



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**JUDICIAL REVIEW MISC. APPLICATION NO. 1 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION**

**8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA**

**AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE THREATENED/INTENDED UNLAWFUL ARREST**

**AND/ OR PROSECUTION OF FREDRICK MASAGHWE MUKASA**

**BETWEEN**

**FREDRICK MASAGHWE MUKASA.....APPLICANT**

**Versus**

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

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT**

**THE INDEPENDENT POLICE OVERSIGHT AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**RULING**

FREDRICK MASAGHWE MUKASA hereinafter referred as the exparte-applicant filed a chamber summons dated 29/2/2016 pursuant to Section 8 (2) and 9 of the Laws of Law Reform Act Chapter 26, Order 53 Rules 1(1) (2) (3) (4) and (2) of the Civil Procedure Rules 2010 seeking the following orders:

1. That this honourable court be pleased to issued orders of prohibition directed at the Respondents prohibiting themselves, or their servants jointly and or severally from commencing, sustaining or proceeding with any criminal proceedings against the applicant in any court herein with respect to matters arising from the incidents occurring at Kitengela Police Station in Kajiado County and within its vicinity on 1<sup>st</sup> April, 2014.
2. That this honourable court be pleased to issue orders of certiorari directed to the respondents mores so specifically at the decision made by the 1<sup>st</sup> respondent in preferring charges, arresting

and/or directing the prosecution of the ex parte-applicant in the Chief Magistrate's Court at Kajiado or in any other court over the complaint of JOSHUA MUNENE GACHOKI.

3. That the honourable court be pleased to grant stay of any action by the respondents, either jointly and severally, to arrest, charge and or proceed with any criminal proceedings against the applicant herein in any court pending the hearing and determination of these judicial review proceedings.

4. The costs of this application be provided for.

The application brought under certificate of urgency was duly considered and the grounds in support together with an affidavit in support by the applicant. On consideration, prayer No. 4 of issuance of stay to preserve the status quo against the respondents was granted pending the final outcome of these proceedings. Prayer No. 4 is therefore spent.

### **Brief Background of the Applicant's Case:**

The application filed was supported by the affidavit of the applicant (FREDRICK M. MUKASA) dated 24<sup>th</sup> February 2016, statement of facts pursuant to statute dated 29<sup>th</sup> February 2016, an affidavit in support of the certificate of urgency sworn by Counsel Mr. Mwaura for the applicant, and the verifying affidavit of the applicant sworn on the said date 29/2/2016.

The ex parte-applicant is a Chief Inspector of Police and an employee of the National Police Service who on the material date was the Officer Commanding Kitengela Police Station in Kajiado County. It is the applicant's case that while on duty at Kitengela Police Station the area member of the County Assembly, Mr. Daniel Kachovi gave notice that along with Hon. Moses Mosapet, the Senator of Kajiado County and other leaders intended to lead and hold a demonstration in Kitengela on 2<sup>nd</sup> April 2016 to protect the alleged grabbing of public land. The applicant further avers that a second report of the intended demonstrations was received from Joseph Nzwili an Officer from the Ministry of Agriculture Livestock and Fisheries which was recorded in OB 26/26/03/2014.

The applicant depones that on 1<sup>st</sup> April 2014 while in his office he was alerted by Mr. Joseph Nzwili – (the officer from the Ministry of Agriculture, Livestock and Fisheries) and one Police Constable Faith Chepngeno that a big crowd of people armed with crude weapons was approaching the police station and was on site demolishing the perimeter wall thereof of the Ministry.

The appellant asserts that in company of Constable Faith Chepngeno, Njanja and Ngugi they rushed to the scene as per the report to maintain law and order. The applicant stated that on seeing the size of the crowd he decided to seek assistance from Administration Police Unit by telephoning SP Maritim in-charge of the camp. The Administration Police in response arrived in riot gear to supplement the other officers already on the ground. Further, the applicant avers that the rowdy crowd started approaching Kitengela Police Station after completing demolition of the neighbouring perimeter wall.

The applicant depones that with the fear that the charged crowd was likely to attack the police station, more so the armoury to take away the guns and the cells to release suspects who had been locked up awaiting being processed for various court appearance, the applicant stated that he made a decision that a breakdown of law and order was imminent and he needed to protect life and property. The applicant deponed that he whipped out his pistol and shot twice in the air.

