REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

MISC. CIVIL APPLICATION NO. 474OF 2014 (JR)

IN THE MATTER OF AN APPLICATION BY BRYAN

YONGO FOR AN ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE MATTER OF THE CRIMINAL

PROCEDURE ACT CAP 75 OF THE LAWS OF KENYA

IN THE MATTER OF THE CHIEF MAGISTRATE COURT, KIBERA

CRIMINAL CASE NO. 5023 OF 2013

IN THE MATTER OF A DECISION OF THE CRIMINAL INVESTIGATION DEPARTMENT TO CHARGE BRYAN YONGO IN KIBERA CRIMAINAL CASE NO. 5023 OF 2014

AND

IN THE MATTER OF THE DECISION THE CHIEF

LICENCING OFFICER, CENTRAL FIREARMS BUREAU TO REVOKE

THE FIREARM CERTIFICATE OF THE APPLICANT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF LICENCING OFFICER,

CENTRAL FIREARMS BUREAU…….....…1ST RESPONDENT

CRIMINAL INVESTIGATION DEPARTMENT.....2ND RESPONDENT

DPP…….…….....….……....…3RD RESPONDENT

THE CM COURT – KIBERA…….....….....……4TH RESPONDENT

EX-PARTE: BRYAN YONGO OTUMBA

JUDGEMENT

Introduction

1. In his Notice of Motion dated 5th January, 2015 filed in this Court on 6th January, 2015, the ex parte applicant herein, **Bryan Yongo Otumba,** seeks the following orders:

1. **That this honourable court be pleased to grant an order of certiorari. To remove and bring to the High Court for the purposes of quashing, the decision by the OCS Spring Valley and the Criminal Investigation through the Inspector General of Police to charge the Applicant in Kibera Criminal Case 5023 of 2014.**
2. **That this honourable be pleased grant an order of certiorari, to remove and bring the High Court for the purposes of quashing the decision of the Chief Licensing Officer, central Firearms bureau dated 11/8/2014 revoking the firearm license of the Applicant.**
3. **That this honourable be pleased grant an order of prohibition directed against the 4th Respondent, prohibiting them through their servants and/or agents from hearing or continuing to hear Kibera Criminal Case No. 5023 of 2014.**
4. **That the costs of this application be provided for.**

***Ex Parte* Applicant's Case**

2. According to the Applicant, he was charged in Kibera Chief Magistrate's Criminal Case No. 5067 of 2014 with 4 other persons with 5 counts of preparing to commit a felony, threatening to kill and being in possession of a firearm without a firearm certificate.
3. It was however contended that with respect to the charge of preparing to commit a felony, the only particulars of the offence given were that they were jointly armed with a pistol, without an indication of any other activities or activity. He however averred that the said firearm was at all material time duly licensed to him, with a valid and subsisting firearm certificate in force, and therefore the mere fact that he had the same did not constitute an element or the basis of the alleged offence. Further given the nature of the offence of murder, an offence that requires that there be a specific person or persons as a victim or victims, the particulars of the count 1 were severely prejudicial to him as he was not informed of the person or persons that he was allegedly preparing to murder, hence making it extremely difficult for him to formulate an effective or informed response. It was therefore his view that the particulars provided were inherently defective and insufficient. Apart from that though it was alleged that he had conveyed to one Bernard Koyyoko his threat to kill the Complainant herein, Jacob Juma, at night, the charge sheet lacked or omitted the specific words that he was supposed to have used, or the nature of the conversation, which again denied him, as well as the trial court the opportunity to examine whatever words or word that may have been used the language employed, the ordinary meaning thereof, and that further amounts to a violation of his constitutional right to a fair trial and denial of the details necessary for his defence.
4. With respect to count 3, it was the applicant's position that the words complained of, in their ordinary and natural meaning, do not and cannot by any stretch of the mind or interpretation amount of purport to be a threat of any kind. They do not, in whatever context they are looked at cause any apprehension of not only physical harm, but let alone murder; but are merely are an expression of an opinion or an admonition of wrongdoing, and to allege that they constitute a threat to kill is outrageous, to say least and to use them as a basis for a criminal prosecution would

be an attempt to criminalize the freedom of thought, speech, opinion and the dissemination thereof against the clear provisions of Article 32(1) and Article 33(1) of the Constitution. It was his case that the preparation of the charge sheet and his prosecution for the listed offences appeared to have been done recklessly without regard to the facts pertaining and in a manner that appears calculated to ignore the basic tenets of criminal law and procedure and respect for his fundamental human and constitutional and legal rights, and the total disregard of the evidence and circumstances that the prosecution has itself pleaded in the particulars, however scant they may be. In his belief, the charges were brought against him to settle scores regarding extraneous issues between the police and **Jacob Juma** on one hand, and himself on the other, and which is not the purpose of the criminal justice system.

