



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 20 OF 2016
IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 23(1),27, 47(1),48,
157,165(3)(b) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 7 THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF
2015

AND

IN THE MATTER OF ANTI CORRUPTION CASE NO 21 OF 2015 AT NAIROBI ANTI
CORRUPTION COURT

BETWEEN

JOHN MUSYOKA..... PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

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

THE ETHICS AND ANTI CORRUPTION COMMISSION.....3RD RESPONDENT

NATIONAL WATER CONSERVATION

AND PIPELINE CORPORATION.....4TH RESPONDENT

AND

1. EVANS NGIBUINI

2. AMAN MUSTAFA

3. GEORGE SAR

4. JAMES BUNDI

5. JUSTUS WABUYABO

6. EZEKIAH KAPKIAI

7. MARGARET KITHUNZI

8. DUNCAN TALLAM

9. MUSIEGA ASSAVA

10. WILFRED MUNYIRI

11. JOHN KIPKORIR.....INTERESTED PARTIES

JUDGMENT

Introduction

1. The Petitioner was an employee of the 4th Respondent. He held the position of the Chief Procurement Officer. He also sat as the Secretary of the 4th Respondent's internal Corporation Tender Committee ("the Tender Committee"). In November 2015, together with the Interested Parties, the Petitioner was charged in Nairobi Chief Magistrates Anti Corruption Court Case No 21 of 2015. There were five counts but the accused persons did not face all of them jointly. None of the accused persons however faced less than two counts. The criminal charges revolved around a tender awarded by the 4th Respondent to Telecommunications Today Limited for the structural cabling of the 4th Respondent's new office premises.

2. In the Petition, the Petitioner, and consequently the Interested Parties who all supported the Petition, sought the following orders:

a. A declaration that the respondents have contravened the Petitioner's rights under Article 27 and 47 of the Constitution.

b. A declaration that the Respondents have contravened Article 157(6) of the Constitution.

c. A declaration that the institution and maintenance of the [sic] commencement of the Nairobi Chief Magistrate's Anti Corruption Case No 21 of 2015 is an abuse of the process of the criminal court as the predominant object is to harass the Petitioner and therefore prejudicial to the petitioners

d. An order that the criminal proceedings in Nairobi Chief Magistrate's Anti Corruption Court in Anti Corruption Case No 21 of 2015 be stayed permanently.

e. An order of prohibition stopping the prosecution of the Nairobi Chief Magistrates Anti Corruption Court in Anti Corruption Case No 21 of 2015.

f. Costs of this application be provided for.

g. Any other order that the honourable court deems just to grant.

Background facts

3. The facts leading to the Petition are contained largely in the affidavit sworn in support of the Petition and also the Petitioner's Supplementary Affidavit sworn on 11 May 2016. The Interested Parties also support the Petition albeit on additional grounds which I shall advert to in subsequent paragraphs.

4. The Petitioner contends that he was an employee of the 4th Respondent. He was the Chief Procurement Officer. The Petitioner sat in the Tender Committee as the secretary to the Tender Committee.
5. In mid 2014 the 4th Respondent, having completed the construction of a new office block, invited tenders for the supply installation and commissioning of a structured cabling to the building. The tender awarded was worth Kshs. 41,051,146/=.
6. According to the Petitioner, when the tender was floated, nineteen entities and individuals submitted their tender documents by the closing date of 1 July 2014. The tenders were subjected to a three-way evaluation criteria involving both technical and financial evaluation by an Evaluation Committee appointed by the 1st Interested Party on 30 June 2014. None of the parties to the proceedings herein was a member of the Evaluation Committee.
7. The Evaluation Committee finally recommended that the award be made to Telecommunications Today, having previously disqualified twelve other bidders for being non-responsive at the mandatory(requirements) evaluation stage. A further three bidders had also been disqualified for not attaining the pass mark of 70%. Telecommunications Today was the lowest evaluated (financial) bidder of the four remaining bidders. It won. Then the Evaluations Committee also conducted a due diligence by visiting the winning bidder's premises and returned a clean bill of health, which ultimately met the approval of the Tender Committee. The Tender Committee had the legal and statutory mandate of the 4th Respondent to award the tender and placing reliance on the Evaluation Committee's recommendations proceeded to award the tender to Telecommunications Today Limited at an amount of Kshs. 41,051,146/33 VAT inclusive on 24 July 2014. The Tender Committee then recommended a contract be executed between the winning bidder and the main contractor.
8. In the Tender Committee sat the 5th ,6th ,7th , 8th , 9th , 10th and 11th Interested Parties as well as the Petitioner.
9. The award was however not without controversy.
10. Two of the unsuccessful bidders posed queries. They questioned their disqualification on the basis of lack of proof of registrations by the communications regulator, the now defunct Communications Commission of Kenya.
11. The Project Engineer also wrote, in August 2014, to the 1st Interested Party as the acting chief executive of the 4th Respondent. The Project Engineer expressed various reservations on the tender award, especially with regard to the evaluation of the winning bid. The various issues raised were addressed by both the Evaluation Committee and the Procurement Oversight Committee of the Respondent's Board.
12. In the Procurement Oversight Committee sat the 1st , 2nd , 3rd and 4th Interested Parties. The Procurement Oversight Committee represented the 4th Respondent's Board.
13. In a meeting held on 10 September 2014, the Procurement Oversight Committee resolved that the two unsuccessful bidders had actually not met the mandatory conditions for the tender and were thus genuinely unsuccessful. The Procurement Oversight Committee also resolved that the issues raised by the Project Engineer did not amount to a material deviation from the requirement of the tender to warrant a cancellation. The tender award by the Tender Committee was thus confirmed and the Procurement Oversight Committee directed that the sub-contract be prepared and executed. On 29 September 2014 a subcontract, prepared by the 5th Respondent was executed between Telecommunications Today Limited and N.K. Brothers Limited, the main contractor.
14. The controversy in the meanwhile raged as in June or July 2015, the 3rd Respondent had been notified of certain alleged irregularities in the process which were deemed of a criminal nature. The 3rd

Respondent investigated and reported to the 2nd Respondent with recommendations. The 2nd Respondent was not satisfied and directed that the investigations be revisited and in November 2015, the 2nd Respondent having been availed with convincing evidence on the Petitioner's and the Interested Parties culpability exercised his discretion and approved of the decision to charge the Petitioner and the Interested Parties with various offences of abuse of office.