As a consequence of the gunshots, the crowd scattered and later learnt that one Joshua Munene lodged a complaint that he sustained gunshot injuries on his right ankle on the material day. That the complainant Joshua Munene was investigated and the file forwarded to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent recommended that the applicant be charged with the offence of unlawful wounding of person contrary to Section 237 (a) of the Penal Code. The applicant contends that the circumstances of the day demanded that they had a legal duty to forestall imminent danger by restraining the crowd from any attack or destruction of property.

## **The Respondent's Case:**

The 1<sup>st</sup> and 4<sup>th</sup> respondents opposed the application by filing grounds of opposition filed in court dated 27<sup>th</sup> May 2016 and 8<sup>th</sup> March 2016 respectively. The grounds of opposition for the 1<sup>st</sup> respondent were that the application lacks merit; the application intends to obstruct and interfere with the statutory and constitutional mandate of the 1<sup>st</sup> respondent; the applicant intends to deny the complainant a right to a fair hearing and that the application is an abuse of the court process.

The grounds of opposition for the 4<sup>th</sup> respondent were that the application lacks merit; that the application as filed intends to curtail the statutory obligations and duties of the 4<sup>th</sup> respondent. That the facts relied on in the application are matters that will form part of the applicant's defence in the criminal trial; that should the applicant be arrested and charged, he will have an opportunity to demonstrate his innocence in the criminal court; that the application is an abuse of the court process and should be dismissed with costs to the 4<sup>th</sup> respondent.

The application was argued on directions taken before this court that it be disposed off by way of written submissions.

## **The Exparte Applicant's Submissions:**

Mr. Mwaura counsel for the exparte applicant submitted that by the respondents refusing to take action on the perpetrators of the crime, the applicant was confronted with amounts to discrimination. Mr. Mwaura reiterated that the crowd action could have resulted in possible attack of the police station, making away with the guns in the armoury and forcible release of suspects in Kitengela Police Station. Mr. Mwaura argues that the applicant was faced with people with an intention to commit a crime. He was therefore under a duty to prevent any acts of lawlessness of which he did by the action taken in circumstances of the case.

Mr. Mwaura further submitted that the action by the respondent to investigate the applicant and prefer a criminal charge against him is most discriminatory and negligence on their part to uphold the constitution. Counsel relied on the provisions of Article 27 (1) (4) of the Constitution on the proposition on equality before the law and freedom from discrimination.

Mr. Mwaura further submitted that by the 1<sup>st</sup> respondent preferring criminal charges against the applicant for being at his work station and preventing criminal acts by the senator and the area member of County Assembly who were neither arrested nor charged is a violation of the law. Mr. Mwaura contended that this acts amount to unfair, discriminatory, unreasonable and an abuse of exercise of powers conferred on the 1<sup>st</sup> respondent.

Mr. Mwaura argued that the 1<sup>st</sup> respondent indictment of the applicant was not at the benefit of evidence and material before him but on other considerations this can be demonstrated by the statement of facts that some other police officer was arrested but no criminal charge was ever preferred against him. Learned counsel further submitted that even if the complainant had actually been shot, it would be grossly irresponsible on the part of the respondents to punish the applicant who was lawfully in duty and doing his job as per the law.

Counsel submitted that the purpose to indict the applicant was not to uphold the criminal process but by either or motives and pressure from external forces like the senator and member of the County Assembly. Mr. Mwaura further contended that the criminal charge discloses no offence and is an abuse of the court process. Counsel submitted that the action by the 1<sup>st</sup> respondent can be better described as oppressive, vexatious and intended to harass the applicant. Learned counsel in support of his submissions placed reliance in authorities of the following cases; ***Petition No. 83 of 2010 NRB Peter Njoroge Antony Dcosta v the Attorney General & Another [2013] eKLR, Civil Application No. 532 of 2004 Mombasa Republic v Kenya Sugar Board & 2 Others UR*** for the proposition that where the prosecution is instituted for reasons other than to enforce the criminal law, then the proceedings shall be quashed. It was also the

submissions by Mr. Mwaura, by impeaching the witness statements relied upon by the 1<sup>st</sup> respondent as being ambiguous and lack of proper factual foundation on the events on the material day to warrant a prima facie evidence against the appellant.

Counsel placed reliance on the cases of *George J. OKungu & Another v The Chief Magistrate's Court – Anti-Corruption Court at Nairobi Petition No. 227 and 230 of 2009 at Nairobi, Republic v AG Exp. Kiputgeno Arap Ngeny HCC No. 40 of 2001* for the proposition that if the prosecution is based on traitorous material and intention of the crime charge lacks proper factual foundation, the action to require an individual undergo a criminal trial will only embarrass and prejudice the individual while putting the prosecution to unnecessary expense and agony. That nature of a criminal prosecution which does not disclose an offence should be prohibited.