5. The applicant averred that in so doing the prosecution violated the specific provisions of Articles 49 and 50 of the Constitution with respect right to a fair trial and Article 48(a)(1) of the Constitution on the right to be informed of the reason for his arrest.
6. The Applicant's belief was, according to him, amplified and magnified by a closer examination of the 2 sets of charge sheets presented in the trial court on the 10/11/2014. According to him, while the prosecution has every right to amend or substitute charges to achieve certain objectives in a criminal prosecution, like for purposes of introducing further charges, withdrawing charges or clarifying certain aspects thereof, correcting typographical and spelling errors and other matters or providing further and sufficient particulars of the charges so as to assist the trial court to have all the issues at the fore with a view to arriving at a just and fair conduct of the proceedings and rendering of evidence and testimony, in this case the 2 separate charge sheets, prepared and filed the same day were done in a manner that betrays malice, and are so tactlessly choreographed to validate that which cannot reasonably be validated. To him, the variations in the 2 sets of charge sheets indicate that either there were no investigations conducted, or that the changes were made to create an illusion of truthfulness long after a decision had been made to charge him without any or sufficient evidence. Since the charges preferred against him and his co-accused were of a serious nature, it was imperative that the police conduct serious and credible investigations prior to proceedings to charge him.
7. He added that despite the question of the firearm charges at count 3 and 4 of the charge sheet having been conclusively dealt with by the High Court and orders issued accordingly, the prosecution demonstrated its ill intentions by continuing to sustain the same despite the knowledge and understanding that he had in his possession a valid and subsisting firearm certificate and was entitled to the firearm for his personal protection. According to him, the said criminal charges were preferred as a means of hitting back on him by the complainant due to the complainant's corrupt deals with the applicant had unearthed. He therefore deposed that the charges the subject of the prayers herein have no substratum, other than the common desire of the complainant and the police to harass and intimidate him, and to win unfairly a contest which they have fairly lost at other or another forum.

Respondent's Case

8. The Respondent's case on the other hand was that the applicant had a series of criminal cases which were reported to the Police and that the other charges are similar to the charges facing the Applicant in respect of the which the instant application is brought.
9. It was therefore the Respondent's case that it is the mandate of the CID and in the public interest that the CID receive all complaints from the public, carry out investigations and upon reasonable grounds a prosecution may be instituted.
10. However in the instant case, a complaint was made by one **Jacob Juma** that the applicant threatened to kill him and notified the police who arrested all the five suspects near the compound of the complainant and took them to Spring police station. Upon search they recovered a loaded pistol Taurus s/no. TF 070156 and a magazine charged with eleven rounds from the Applicant which were kept as exhibits. After analysis, ballistic experts confirmed that the earlier recovered cartridge which was an exhibit in criminal case no. 5029 of 2014 was fired from the same pistol which was recovered from the Applicant. It was the Respondents' case that the Investigations commenced which revealed that there was sufficient evidence to charge the Applicant.
11. It was disclosed that in criminal case no. 5029 of 2014, was in respect of c complaint by **Muambi**

Mutune and **Rolient Simiyu** to the effect that the applicant threatened to kill them. When we carried out our investigations one cartridge of ammunition was recovered from the scene of crime. The Applicant was summoned to the station to record a statement, but he refused to honour the summons. Later the accused was arrested and charged.

12. It was therefore the Respondents' position that there was a commission of offence by the applicant by misusing his licensed firearm by threatening to kill more than once contrary to the provisions of ***Firearms Act*** cap 114 laws of Kenya and the ***Penal Code***. To them, the decision to charge and prosecute the applicant is based on the sufficiency of the evidence after investigations was done and analyzing the evidence. Further the offences with which the applicant is charged are clearly spelt out in the respective statutes and the penalties thereof specified and it is in the public interest that any criminal act be dealt with accordingly.
13. It was contended that it is the mandate of the 1st Respondent to revoke the firearm certificate as provided under the ***Firearms Act*** if satisfied that the holder of the certificate has violated the provisions the law.

Interested Party's Case.

14. According to the interested party, the Applicant is well known to him since 1997 having formerly engaged him to do some business for the interested party before the two fell out in March 2012 and the applicant sent him abusive messages on phone which he reported at CID Headquarters and he was charged in Kiambu Chief Magistrate Criminal Case Number 1555/2012 which is still pending and wherein the interested party is the complainant Thereafter the Applicant went to the High Court to stop this criminal case and obtained temporary orders to stay the criminal proceedings till his application was heard and determined.
15. He deposed that on 8th November 2014 at 4.07 pm the Applicant called him using cell phone number 0770-365-069 which he did not pick and again at 6.04 pm the Applicant sent a message on his phone Number 0770-365-069 to the interested party's phone number 0726 071 616 threatening to kill him during the night of 8th and 9th November 2014 which message read thus : "*U tried to grab a plot in Karen yesterday an Magelo warned you. U think wifes r plots!! Ltes meet toniit my wife is no Kate.*"
16. The interested party deposed that two of his friends namely **Cathryne Mutunga** and **Bernard Koyyoko** who are also well known to the Applicant called him on 8/11/2014 at 4.10 pm and 5.18 pm respectively and informed him of the Applicants threat to kill him during the night of 8/11/2014. The same day at about 4.20pm the interested party had received a message on my phone from **Anni Wambui** who is a wife to the Applicant threatening his life which message reds thus: "*you called me thinking am a Whore? I've told Bryan that you called me! And the consequences will be up to you.*"
17. On the same day on 8/11/2014 at about 7.20 pm, as the interested was closing the kitchen door balcony, which is on 3rd floor and has a very god view of the road, he saw the Applicant park his four wheel drive car at the T-Junction, which is directly opposite the interested party's house and I saw the Applicant alight out of his four wheel drive vehicle accompanied by four men, and the driver drove off leaving them outside the house. According to him the said men took strategic positions where two men stood at the junction where school lane touches the Brookside Drive and the Applicant stood at the T. Junction outside his house and two other men stood at the right hand side of the Brookside Drive road junction ready to execute him. Three other men were with another driver in a white probox car which was escorting the four wheel drive car. This probox car stopped briefly directly opposite the entrance of the interested party's gate and followed the driver of the four wheel drive car immediately it drove the Applicant and his accomplices. The interested party deposed that he called CID officer from Gigiri Police Station, and police officers were sent from Gigiri Police Station in a vehicle that had private number plates and they found the Applicant and the four men waiting outside the interested party's house waiting to kill him as I left for his Karen home.
18. The interested party confirmed that indeed the Applicant and his accomplices were on 10/11/2014 arraigned before Kibera Chief Magistrate Court in Criminal Case 5023 of 2014 and charged with various offences. He was therefore of the view that the Applicant's Notice of Motion seeking to prohibit the hearing of Kibera CM Cr, Case No. 5023 of 2014, should not be entertained as the

Applicant's specific threat to kill him and being found armed with a pistol outside his house are separate and distinct from whatever differences and grievances the Applicant alleges to have with the 1st, 2nd and 3rd Respondents. To him, any delay in the hearing and determination of the Kibera CM Cr. Case No. 5023 of 2014 will subject him and his family to undue stress, horror and fears as the Applicant and his accomplices who are out on bond have threatened to eliminate him.

Determinations

19. I have considered the application, the supporting affidavit, the affidavits in reply as well as the submissions filed.
20. It is trite that the Court ought not to 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. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.
21. In **Joram Mwenda Guantai vs. 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 continue 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 a wrong decision on the merits of the proceedings...Equally 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 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."

22. In **Kuria & 3 Others vs. 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 and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer...It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated,

abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made..."

23. In **Republic vs. 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...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

24. I also agree with the decision in **R vs. 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".

25. It is therefore clear that whereas the discretion given to the 3rd respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt.
26. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.
27. Dealing with the burden and standard in judicial review applications, it was held in **Kuria & 3 Others vs. Attorney General** (supra) that:

"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution...In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. 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...In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

28. In **Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** this Court expressed itself a follows:

"Before dealing with the issues raised herein, it is my view that the principles guiding the grant of the orders in the nature sought herein ought to be reiterated. Several decisions have

been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court. The Court ought not to 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. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings."

29. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.
30. Therefore the determination of this case must be seen in light of the foregoing decisions.
31. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

32. Apart from that, section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the

following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

65. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system…In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…….. In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."

33. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."

34. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

35. As was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

"Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and

ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

36. In this case, the ex parte applicant contends that the only particulars of the offence given were that they were jointly armed with a pistol, without an indication of any other activities or activity. He however averred that the said firearm was at all material time duly licensed to him, with a valid and subsisting firearm certificate in force, and therefore the mere fact that he had the same did not constitute an element or the basis of the alleged offence. In other words the applicant contends that

the mere fact that he was in possession of a firearm for which he was licensed, does not amount to an offence. Two issues arise herein. First, the applicant contends that he has a defence and secondly that the facts as particularised cannot sustain the offence with which he was charged. In my view these twin issues can properly be raised before the trial court. If the particulars do not support the charge as framed, the issue if true can be raised before the trial court. It ought to be emphasised that there is a distinction between a situation where the particulars do not support the charge and where the particulars do not disclose any offence known to law. In this case, the applicant in my view is raising the former which in my view is not a basis for halting criminal proceedings by way of judicial review proceedings as opposed to the latter. The same position would apply to the contention that the words complained of, in their ordinary and natural meaning, do not and cannot by any stretch of the mind or interpretation amount or purport to be a threat of any kind.