15. The charges the Petitioner and the Interested Parties variously faced revolved around the tender award. The charges included abuse of office contrary to Sections 46 & 48 of the Anti-Corruption and Economic Crimes Act 2003; inappropriate influence on the evaluation committee contrary to section 38(1)(b) of the Public Procurement and Disposal Act 2005; willful failure to comply with the law or applicable procedure and guidelines relating to procurement contrary to section 48 of the Anti-Corruption and Economic Crimes Act 2003; and misleading a person contrary to sections 135(1)(b) & 137 of the Public Procurement and Disposal Act .

The Petitioner's and the Interested Parties' case

16. According to the Petitioner as well as the Interested Parties, the offences were not well founded and had no foundational basis.

17. The Petitioner like the Interested Parties contended that all the proper procurement procedures had been followed and there was no fault on their part. According to the Petitioner as well as the Interested Parties, the error and mix up in the name of the winning bidder was not sufficient to lead to any criminal culpability. It was their contention that the Respondents had abused their investigatory and prosecutorial powers under Article 157 of the Constitution.

18. The Petitioner and the Interested Parties contended that they were innocent parties as they had acted based on the recommendations and documentation vetted by the Evaluation Committee. In this respects, the Petitioner and the Interested Parties asserted that there was selective prosecution and that there was no equality of the benefit of the law conferred to the parties as the Respondents had opted not to arrest and prosecute the members of the Evaluation Committee.

19. Singularly, the Petitioner also contended that the Petitioner was never a member of the Tender Committee and as such he could not be held responsible for any shortcomings or criminal activities if any of the Tender Committee.

20. On his part, the 1st Interested Party contended that he was also not a member of the Procurement Oversight Committee and thus could not be responsible for the actions of the Committee. In this respect the 1st Interested Party also contended that the tender award was a decision of the 4th Respondent's Board and thus as part of the management team he could not be held responsible. Finally, it was also the 1st Interested Party's case that the criminal charges are actuated by some other motive other than that known in the criminal justice system. The 1st Interested Party contended that the criminal justice process was initiated and driven by the 4th Respondent through its managing Director who was also the 4th Respondent's chief executive officer and who had a vendetta to pick with the 1st Interested Party. The officer was one Eng. Jacqueline Musyoki whose appointment to take over the mantle from the 1st Interested Party had met with a court challenge but then the officer turned around and blamed the 1st and 5th Interested Parties as being behind the court challenge.

21. The 5th Interested Party case was also largely similar. He contended that the prosecution is actuated by malice prompted by the chief executive officer whom he stated had expressly threatened the 5th Interested Party with prosecution and was now putting her threat to test. Once again, it was contended that the bad blood originated from a court case filed by an ordinary citizen challenging the appointment of the Managing Director to the post even though both the 1st and 5th Interested Parties had been ranked better in the interviews for the Managing Director's position. The 5th Interested Party pointed to alleged hostility by the Managing Director once she had assumed office as the chief executive officer of the 4th

Respondent.

22. All the other Interested Parties contended that the criminal charges had no foundational basis with the 11th Interested Party adding that he was never a member of the Tender Committee.

1st Respondent's Case

23. The 1st Respondent opposed the Petition.

24. It was contended on behalf of the 1st Respondent that the Petition did not disclose any evidence of violation of constitutional rights. In particular the 1st Respondent stated that the Petitioner had failed to provide any evidence of discrimination or denial of fair administrative action under Article 27 and Article 47 of the Constitution respectively. The 1st Respondent also stated that the 2nd and 3rd Respondents had a constitutional duty to investigate and rein in on crime.

2nd Respondent's Case

25. The 2nd Respondent also contended that the Petitioner had failed to prove that he had been discriminated against or treated in an undignified manner. It was the 2nd Respondent's contention that the determination as to the innocence or otherwise of the Petitioner as well as the Interested Parties was for the trial court and not this court.

26. The 2nd Respondent further asserted that the 2nd Respondent had correctly exercised his discretion to prosecute after reviewing the evidence and having caused the entire process to be investigated again. The 2nd Respondent stated that the Petitioner had not established any reason to interfere with the 2nd Respondent's discretion.

3rd Respondents' Case

27. The 3rd Respondent filed a Replying Affidavit in opposition to the Petition.

28. The Replying Affidavit detailed the chronology of events and availed some of the statements made by witnesses to be relied upon during trial. The Replying Affidavit was clear that the investigations undertaken by the 3rd Respondent had shown that the criminal case was well founded.

29. The 3rd Respondent stated that it had the mandate to conduct the investigations on its own initiative or upon prompting by any person and that the mandate was engrained under Chapter Six of the Constitution as read together with Article 252 of the Constitution. Additionally the 3rd Respondent also stated that it had powers under Section 11 of the Ethics and Anti-Corruption Commission Act to investigate allegations of acts of corruption and violation of ethics. The same powers, contended the 3rd Respondent, were also founded under Sections 42 and 43 of the Leadership and Integrity Act (Cap 182) Laws of Kenya.