Mr. Mwaura relying on the above principles submitted that the applicant has established a case on a balance of probabilities to warrant issuance of the orders of certiorari and prohibition against the respondents more specifically against the 1<sup>st</sup> respondent from prosecuting the applicant.

### **The 1<sup>st</sup> Respondent's Submissions:**

Mr. Akula for the 1<sup>st</sup> respondent submitted and objected to the grant of orders sought by the applicant on the basis the application lacks merit. Mr. Akula appraised the witness statements made by investigating officer in respect of the circumstances which occurred on 1/4/2014 at Kitengela Police Station involving the applicant.

Mr. Akula contended that the prosecution has a factual foundation and evidence which meets a threshold of a prima facie case to prosecute the applicant for a criminal offence. It was Mr. Akula's argument that the 1<sup>st</sup> respondent mandate is provided for in the Constitution of the Republic. That constitution mandate by the Director of Public Prosecutions is not subject to control or interference from any other party. In support of the proposition on the mandate of the office of the Director of Public Prosecutions (DPP) he relied on the case of *Republic v Director of Public Prosecutions & 3 Others, Exparte Bedan Mwangi Nduati & Another [2015] eKLR*.

Further Mr. Akula emphasized in his submissions that the police have established a reasonable suspicion and gathered sufficient evidence that establishes a prima facie case. Counsel in support of that relied on the authority of *David Ndolo Ngiali & 2 Others v Director of Criminal Investigations & 4 Others [2015] eKLR, Erick Kibiwott & 2 Others v Director of Public Prosecutions & 2 Others JR Civil Application No. 889 of 2010*.

Counsel further submitted that the onus of proving that there is a fundamental breach of rights and freedoms is upon the applicant. He relied on the case of *Kipoki Oreu Tasur v Inspector General of Police & 5 Others [2014] eKLR*. Mr. Akula urged the court to dismiss the application.

### **The 4<sup>th</sup> Respondent's Submissions:**

Mr. Olola counsel for the 4<sup>th</sup> respondent submitted and relied on the grounds of opposition dated 8/3/2016. Learned counsel further submitted list of authorities. The first authority was *Republic v Director of Public Prosecutions & 2 Others, Exparte Francis Njakwe Maina & Another [2015] eKLR* on the legal principle that:

**“Judicial Review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with legality of the decisions of bodies or persons whose decisions are susceptible to judicial review.”**

The other precedents *Republic v Chief Magistrate's Court & 3 Others, Exparte Stephen Oyugo (Supra)* where **Korir J** cited several cases emphasizing on caution in interference of the judicial review court with the criminal trial.

## DISCUSSION AND RESOLUTION:

### Case Law and Commentaries:

The question of judicial review has been litigated in our courts more so following the enactment of the Constitution 2010. Under Article 23 (c) the High Court has jurisdiction in accordance to Article 165 in hearing and determining a claim for redress of a denial, violation or infringement or threat to a right or fundamental freedom in the Bill of Rights may grant inter alia an order of judicial review.

The scope of judicial review was clearly set out by **Lord Diplock** in the persuasive authority of *Council for Civil Service Unions v Minister for Civil Service [1985] AC 374 at 401 D* when he stated that:

**“Judicial review has I think developed to a stage today when one can conveniently classify under three heads, the grounds upon which administrative action is subject to control by judicial review: the first ground I will call illegality, the second irrationality and the third procedural impropriety. By illegality as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. By irrationality, I mean what can now be succinctly referred to as *wednesbury* (unreasonableness) it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it... I have described the third head as procedural ‘impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”**

I am aware of the fact that judicial review remedies being discretionary the court would not grant them in certain circumstances even if the same are merited. As is appreciated in *Hallsbury’s Laws of England 4<sup>th</sup> Edition Vol 1 (1) paragraph 12 pg 270* it states:

**“The remedies of quashing orders (formerly known as order of certiorari), prohibition orders (formerly known as orders of prohibition) mandatory orders (formerly known as orders of mandamus) are all discriminatory. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief, the court will take into account the conduct of the party applying and consider, whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.**

**Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or further, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question; would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfillment. The court has an ultimate discretion whether to set aside the decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow a temporary decisions to take their course, considering the compliance and intervening if at all later and in retrospect by declaratory orders.”**

In *Republic v National Transport & Safety Authority & 10 Others Ex parte James Maina Mugo [2015] eKLR Odunga J* held inter alia:

**“The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the**

**merits of the dispute the court would not have jurisdiction in a judicial review proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil courts” or “*criminal courts*” *emphasis mine*.**

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

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

The above cases demonstrate the role of judicial as procedure courts use to supervise the exercise of public power to ensure those who exercise that power do not exceed constitutional or statutory jurisdiction. It is also clear that from the principles that judicial review is concerned in reviewing the decision which has been made without authority or in excess thereof by a public body in contravention of individual rights.

The factors and requirements an applicant seeking redress has to satisfy for the courts to entertain and review the decision of a public body has also been elucidated in the cases discussed herein. One of the cordial principle in judicial review cases is that the concern of the courts has nothing to do with the merits of the decision but the process in making that decision. The high court supervision jurisdiction in judicial review cases is to evaluate the fairness of the action or decision complained of with a view to vary or set it aside to ensure fair treatment is accorded to the claimant.

Briefly therefore those are the principles of law to be applied in deciding this application. It is commonly accepted that in these matters the courts power that is so wide to but to be exercised judiciously. The court may refuse to grant orders of certiorari or prohibition to review the decision if there is another remedy available to the applicant or that there are no merits in the application.

The question which is of concern to this court is whether looking at the circumstances of this case, the applicant has brought himself within the ambit of judicial review. The central issue between the disputants in these review proceedings is in respect to the exercise of the constitutional mandate of the 1<sup>st</sup> respondent under Article 157 (6), (8), (9), (10) and (11) of the Constitution 2010. The exercise of discretion by the Director of Public Prosecutions in administration of criminal justice is at the heart of the power donated to the office by the constitution. The same constitution insulates the office of the Director of Public Prosecutions by a declaration that in exercise of his/her power or function shall not be under the direction or control of any other person.

I find that independence of exercise of power and mandate under Article 157 of the Constitution well illustrated in an earlier case which arose in the old constitutional order. In the case of *Stanley Munga Githunguri v Attorney General High Court Criminal Appeal No. 271 of 1985 Nairobi*, Mr. Kamere the Attorney General as he then was had been pressured by parliament to prosecute Stanley Munga Githunguri on charges of contravening the Exchange Control Act. In his reply to parliament on the role of the Attorney General who doubled up as a prosecutor states as follows:

**“Kenya as a constitutional government is totally committed to the rule of law. We cannot talk of the rule of law without an efficient machinery to enforce the ordinary laws of the land. The**

**police, the judiciary and my office are the components of that machinery and if any of those cogs break down that essential machinery can easily come to a grounding halt. Prosecution is not persecution. What this house has been subjected to is to challenge the decision of the A.G., who decided not to proceed against Mr. Githunguri on the evidence contained in the inquiry file. This house makes laws but do not execute them. The law is left to persons if integrity, those with patience in their deliberations to consider whether to prosecute or not to prosecute. The question as to whether to prosecute or not to prosecute is entirely left to the discretion of the A.G. In this country we believe in the separation of the judiciary, and we also believe that you cannot be a judge and prosecutor. Prosecution and not persecutions play one of the most important roles in the administration of criminal justice in any form of a constitutional government.”**

The above statement which in my view was relevant then and even more strengthened in the criminal constitutional dispensation is the mandate of the Director of Public Prosecutions is initiating prosecution and termination of cases. The exclusive role is exercised without direction or control of any person or authority.

As pointed out by **Professor S.A Dr. Smith** in his book, *the New Common Wealth and its Constitution SC London Stevens & Sons [1964] at pg 144 – 145* stated as follows:

**“The independent constitutional status of the DPP stemmed from the need to safeguard the stream of criminal justice from being polluted by the inflow of noxious political contamination....to segregate the process of prosecution entirely from general political considerations.”**

The applicant in this case has impugned the exercise of authority by the Director of Public Prosecution to prefer criminal charges as being vexatious and an abuse of the court process. It was also the applicant’s contention that in making the decision external forces like the senator and County Assembly put pressure on to him to institute criminal proceedings. That contention has been vehemently opposed by the 1<sup>st</sup> respondent.