37. The ex parte applicant also contends that given the nature of the offence of murder, an offence that requires that there be a specific person or persons as a victim or victims, the particulars of the count 1 were severely prejudicial to him as he was not informed of the person or persons that he was allegedly preparing to murder, hence making it extremely difficult for him to formulate an effective or informed response. It was therefore his view that the particulars provided were inherently defective and insufficient. In this instance it is trite that the trial court is entitled to terminate criminal proceedings where there is a defect in the charge sheet. In other words the issue raised herein can be properly raised before the trial court and if found to be valid the trial court would make appropriate orders.

38. It was the applicant's case that the charges were brought against him to settle scores regarding extraneous issues between the police and **Jacob Juma** on one hand, and himself on the other, and which is not the purpose of the criminal justice system. It must however be remembered that even in cases where it is shown that the prosecution is partly motivated by malice or other extraneous considerations unless it is shown that the predominant motive for preferring charges is informed by such malicious or extraneous matters, the Court ought not to interfere if apart from such motives the facts of the case justified the course taken. In other words malice ought to be the driving force behind the institution of the criminal process and not just one of the factors. In this case the 2nd and 3rd Respondents have adduced evidence by way of an affidavit in which they have explained the basis for preferring the charges against the applicant. Whereas it is not the purpose of these proceedings to make a finding on the strength or merit of the said allegations, it cannot be said that the said allegations are invalid. Accordingly, based on the evidence before this Court I cannot state with certainty that the applicant's prosecution is purely driven by malice on the part of the complainant divorced from the independent investigations on the part of the 2nd and 3rd Respondents.

39. To the ex parte applicant, the variations in the 2 sets of charge sheets indicate that either there were no investigations conducted, or that the changes were made to create an illusion of truthfulness long after a decision had been made to charge him without any or sufficient evidence. Since the charges preferred against him and his co-accused were of a serious nature, it was imperative that the police conduct serious and credible investigations prior to proceeding to charge him. However, the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** expressed itself as hereunder:

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. 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... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in

consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

40. Accordingly this court would be exceeding its jurisdiction if it embarked on the investigation as to whether the evidence to be relied upon by the prosecution is sufficient to sustain a conviction.
41. It was further contended that the charges at count 3 and 4 of the charge sheet having been conclusively dealt with by the High Court and orders issued accordingly, the prosecution demonstrated its ill intentions by continuing to sustain the same despite the knowledge and understanding that he had in his possession a valid and subsisting firearm certificate and was entitled to the firearm for his personal protection. In the matter alluded to this Court was dealing with the process of cancellation of the applicant's firearm certificate which the Court found to have been improper. I must emphasise that the Court did not bar the 1st Respondent herein from starting the process of the said cancellation afresh by following the law. In granting the orders of certiorari as opposed to mandamus, the Court ordinarily does not direct the Respondents on the course to be taken thereafter but leaves the matter entirely on the Respondent to take the course as provided by the law. The 2nd and 3rd Respondents however contend that the matters the subject of these proceedings are distinct from the maters that gave rise to the said earlier proceedings and that the ex parte applicant's firearm is an intended exhibit. From the affidavits on record this Court cannot find that that contention is baseless in order for the Court to interfere.
42. Having considered the issues raised in this application, it is my view that the issues can properly be addressed before the trial Court. It has not been contended that the applicants will not be able to receive a fair hearing before the trial Court. The criminal justice system in Kenya is structured such that every accused person has a right to a fair trial and this is a guaranteed right enshrined in the Constitution. I therefore do not see any reason to apprehend that the trial court will not adhere to the provisions of Article 50 of the Constitution with respect to a fair trial. As was appreciated by this court in **Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR**:

"Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquittal are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited."

40. Since the ex parte applicant has a proper avenue in which to ventilate the issues raised herein the same ought to be dealt with thereat. It trite, however where that there is an alternative remedy

which is more convenient and appropriate for the resolution of the issues in contention in judicial review proceedings, the Court ought to exercise restraint. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

41. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal [and if I may add trial] procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

43. Having considered that the Notice of Motion dated 5th January, 2015, I find no merit in the said Motion.

Order

44. It follows that I disallow the said Notice of Motion with costs.

Dated at Nairobi this 7th day of April, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Applicant in person

Mr Ndege for the 1st 2nd and 3rd Respondents

Mr Mereka for Mr Wamwayi for the interested party