30. The 3rd Respondent contended further that the Petitioner and the Interested Parties as members of the Tender Committee and the Procurement Oversight Committee were responsible for reviewing, verifying and ascertaining that all procurement and disposal had been undertaken in accordance with the Public Procurement and Disposals Act. In this case, the 3rd Respondent contended that the Petitioner and the Interested Parties failed to disqualify Telecommunications Today Limited even though it had failed to meet the requisite standards and requirements. Specifically, it was noted that the Petitioner and the Interested Parties deliberately ignored the fact that Telecommunications Today and Telecommunications Today Limited are two separate entities. In the 3rd Respondent's case, both the Petitioner and the Interested parties had played active roles in the decision making process of the tender and were thus culpable. Additionally, the evidence gathered also pointed to the Petitioner's and the Interested parties'

culpability and hence the recommendation to the 2nd Respondent to institute criminal proceedings.

31. The 3rd Respondent denied that the Petitioner as well as the Interested Parties were ever cleared by the 2nd Respondent and contended that the investigations as well as the prosecution was objectively undertaken in good faith and honestly so.

Arguments in court

Petitioner's submissions

32. Mr. Githui urged the Petitioner's as well as the 6th, 8th, 9th and 10th Interested Parties' cases.

33. Mr. Githui submitted that the criminal case was unnecessary as the procurement procedures had been followed and the Petitioner as well as the Interested Parties only played a role after the Evaluation Committee to which they did not belong had confirmed whether the winning bidder genuinely qualified and then recommended the winning bidder to be awarded the tender. Counsel submitted that there was no evidence that the Petitioner and the Interested Parties had flouted any law in awarding the tender on the recommendations of the Evaluation Committee. Counsel further submitted that the mala fides of the criminal proceedings was evident when the Tender Opening Committee members as well as the Evaluation Committee members were not heaped with any responsibility by the Respondents or similarly prosecuted. On the issue of awarding the tender to Telecommunications Today Limited, counsel stated that the tender had been awarded by the Tender Committee to Telecommunications Today and the issue of Telecommunications Today Limited only surfaced after or during investigations. Counsel insisted that the Petitioner was never a member of the Tender Committee or of the Evaluation Committee and thus could not be responsible criminally or otherwise for the deeds of the 4th Respondent. Mr. Githui also submitted that no money had been lost and that the tender was on going.

34. Mr. Githui insisted that the Petitioner's as well as the Interested Parties' rights under Articles 27, 28 and 47 had been infringed.

35. In support of his submissions counsel relied on the cases of **Meixner & Another v Attorney General [2005] 2 KLR 189** as well as **Kuria & 3 Others v Attorney general [2002] 2 KLR 69** and the case of **Githunguri v Republic [1986] KLR 1** all for the proposition that the court had the inherent jurisdiction to intervene and prohibit any prosecution which was unwarranted and amounted to an abuse of the power or discretion to prosecute. Additionally counsel relied on the case of **R v Attorney General ex p Kipngeno Arap Ngeny HC Civil Appl No 406 of 2001** for the proposition that a criminal case commenced in the absence of a factual foundation or an improper motive was subject to being prohibited by the court.

Interested Parties' submissions

1st Interested Party

36. Mr. Kamunya argued the 1st Interested Party's case.

37. Mr. Kamunya submitted that there was no foundational basis for the charges preferred against the 1st Interested Party as all the 1st Interested Party did was to communicate the decision of the 4th Respondent to award the tender to Telecommunications Today. Counsel also submitted that the 1st Interested Party had acted in good faith and was consequently immunized from any criminal and civil proceedings.

38. Counsel then submitted that the complaint against the Petitioner and the Interested Parties especially the 1st and 5th Interested Parties had been lodged in bad faith and was linked to a civil case that had been filed by an ordinary citizen to restrain the appointment of one Eng. Jacqueline Musyoki as the chief executive officer of the 4th Respondent. Apparently, the said Jacqueline Musyoki had been ranked 5th

below the 1st and 5th Interested Parties who had been ranked 1st and 2nd respectively in the interviews conducted for the post of chief executive officer. The 1st Interested Party's counsel submitted that the Respondents had been hooked into a conspiracy to ensure the 1st and 5th Interested Parties ceased being employees of the 4th Respondent.

5th Interested Party

39. Mr. Justus Wabuyabo argued his own case as the 5th Interested Party.

40. Mr. Wabuyabo started his submissions by stating that the criminal proceedings were not motivated by any legal principles. He pointed out that it was motivated by the bad blood which arose as a result of a suit filed being Judicial Review No 53 of 2015 wherein the appointment of the chief executive officer of the 4th Respondent by the Cabinet Secretary had been challenged in court and the chief executive officer believed that the 1st and 5th Interested Parties were behind the suit as they had been ranked higher in the interviews than the appointee of the Cabinet Secretary. Mr. Wabuyabo added that this was evident in the fact that the investigations had been commenced as soon as the chief executive officer assumed office in May 2015. According to the 5th Interested Party, there was some determination to get him as well as the 1st Interested Party out of office.

41. Mr. Wabuyabo also described the criminal charges as improper and selective as procurement involves a process, yet all the persons who were involved in the process including the tender opening committee as well as the Evaluation committee members were not being prosecuted.

42. Counsel then stated that there was never any intention to mislead anybody as an entity may convert itself from a sole proprietorship to a limited liability company just the same way as had happened in the instant case when Telecommunications Today converted to Telecommunications Today Limited. In counsel's view the criminal charges had no foundation at all.

11th Interested Party

43. Mr. Ambala who represented the 11th Interested Party submitted that the criminal charges had no legal basis. He stated that the 11th Interested Party was only a member of the 4th Respondent's secretariat and was never a member of any of the committees which made any decision on the tender. The 11th Interested Party was never at all a decision maker and thus criminal liability could not be fetched on him for decisions made by others.

Respondents' submissions

First Respondent

44. The 1st Respondent's counsel Ms. Linah Wawira submitted that the Petitioner had not shown that his rights under Article 27 had been violated as the Petitioner as well as the Interested Parties had failed to show that they had been treated differently from other persons who were in a similar position or situation. Likewise, the Petitioner and the Interested Parties had not shown how the criminal proceedings had caused them unequal protection and benefit of the law. The same submissions were applicable to the alleged violation of Article 47, with the counsel submitting that the Petitioner and the Interested Parties had failed to demonstrate that they had not been accorded fair administrative action.

45. Ms. Wawira relied on the cases of **Dry Associates Limited v Capital Market Authority & Another [2012]eKLR** for the proposition that the elements of procedural fairness had to be viewed and balanced against reasonableness, expediency and efficiency in the decision making process.

46. With regard to Article 28 of the Constitution, it was submitted by counsel while referring to the case of **Anarita Karimi Njeru v Republic[1979] KLR 154** that no particulars had been availed for the court

to even warrant an interrogation of the alleged breaches.

47. Finally, Ms. Wawira was of the view that the court ought not to interfere with the independence of the 2nd Respondent in preferring criminal proceedings against individuals. Counsel stated that Article 157 of the Constitution was clear that the powers of the Director of Public Prosecutions to direct the investigations of crime and to prefer criminal charges against any suspects was not to be exercised under the control or direction of any person.

Second Respondent

48. Mr. Mule for the 2nd Respondent was also categorical that the Petitioner and the Interested Parties had failed to prove that their rights under the Constitution had been violated.

49. Counsel stated that the 2nd Respondent had properly and reasonably exercised his discretion in instituting the criminal proceedings against the Petitioner and the Interested Parties. The discretion it was stated was exercised based on the evidence that the investigations undertaken by the 3rd Respondent had unearthed. Mr. Mule urged that the court ought not to allow itself to be used as the trial court. For the proposition that the issue as to the sufficiency and accuracy of evidence was a matter for the trial court counsel referred the court to the cases of **Meixner & Another v Attorney General [2005]2 KLR** and **Michael Monari & Another v The Commissioner of Police & 3 Others [2012]eKLR**. Mr. Mule was firm that the Petitioner's as well as the Interested Parties guilt could only be ascertained by the trial court where the Criminal Procedure as well as the Constitution had laid out adequate safeguards to ensure the parties had a fair trial.

50. Mr. Mule finally urged the court not to interfere with the constitutional mandate of the 2nd Respondent as outline under Article 157 of the Constitution.

3rd Respondent

51. Ms Charity Kiget submitted on behalf of the 3rd Respondent that the 3rd Respondent was also exercising its constitutional and statutory mandate when upon prompting by a member of the public it investigated the alleged improprieties on the tender process and made its recommendations to the 2nd Respondent.

52. According to Ms Kiget, there was a sound foundational basis for the criminal case as the documents had revealed that there were two separate entities involved in the process. The investigations had also revealed that the Petitioner and the Interested Parties had flouted the procurement process. As far as the merits of the case was concerned , counsel submitted that the trial court would be better placed to deal with the issue.

53. Ms Kiget additionally submitted that the 3rd Respondent had not been influenced by any other person in the course of the investigations and that the mere fact of investigating an alleged criminal activity could not amount to a violation of rights guaranteed by or under the Constitution. Counsel stated that neither the Petitioner nor any of the Interested Parties had shown that there was any malice in investigating the tender process and ultimately arraigning them in court.

54. Counsel therefore urged the court to exercise extreme care and caution not to interfere with the constitutional powers of the Respondents to investigate and subsequently institute and undertake criminal proceedings. Additionally Ms. Kiget submitted that the court should only interfere with the independent judgment of the Respondents if it is shown that the exercise of their powers was contrary to the Constitution, in bad faith or amounted to an abuse of process. Counsel relied on various cases amongst them **Paul Nganga Nyaga & 2 Others v Attorney General & 3 Others [2013]eKLR** and **William S.K. Ruto v Attorney general [2010]eKLR**.

55. Mr. Muriuki for the 4th Respondent opened his submissions by decrying what he called the unnecessary joinder of the 4th Respondent to these proceedings. Mr. Muriuki pointed out that the 4th Respondent was not a complainant to the criminal proceedings at all. Additionally, the 4th Respondent was not in any way blamed by the Petitioner or the Interested Parties of any wrong doing.

56. With regard to the Petition, counsel stated that the issues raised touched mainly on evidence which the Petitioner ought to tender before the trial court and nowhere else. In this regard counsel referred to the case of **Meixner & Another v Attorney General [2005] 2 KLR 189**.

Discussion and Determination

57. I have considered the Petition. I have also considered the evidence laid before me as well as the submissions made by the Parties.

58. Three core issues, in my view, emerge for determination.

59. First, was there a violation of the Petitioner's or the Interested Parties' rights. Secondly, have the Respondents or any of them acted in a manner inconsistent with the Constitution and in abuse of their respective constitutional or statutory mandates. Thirdly, was there a foundational basis for the prosecution of the Petitioner and the Interested Parties?

60. I must state from the onset that a party alleging that his rights or fundamental freedoms as guaranteed by and under the Constitution is under a duty to, with reasonable precision, state the Articles of the Constitution which grant the rights allegedly violated. The party must also particularize the manner and extent of the violation. This has been and still is the position of the law and was clearly outlined in the case of **Anarita Karimi Njeru v Republic [1976-80] KLR 1272, [1979]KLR 154** and followed in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013]eKLR**. The intention behind the rule as to reasonable precision is to ensure that a responding party, and the court for that matter, have an idea of the issue(s) in controversy. The rule is not cast in stone and where the court or the responding party is able to painlessly identify the issue(s) at hand then the claim must be heard on its merits. Where however the claim is so lacking in specifics as to only leave a party guessing as to the true nature and scope of the claim then the claim will not be allowed to strand the corridors of justice and must be struck out. It is thus not enough to simply identify Articles of the Constitution.

61. Secondly, it must also be stated from the onset that it is upto the claimant to prove his case by discharging the evidential burden on a balance of probabilities: see **The Attorney General -v- Butambala (1992) LRC 496** and also **Matiba -V- Attorney General (1990) KLR 666**. See also **Catholic Commission for Justice & Peace in Zimbabwe -v- Attorney General [1993]2LRC (Const) 279 at 290** where Gubbay CJ stated as follows:

“I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it...[it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met”

62. In the instant case, the Petitioner identified Articles 27, 28 and 47 as the relevant constitutional provisions which had been violated. Additionally, the petitioner also stated that the Respondents had acted in a manner inconsistent with the provisions of Article 157 of the Constitution. It was alleged that the rights under these Articles had been violated. Article 27 deals with equality and freedom from discrimination while Article 28 is the human dignity Article. It provides that ‘every person has inherent dignity and the right to have that dignity respected and protected. Article 47 of the Constitution on the other hand guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

63. I must confess that I was unable to trace any particulars regarding the violation or breach of Articles 28 and 47 of the Constitution. The Petition itself was lacking on these particulars. The affidavits sworn by

the Petitioner as well as some of the Interested Parties , either in support of the Petition or in support of the intermediary applications made by the Interested Parties, also did not contain any particulars on the manner and extent of the violation by the Respondents or any of them of the rights grounded under Articles 28 and 47 of the Constitution. Indeed during the oral hearings, the Petitioner and the Interested Parties gave these two Articles a wide berth. I was unable to discern or frame any specific or particular issues regarding the alleged violation of rights enshrined under these two Articles.

64. Article 28 essentially sets the stage for literally all other rights and freedoms under the Bill of Rights given that it is the respect for human dignity that leads one to acknowledge the value and worth of individuals as members of society. Respect for human dignity is thus a wide concept. Precision and specificity are thus critical when it is alleged that a person's dignity has been violated. Article 47 on the other hand has several ingredients as is now clear from the derivative statute the Fair Administrative Action Act of 2015. It is important that any party alleging a violation of Article 47 does not leave it open but specifically states with possible reference to the Fair Administrative Action Act provisions which particular principle as to natural justice has been violated. That was not the case in the instant Petition.

65. Effectively, there was no proof of the wide allegations that the Petitioner's as well as the Interested Parties' dignity and right to fair administrative action had been violated. I would agree with the Respondents consequently when they fault the Petition as not having met the competency test set out in *Anarita Karimi's* case but only to the extent of the alleged violation of Articles 28 and 47 of the Constitution.

66. With regard to the allegations that Article 27 as well as Article 157 of the Constitution had been placed under siege to the prejudice and detriment of the Petitioner as well as the Interested Parties, I hold the view that the pleadings as well as the affidavit evidence pointed to adequate particulars to merit an interrogation by the court.

67. The Petition revolves around the prosecution of the Petitioner as well as the Interested Parties over the award by the 4th Respondent of a tender to supply deliver install and commission a structured cabling to the 4th Respondent's newly constructed premises. The tender was awarded to Telecommunications Today Limited after going through the tender process. The tender process involved the 4th Respondent's Tender Opening Committee, the Evaluation Committee, Tender Committee and the Procurement Oversight Committee.

68. Both the Petitioner and the Interested Parties claim that they should not be prosecuted as there is no foundational basis for the prosecution. Both also claim that the Respondents were selective in their prosecution as the Respondents deliberately left out all the members of the Evaluation Committee of the 4th Respondent who are the ones who recommended the award of the tender and which recommendation was ultimately approved by the Petitioner and the Interested Parties. There is in my view, sufficient material placed before the court to allow a merit based hearing of the Petition with regard to claims that Article 27 and Article 157 have been violated.

69. I turn now to interrogate those allegations.

Article 27 of the Constitution

70. The Petitioner as well as the Interested Parties complained that the investigation as undertaken by the Respondents was selective and merely intended to pin the Petitioner and the Interested Parties. The Petitioner as well as the Interested Parties went to great lengths in an attempt to show that the investigations were discriminatory in so far as the Respondents had not laid any blame on the members of the Evaluation Committee. The Interested Parties, especially the 5th Interested Party, also argued that the parties had not been accorded the equal protection and benefit of the law not only in so far as the members of the Evaluation Committee seemed immunized from protection but also that the Respondents had failed to allow the Public Procurement Oversight Board to undertake its oversight role over public procurement. Further, it was argued that the Respondents had failed to appreciate the provisions of

Section 138 of the Public Procurement and Asset Disposal Act which shielded individuals from criminal or civil liability for acts performed in good faith.

71. It would be important to point out that Article 27 prohibits discrimination of any kind, whether indexed or not indexed under the Constitution. Equality of all being is paramount under the Constitution. The basic concept is that people who are similarly situated in relevant ways should be treated similarly. Note must however be given to the fact that Article 27 is however not an absolute right and there is reason for that. It is simply and naturally impossible to treat all beings the same all the time. There will always be some sense of inequality depending on the circumstances.

