of lack of legal representation on 2nd May 2014. In the circumstances, the proper orders to make in this Petition are the following:

i) The Petition is dismissed save that the trial magistrate in Criminal Case No.702 of 2012 is hereby directed to re-open the proceedings of 2nd May 2014 should the 1st Petitioner be minded to do so and allow the 1st Petitioner's Advocate to cross-examine the witness who testified on that day and any other witness who testified in the absence of the 1st Petitioner's advocate. If the 1st Petitioner has no intention of re-opening the case or he has no Advocate at the resumption of the trial, then the trial shall continue to its conclusion.

ii) Let each Party bear its own costs.

64. I would like to apologise to the Parties for delay in delivering this judgment due to exigencies of duty.

65. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Mule for Respondents

Order

Judgment to be delivered on 13/10/2016. Notice to issue

ISAAC LENAOLA

JUDGE

At 11.55 a.m.

Petitioner now present

No appearance for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE