



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 271 OF 2014

CAROLINE KINYA KIMURU.....1ST PETITIONER

JUSTUS IKIUGU KAIMENYI.....2ND PETITIONER

AND

THE CHIEF MAGISTRATES COURT AT NAIROBI....1ST RESPONDENT

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

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE HONORABLE ATTORNEY GENERAL.....4TH RESPONDENT

AND

DENNIS GITOBU.....1ST INTERESTED PARTY

ZAKAYO GITONGA.....2ND INTERESTED PARTY

WINFRED KAGWIRIA.....3RD INTERESTED PARTY

JUDGMENT

Introduction

1. In their petition dated 16th June 2014, the petitioners seek to stop their prosecution in **Nairobi Chief Magistrate's Court Criminal Case No. 722 of 2014- Republic vs Justus Kaimenyi Ikiugu** and **Chief Magistrate's Court Criminal Case No. 521 of 2014 - Republic vs Caroline Kinya Kimuru**, as well as **Nairobi Chief Magistrate's Criminal Case No. 601 of 2014 - Republic vs Caroline Kinya Kimuru**. They indicate in their pleadings that these cases were all consolidated.

2. The petitioners first approached this Court by way of a Chamber Summons Application also dated 16th June 2014 in which they alleged violation of their constitutional rights and sought interim orders staying their prosecution. Upon considering the application, I declined to issue the interim orders sought, noting that they were seeking to stop in June 2014 a prosecution that had commenced in April 2014, and which was due to proceed before the trial court on 18th June 2014, and I directed that they should serve the respondents and interested parties. The petitioners subsequently withdrew the application for interim orders.

3. In the petition dated 16th June 2014, the petitioners seek the following orders:

a) That a declaration do issue that in forcibly entering the 1st petitioner's bedroom. Insulting her in front of her 3 year old daughter, and her brother, in roughing her up and using excessive and illegal force at the time of the 1st petitioner's arrest amounts to a violation of section 21 of the Civil Procedure Code, and a violation of the 1st petitioner's fundamental rights guaranteed under Articles 28 and 29(f) of the Constitution.

b) That a declaration do issue that in instituting selective and piecemeal charges drawing from similar allegations, from members of the same group, all in an effort to split complainants and induce multiple arrests and charges, amounts a violation of the 1st petitioner's fundamental rights guaranteed under Articles 47(1) and 50(2) of the Constitution.

c) That a declaration do issue that the 2nd petitioner's fundamental right against being treated in a discriminatory manner as guaranteed by Article 27 of the Constitution has been and is likely to be violated by selectively preferring criminal charges against him in Nairobi Chief Magistrate's Court Criminal case No 722 of 2014 Republic vs Justus Kaimenyi Ikiugu pending before the Chief Magistrates Court, to the exclusion of all the other persons whose names and purported signatures appear on the impugned local Purchase Order.

d) That a declaration do issue that the existence of charges and proceedings by the 1st and 2nd Respondents in Nairobi Chief Magistrates Court Criminal Case No. 521 of 2014 Republic vs Caroline Kinya Kimuru, Nairobi Chief Magistrates Criminal Case No. 601 of 2014 Republic vs Caroline Kinya Kimuru and Nairobi Chief Magistrates Court Criminal Case No 722 Of 2014 Republic vs Justus Ikiugu Kaimenyi (All Consolidated), on the basis of allegations made by the 1st and 2nd Interested Parties amounts to a violation of Article 157 (11) of the constitution, as well as section 4 of the office of Public Prosecutions Act, Act No 2 of 2013.

e) That a declaration do issue that the existence of charges and proceedings by the 1st and 2nd respondents in Nairobi Chief Magistrates Court Criminal Case No. 521 of 2014 Republic vs Caroline Kinya Kimuru, Nairobi Chief Magistrate's Criminal Case No. 601 of 2014 Republic vs Caroline Kinya Kimuru and Nairobi Chief Magistrates Court Criminal Case No 722 of 2014 Republic vs Justus Ikiugu Kaimenyi (All Consolidated), on the basis of allegations made by the 1st and 2nd Interested Parties amounts to an abuse of the criminal justice system, and an abuse of the process of the court as the predominant object behind the same is to punish and exert overt pressure on the petitioners over the loss of USD 40,000,00 a matter that is still under investigation by the police and the decision by the 1st petitioner to no longer work for the group.

f) That an Order of Certiorari do issue to remove into this Honourable Court,

the charges and proceedings before the Chief Magistrates Court, Nairobi Chief Magistrates Court Criminal Case Number 521 of 2014 Republic vs Caroline Kinya Kimuru, Nairobi Chief Magistrates Criminal case No. 601 of 2014 Republic vs Caroline Kinya Kimuru and Nairobi Chief Magistrates Court Criminal Case No 722 of 2014 republic vs Justus Ikiugu Kaimenyi (All Consolidated), and quash the same.