72. I start off by pointing out that the Respondents are enjoined under the Constitution to perform specific tasks.

73. The 2nd Respondent has constitutional powers to investigate crime and institute the prosecution of possible suspects and offenders. Article 157 of the Constitution grants the 2nd Respondent these powers. The 3rd Respondent on the other hand is also enjoined to undertake the investigation of economic crimes when prompted either by a member of the public or on its own initiative: see **Article 252(1) of the Constitution** and **Section 11 of the Ethics and Anti-Corruption Commission Act, 2011**. These are constitutional responsibilities and the court has to exercise a lot of reticence prior to interfering with the exercise of such responsibilities.

74. In the instant case, the Respondents have contended that their investigations only pointed out to the Petitioner's and the Interested Parties' culpability and no other person. The Respondents also contend that the investigations were undertaken in good faith.

75. I have seen the documentation availed to the court by the Respondents as well as the Interested Parties and the Petitioner. It is clear that the role of the Evaluation Committee cannot be gainsaid. It is a role performed at the truly initial stages of the tender. The Evaluation Committee makes recommendations. The recommendations, in my view, do not however bind the Tender Committee which can veto any decision of the Evaluation committee, especially where it is apparent that the Evaluation Committee has erred. The Tender Committee may likewise seek clarifications from the Evaluations Committee when in doubt or on any issue; and in this case the Tender Committee seemingly did seek clarifications when a controversy arose. The Petitioner and the Interested Parties however allege that the tender process was clean and replete with all the necessary explanations from the Evaluation Committee

76. In my view however, the mere fact that the tender process is alleged to have gone a full throttle, complete with a thorough evaluation cannot be good enough reason to stop the criminal proceedings. Neither can it be said that there is discriminative and selective prosecution. The fact too that the Evaluation Committee can stand in good stead and shew that the tender process was perfect, is appropriate only to be raised by the defence in the criminal trial if the trial court indeed finds that the Petitioner and the Interested Parties have a case to answer.

77. I also hold the view, that the process of investigation is a long drawn process. In the course of it the investigator meets many parties. The investigator also absolves some parties. The process reveals matters at times not even anticipated by the investigator. At the end of it all it is for the investigator to determine who, in his view, is culpable and who is not, based on the evidence available. Likewise, most white collar crimes are transactional. They involve processes. Many people are often involved. The pick as to who is culpable has to be delicately made. It would be inappropriate for the court to itself take over the role of the investigator as well as the prosecutor and sieve through the evidence to determine who should be in the dock. At the very worst that ought to be left to the trial court.

78. I therefore return the verdict that in the absence of any exceptional facts being tendered to show that the members of the Evaluation Committee were treated in a preferred manner, the Petitioner and the Interested Parties have not shown that the criminal proceedings were selectively and discriminatively investigated and instituted.

79. In **George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court At Nairobi & another** [2014] eKLR the court when faced with a situation where the Petitioner had been investigated alongside other persons in a series of transactional matters but a determination made to prosecute only the Petitioner stated as follows:

*[I am] certain therefore 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 been taken action against. It is not in the place of the Petitioner to decide who should be charged or not. The AG and now the DPP have the discretion to prefer charges against any person in respect of whom they find sufficient evidence to prefer charges and omissions to charge individuals persons perceived by the Petitioners as co-accused persons is not fatal to the criminal proceedings against him neither is it discriminatory. In so finding, I find support in the holding of Mumbi J in *Hon James Ondicho Gesami v The Hon. Attorney General & 2 Others*, Petition No. 376 of 2011 where she expressed herself as follows;*

*“The Petitioner also argues that there has been failure of legal process and discrimination against him as he has been singled out for prosecution yet under Section 23(1) of the CDF Act, the member of Parliament is only one member and should not be singled out for criminal prosecution. He also argues that such failure of legal process is manifested by his prosecution for the same offence that he is a witness to in *Nyamira Criminal Case No.190 of 2011 Republic v Gilbert Ateyi Onsomu*. With respect, I do not find anything discriminatory in the preferment of criminal charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango Constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them.” [emphasis mine]*

80. I would adopt a similar approach and add that not only is it not the role of the petitioner to decide who ought to be prosecuted but the court too must always refrain from making such decisions noting that it is the same court system that is also expected to preside over the trial. I consequently return the verdict that the allegation of discriminatory and selective prosecution, in the instant case, of the Petitioner as well as the Interested Parties is not well founded.

81. Additionally, I hasten to add that the charges which have been preferred against the Petitioner and the Interested Parties are statutory. They are provided for under statute and thus the provisions of Article 50(2)(m) of the Constitution which provides that every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya, has not been violated. The alleged offences are offences known in law. They have existed notwithstanding the existence of the Public Procurement Oversight Authority and the allusion by the Petitioner as well as the Interested Parties that the matter ought to have been first referred to the Public Procurement Oversight Authority stands on no solid ground. The Respondents would be failing in their duty if they failed to investigate and prosecute any allegations of criminal offences.

82. There is consequently no violation of the Petitioner's or the Interested Parties' rights guaranteed under Article 27 of the Constitution.

83. The Petitioner as well as the Interested Parties also contended that there was a violation of Article 157 of the Constitution. The contention was mainly that there was no foundational basis for the criminal charges preferred against the Petitioner as well as against the Interested Parties and that additionally as regards the 1st and the 5th Interested Party, their prosecution was motivated by other ulterior motives.

84. Article 157 of the Constitution donates powers to the 2nd Respondent not only to direct the investigations of any particular offence but also prosecute any person. The powers are to be exercised without the direction or control of any person.