The reading of Article 157 (6), (7), (8), (9), (10) and (11) of the Constitution:

The exercise of discretion to prosecute any person is at the heart of a decision making of the Director of Public Prosecutions its agents or servants. There is a plethora of case law where the decision by the Director of Public Prosecutions has been a subject of judicial review. Mr. Mwaura counsel for the applicant also alluded to the legal proposition in the authorities cited and relied upon in his submissions. Likewise several case law within our jurisdiction and without have leaned towards upholding the constitutional mandate of Director of Public Prosecutions.

Since the powers and mandate of the Director of Public Prosecutions donated by Article 157 of the Constitution 2010, what are the areas can judicial review apply against the Director of Public Prosecutions. I mention just but a few instances which are amenable to review i.e. Director of Public Prosecutions acts in excess of the constitutional or statutory grants of power, such as an attempt to he institute proceedings in a court established under (martial law) Article 157 (6) (a); if he exercises powers contrary to the provisions of the constitution; if the Director of Public Prosecutions was to be pressured by the executive or parliament to institute a prosecution. That could be amenable to judicial review; if the Director of Public Prosecutions acts in bad faith, malice or conflict of interest on or financial interest; if the Director of Public Prosecutions exercises discretion to institute criminal proceedings as an abuse of the court process. All these instances, the court’s to review the decision will be supervisory jurisdiction invoked.

In this instances may not be the only ones where a decision by the prosecution can be a subject to review proceedings. What this court has pointed out are instances which can be deduced from the constitution provisions where a decision would be reviewed by a court of law of being ultra vires but this list is not exhaustive.

What the courts so does in judicial review is to ensure an applicant before it is given fair treatment by the body or individual complained of. The judicial review jurisdiction does not extend to decide the merits of the matters in question. In the case applicable by the applicant, I am called upon to confine myself whether the respondents more specifically the 2<sup>nd</sup> respondent's decision to prosecute exceeded its powers, committed an error of law, committed a breach of natural justice reached a decision which he could reasonably not have reached, abuse of his powers or acted malafides.

In the persuasive authority in *Hangsraz Mahatma Ganahi Institute & 2 Others [2008] MR 127:*

**“Judicial Review is not a fishing expedition in unchartered seas. The course had been laid down in numerous case laws. It is that this court is concerned only with reviewing, not the merits of the decision reached, but of the decision making process of the authority concerned. It would scrutinize the procedure adopted to arrive at the decisions to ascertain that it is in uniformity with all elements of fairness, reasonableness and most of all its legality. It must be borne in mind and which had been repeated many times by this court that it is not its role to substitute itself for the opinion of the authorities concerned. This court on a judicial review application does not act as a court of appeal of the decision of the body concerned and it will not interfere in any way in the exercise of the discretionary power which the statute had granted to the body concerned. However it will intervene when the body concerned had acted ultra vires its powers, reached a decision which is manifestly unreasonable in the wednesbury sense; had acted in an unfairly manner and the applicant was not given a fair treatment.”**

The applicant in this matter according to the affidavit evidence was incharge of Kitengela Police Station. He was faced with a mob of people under the leadership of the Local Senator and County Assembly Member. According to the applicant, the crowd moved to the neighbouring land belonging to the Ministry of Agriculture and Livestock where they demolished the wall. Subsequently he saw them marching towards the police station.

In order to maintain law and order and fearing the worst, applicant used his firearm by shooting in the air to prevent them from entering the police station. When the dust had settled a complainant reported the incident of having been wounded on the material day from the gun shots fired.

It appears from the record that the 1<sup>st</sup> respondent initially was of the view that the investigation case was not strong enough to mount a prosecution. In the same breathe a further review of the evidence occasioned a recommendation that applicant be arrested and charged with the offence of wounding a person. The applicant then applied for orders of certiorari and prosecution to quash the orders of the 1<sup>st</sup> respondent to restrain him from carrying on with the prosecution.

The issue therefore that requires determination is whether any of the grounds relied upon by the applicant fall under the reach on of certiorari and prohibition orders to be issued in his favour. The circumstances surrounding the shooting by the applicant have been a subject of police investigations and the 4<sup>th</sup> respondent.

It is alleged that the complainant in the preferred criminal case against the applicant was at the scene where he sustained bodily harm. The nature of injuries and the cause and how they were occasioned will be matters to be tested in another forum by way of evidence.

From what is being contested it suffices to say that the 1<sup>st</sup> respondent under the constitution and statutory law has the power to initiate or discontinue criminal proceedings in our Republic. In exercising that authority, the 1<sup>st</sup> respondent is expected to act independently to uphold the rule of law and integrity of the criminal justice system.