85. Under Article 157(6) of the Constitution, the 2nd Respondent exercises the state powers and functions of prosecution which entails the institution, undertaking, taking over, continuance and or termination of

criminal proceedings amongst other functions and duties. But in the discharge its duties and functions, the 2nd Respondent is expected adhere to , observe and uphold various constitutional provisions. These include having regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process under Article 157 (11); the national values and principles of governance enshrined in Article 10 in the application, interpretation of the Constitution as well in making and implementing the laws and public policy decisions; respect, observe, protect, implement, promote and uphold the rights and freedoms in the Bill of Rights enshrined in Article 21(1).

86. It is clear that the court ought to not interfere with the 2nd Respondent's powers to prosecute and likewise the court also ought not meddle with any agency mandated by statute or the Constitution to undertake any investigatory and supportive role on behalf of or at the instance of the 2nd Respondent. Where however the 2nd Respondent does not meet the constitutional muster in performing its role then the court will invoke its superintending powers to ensure that the process of the court is not abused.

87. The Petitioner as well as the Interested Parties basically seeks to curtail the powers of the 2nd Respondent to prosecute.

88. In my view, it is important to first revisit the circumstances under which the Court will grant an order prohibiting the commencement or continuation of a criminal trial process.

89. In view of the infinite variety of cases in which a court may issue a prohibition or stay of criminal proceedings initiated by the Director of Public Prosecutions , I must point out that there can be no rigid classification as to when a prohibition or stay may be (or may not be) appropriate. I may state that an attempt to index the instances was made in the case of ***Macharia & Another vs Attorney General & Another [2001] KLR 448***. The court stated as follows

“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”.

90. Then in ***Kuria and Others v AG (2002) 2 KLR 69*** the court held that for an application to prohibit or stay criminal proceedings to succeed:

“(i), there is need to show how the Court process is being abused or misused, there is need to indicate or show the basis upon which the rights of the Applicants are under serious threat of being undermined by the criminal prosecution”.

91. In the Indian case of ***State of Maharashtra & others v Arun Gulab Gawali & others Criminal Appeal No. 590 of 2007 (27 August, 2010)***, the Supreme Court of India stated as follows:

“In R.P. Kapur Vs. State of Punjab AIR 1960 SC 866, this Court laid down the following principles:-

(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(II) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(III) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(IV) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”

92. The above are sensible indices.

93. The pointer, in my view, however under the new constitutional dispensation seems to lie under Article 157(11) of the Constitution. While appreciating that the court must be reticent when it comes to superintending the functions of such constitutional offices as the Director of Public Prosecutions cognizance must be taken of the fact that the functions and powers must be executed pursuant to and in accordance with the Constitution. It is thus critical for a party challenging the exercise of constitutional compulsion under Article 157 to zero in to Article 157(11) and show that the powers have been exercised in a manner absent any regard to

“...the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process”

94. Perhaps alongside Article 157(11) of the Constitution, I may point out that several decisions have also been handed down which set out the various principles applicable when the Court has to decide whether to prohibit, bring to a halt or quash criminal proceedings. I may reprise the principles as follows.

95. The court must always be extremely cautious in its decision not to prejudice the intended or pending criminal proceedings. The Court must not usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. Notwithstanding the fact that the intended or ongoing criminal proceedings are bound to fail, it has been held time and again, is not a ground for halting criminal proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court to halt criminal process undertaken *bona fides* since that defence is open to the petitioner before the trial court. However, where the petitioner demonstrates that the criminal proceedings constitute an abuse of process, the Court will put a halt to such proceedings. Most of these principles may be retrieved from the case law, I now refer to.

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

“..., the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

97. In **Meixner & Another v Attorney General [2005] 2 KLR 189**, the same Court expressed itself as hereunder:

“The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined

in section 77 of the Constitution....”

98. However, in **Kuria & 3 Others v Attorney General [2002] 2 KLR 69**, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence.....There is a The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial....”

99. Then more recently in **R v Commissioner of Police and Another ex p Michael Monari & Another [2012]eKLR** the court stated as follows:

“the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

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

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

101. Similarly in **R v Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

.. “A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal

proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

102. Clearly the decisions also point to the fact that the 2nd Respondent cannot exercise its prosecutorial discretion or powers arbitrarily. He must act within the confines of the Constitution. He must have a foundational basis for the criminal proceedings to be commenced. He must not allow his office to be used for any other purpose other than for attaining the objectives of the criminal justice system. The standards are clearly provided under the Constitution and the Office of the Director of Public Prosecutions Act. Where it is alleged as in this case that the standards and principles have not been met then the court will investigate and where appropriate intervene. Caution must however be exercised by the court and the court only ought to intervene where there are clear and concrete grounds established which manifest an abuse of the process or is against public policy. That is why in the case of **Manilal Jamnadas Ramji Gohil v Director of Public Prosecutions NBI Criminal Appeal No 57 of 2013** the Court of Appeal was clear that criminal proceedings before a trial court should only be stayed (or prohibited) by the High Court in the most exceptional circumstances.

103. It is for the Petitioner to establish such circumstances as to warrant an intervention by the court through an order of stay or prohibition: see **Koinange vs. Attorney General and Others [2007] 2 EA 256**.

104. In the instant case the Petitioner has alleged that the evidence discounts his culpability. The Interested Parties have stated likewise and added that their prosecution was prompted by other ulterior motives, that of settling scores and ensuring that the Interested Parties are no longer employees of the 4th Respondent.

105. A paradox does however exist when it is contended that the court ought not to review any evidence as that is for the trial court and by the same vein it is stated that for a prosecution to stand, it must have a sound foundational basis. While it is true that the decision to prosecute should only be made upon sound evidence being available : see **Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another Nairobi HCCC No. 1729 of 2001** and also **The National Prosecution Policy**, pp 5-6, 2015 ed., it is also true that true that the sufficiency and veracity of evidence is a matter of the trial court to decide in determining whether the accused person is innocent or guilty: see **Meixner & Another v Attorney General [2005]2 KLR 189** . And it has been held variously that it is the trial court that is better placed to consider the evidence, find that the prosecution has established a prima facie case and decide whether or not to even place the accused person on their defence : see **R v Attorney General & 4 Others ex p Diamond Hashim Lalji & Another [2014]eKLR**.

106. The Petitioner as well as the Interested Parties in the instant case contend that there is no foundational basis for their prosecution.

107. I have looked at the documentation availed. I have read through the possible witness statements availed by both the Petitioner as well as the Respondents. I have also considered the offences with which the Petitioner as well as the Interested Parties is charged with. It is not for this court to make any conclusions as to whether the evidence is adequate or not. It is also not for this court to determine whether the Petitioner and the Interested Parties are guilty or not. I only need satisfy myself that the Respondents were objective in their handling of the matter from the investigations through the decision to prosecute.

108. The Petitioner and the Interested Parties were charged with offences under the Anti-Corruption and Economic Crimes Act, 2003 and the Public Procurement and asset Disposal Act 2005. The offences range from inappropriate influence on evaluation of tenders to misleading a person under the procurement regulations through willful failure to comply with applicable procurement laws and procedures.

109. The Petitioner and the Interested Parties, it is contended by the Respondents, were at the material time members of decision making organs of the 4th Respondent in so far as procurement was concerned.

The Petitioner and some of the Interested Parties deny they were. Some of the documents point to the fact that they were. Some of the documents also point to the fact that they were involved in some of the decisions now questioned by the Respondents and centering on the impugned criminal proceedings. Pointedly, the Respondents' case against the Petitioner and the Interested Parties revolved around the entity known as Telecommunications Today Limited which was previously Telecommunications Today. The Petitioner as well as the Interested Parties seemed to have been aware that the two were not one unless the veil was lifted. I am conscious of the fact that not all evidence to be relied upon by the prosecution during the pending trial was placed before the court. Indeed, the Respondents did not need to.

110. It is however evident that an objective and rational assessment of the evidence would have led any reasonable investigator and prosecutor to the Petitioner and the Interested Parties in the circumstances of this case. As to whether the decisions were actually made by the Petitioner or the Interested Parties will have to be the subject of proof by the prosecution. Likewise any defences including but not limited to membership of the decision making organs or that the Petitioner as well as the Interested Parties acted all along in good faith or that the Public Procurement Oversight Board ought to have been involved, in my view and in the circumstances of this case, ought to be advanced before the trial court. It would be inappropriate for the court to usurp that role and make any determination.

111. With regard to the contention that the criminal proceedings were prompted by and are being driven by an ulterior motive, I have been unable to gather any evidence pointing to the same.

112. The 1st and 5th Interested Parties went to great lengths to show that they were victims of an individual bent on settling score. They pointed an accusing finger at the chief executive officer of the 4th Respondent. They claimed, and it was a proven fact, that the said chief executive officer had been ranked fifth in an interview where the 1st and 5th Interested Parties had been ranked first and fifth respectively. They accused the said chief executive officer of a personal vendetta. I have however been unconvinced on the totality of the evidence. Issues and questions surrounding the impugned procurement process seem to have dogged the Petitioner as well as the Interested Parties long before the chief executive officer took office. The trail was already there. On the basis of the evidence before me, I am unable to make the conclusion that the investigation as well as the prosecution of the Petitioner and the Interested Parties was influenced directed or controlled by the chief executive of the 4th Respondent.

113. Additionally, it was urged that the 2nd Respondent had indeed absolved the Petitioner and the Interested Parties, only for the 3rd Respondent to reopen the investigations. Such line of argument emerged strongly during the oral arguments. I however did not sight any evidence along those lines. The only evidence placed before me was a pointer to the fact that the 2nd Respondent had not been particularly happy with recommendations by the 3rd Respondent that the inquiry file be closed for want of evidence. The 2nd Respondent directed the 3rd Respondent to carry further investigations. Such directions were within the 2nd Respondent's constitutional mandate and when ultimately the investigations were complete the 2nd Respondent had the sole discretion to decide whether on the basis of the evidence retrieved criminal charges could be pursued and he did so in this case.

114. I hasten to add that if the Petitioner and the Interested Parties had shown that indeed the 2nd Respondent had absolved them and declined a recommendation to prosecute them, then exceptional circumstances would have been established in such a case. The onus then would have easily shifted to the Respondents to show that the additional evidence retrieved warranted the variation in decision and that the decision to prosecute was not in bad faith or out of any ulterior motive.

Conclusion

115. The Petitioner and the Interested Party in my view have failed to show how their respective constitutional rights have been violated or threatened with violation. I am satisfied that the Respondents have thus far executed their respective constitutional mandates within the confines of the Constitution.

116. Having also considered the material on record, it is clear that the Respondents have laid basis upon which it can be concluded by this Court that they have any prospects of successfully prosecuting the Petitioner and the Interested Parties. That is however not to say that a conviction will and must be achieved.

117. The Petition fails as in the premises, I have not found any merit in this Petition. It is dismissed.

118. Each party will bear its own costs of the Petition.

Dated signed and delivered at Nairobi this 7th day of December, 2016

J.L.ONGUTO

JUDGE