A wrong decision by the 1<sup>st</sup> respondent to prosecute and conversely a wrong decision made not to prosecute undermines public confidence in administration of justice as a whole. It is settled that in judicial review the applicant must show by way of evidence that the decision by the 1<sup>st</sup> respondent was tainted

with procedural impropriety and in the same breathe in reaching the decision there was failure to observe the basic rules of natural justice. The applicant also must show that the 1<sup>st</sup> respondent in particular in arriving at the decision to prosecute took into account some extraneous material which was not relevant to the case.

Thirdly the applicant must demonstrate that the decision reached by the 1<sup>st</sup> respondent who reviewed the statement of facts at the time lacked the jurisdiction or acted in excess of that jurisdiction to recommend a prosecution against him.

Can this court infer that the power vested in the office of the 1<sup>st</sup> respondent by the constitution and statute was abused by a mere fact of reviewing his earlier decision. In my view the answer will be in the negative. It is also worthy to note that the powers donated to the 1<sup>st</sup> respondent under Article 157 of the Constitution can be delegated to other servants, agents, bodies and organizations to act and prosecute on behalf of the 1<sup>st</sup> respondent. That delegation is permitted by law. The review of decisions to commence or terminate criminal proceedings is within the jurisdiction of the 1<sup>st</sup> respondent.

The people of Kenya in promulgating the Constitution 2010 set a clear path on how they wanted to be governed. It is a requirement of the constitution more specifically Article 10 on national values and principles of governance, Article 35 on access to information, Article 50 right to a fair hearing, and Article 47 right to a fair administration action which makes it a fundamental requirement of fairness and justice, that a party/citizen is entitled at the end of the day to be provided with reasons of the decision made by a public body or individual in position of authority.

In the facts before me, did the respondents provide the applicant with the reasons of their decision? The applicant in this case is senior police officer in the National Police Service. It has not been alleged that the decision reached was not consultative including gathering of evidence from the department charged with that responsibility. It has not been alleged that the applicant was not given a chance to answer to the complaint at that point of inquiry whether cognizable offence has been committed.

Can one say that the respondents are guilty of procedural impropriety in preferring to prosecute the applicant? This aspect of procedural impropriety was discussed in the case of ***Republic v North and East Devon Health Authority, EXP Coughlan 34*** the Court of Appeal determined that:

**“To be proper, consultation must be undertaken at a time when proposals are still at a formative stage, it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be consciously taken into account when the ultimate decision is taken.”**

Applying these principles to the application before me, I find no material of a nature to make a finding that the respondent’s decision was tainted with procedural impropriety.

In conclusion, there are two fundamental questions which the application must answer in view of the nature of reliefs sought thereby. Can it be said from the affidavit evidence, submissions made on the facts of the case the 1<sup>st</sup> respondent exceeded his jurisdiction or acted contrary to the rules of natural justice? In my view the answer is no. consequently prohibition order is denied. Secondly from the set of facts demonstrated these review proceedings, did the 1<sup>st</sup> respondent in making decision against the applicant guilty of bias, error in law irrationality excess jurisdiction of the constitution and the law, impropriety, abuse of the process? In my conceded opinion the answer is no. The relief on certiorari is not therefore grantable by this court as prayed by the applicant.

## **DECISION**

I have weighed the rival submissions and affidavit evidence together with annexures in support of the application. The threshold to be established by an applicant seeking orders of prohibition and certiorari

has been exhaustively discussed in my ruling and the abiding legal principles earlier illustrated. I am therefore satisfied that the action by the respondents singularly or collectively is not vexatious malicious or an abuse of the court process to warrant invocation of judicial review jurisdiction. The applicant in the event he finally takes plea in a criminal court. The contention on facts and evidence will be dealt with on the merits. The applicant fundamental right to fair hearing is insulated under Article 50 of the Constitution.

It follows therefore under the provisions of the constitution, statute law, the legal principles in the persuasive authorities and our own like *Joram Mwenda Case (Supra)* the chamber summons dated 29/2/2016 seeking orders of prohibition and certiorari against the respondents fails. Accordingly the same is hereby dismissed with no orders as to costs.

**Dated, delivered in open Court at Kajiado on 7<sup>th</sup> day of October, 2016.**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Akula for the 1<sup>st</sup> Respondent

Mr. Mwaura for the Applicant present

Mr. Mateli Court Assistant