g) That in the alternative of f) above, that an Order do issue acquitting the petitioners herein of all charges that they are facing in Nairobi Chief Magistrates Court Criminal case No 521 of 2014 Republic vs Caroline Kinya Kimuru, Nairobi Chief Magistrates Criminal Case No 601 of 2014 republic vs Caroline Kinya Kimuru and Nairobi Chief Magistrates Court Criminal Case No 722 of 2014 Republic vs Justus Ikiugu Kaimenyi (All consolidated) before the Chief Magistrate Court.

h) That a permanent injunction do issue restraining the 1st, 2nd and 3rd respondents from arresting, intimidating and/or preferring any other charges against the petitioners on the basis of similar allegations made by the 1st and 2nd interested parties, or any member of the business group, by themselves, their agents, servants and/or anybody working for them.

i) That a declaration do issue that the petitioners are entitled to damages as redress in respect of each of the above rights that were and continue to be breached against them during the instigated criminal proceedings.

j) That an order consequential to the above declaration in i) above quantifying the amount of damages in respect of each and every declaration and orders granted

k) Costs of this petition.

4. The petition is supported by the affidavit of the 1st petitioner, Caroline Kinya Kimuru, sworn on 16th June 2014, her further affidavit sworn on 14th October 2014, the affidavit of the 2nd petitioner, Mr Justus Ikingu Kaimenyi sworn on 13th June 2014 and a supplementary affidavit also sworn by the 2nd petitioner, on 10th October 2014.
5. The respondents and interested parties oppose the petition which they dismiss as without merit and an abuse of the court process. The respondents have filed an affidavit in response sworn by Cpl Gerald Kamwaro on 10th September 2014. Each of the interested parties has also filed an affidavit in opposition to the petition.
6. The parties filed written submissions which were highlighted before me on their behalf on 17th March 2015.

The Petitioners' Case

7. The petitioners allege violation of their constitutional rights under Articles 27, 28, 29(f) and 50(2) of the Constitution. They claim that the manner of the arrest of the 1st petitioner violated her right to dignity and the provisions of section 21 of the Criminal Procedure Code and the charges brought against them were a violation of the right to non-discrimination and a fair trial. They ask the Court to quash the proceedings against them in the Magistrate's Court, and to grant them damages for violation of their rights.
8. In her affidavit sworn in support of the petitioner, Ms. Kimuru avers that sometime in 2013, her cousin, a Mr. Ntika Munoru, offered her a job which would entail running errands for him and a

group comprising their friends and relatives. Some of these members included the complainants in **Nairobi Chief Magistrate's Criminal Case No 521 of 2014** and **Nairobi Chief Magistrate's Criminal Case No 601 of 2014**, namely Dennis Gitobu and Zakayo Gitonga.

9. Ms. Kimuru states that on the 18th of December 2013, while in the course of her work, she was accosted by two men dressed as police officers along James Gichuru Road and robbed of USD\$40,000.00 which she had collected on behalf of the group. She avers that at the time of the alleged robbery, she was on her way to Adams Arcade to meet up with a Fridah Kinya, who is also a member of the group and who had informed the 1st petitioner that she knew of a good foreign exchange (forex) bureau at Adams Arcade, with favourable exchange rates. The 1st petitioner avers that she reported the robbery incident at Muthangari Police Station, and that she also informed the group members of the robbery.
10. The 1st petitioner claims that thereafter, her health failed and she was hospitalized a number of times between January and March 2014. She therefore informed Mr. Ntika Munoru that she would no longer be in a position to work for the group.
11. The petitioner avers that she and the 2nd petitioner were later required to record statements at Kilimani Police Station on 19th March 2014 pursuant to a complaint by the said Ntika Munoru that they owed him Kenya Shillings Eight Million (Kshs8,000,000.00). She alleges that she recorded a statement on 20th March 2014 at Kilimani Police Station where she later learnt that another member of the group, Fridah Kinya, had also reported at the same police station on the 19th of March 2014 that the 1st petitioner owed her between Kshs 2,000,000 and Ksh3,000,000.00. A third member of the group had allegedly also complained to the Muthangari Police Station on 26th March 2014 that the 1st petitioner owed her Kshs200,000.00.
12. According to the 1st petitioner, none of the remaining group members have ever reported to Kilimani Police Station to record statements over the allegations made by the other members against her.
13. The 1st petitioner claims that on the 29th of April 2014, a large group of people led by Corporal Kamwaro, the investigating officer in Nairobi Chief Magistrate's Criminal Case Nos. 521 and 601 of 2014, together with the 1st interested party, Dennis Gitobu, went to her home and forcefully entered her house, up to her bedroom where she was in bed as she was unwell, and roughed her up. She states that despite her protestation that there were other ongoing investigations at Kilimani Police Station, she was taken to the Flying Squad Headquarters in Milimani and informed that she would be charged with the offence of obtaining by false pretence contrary to section 313 of the Penal Code.
14. The 1st petitioner further states that on 24th of April 2014, while leaving court after attending the mention for Nairobi Chief Magistrate's Court Criminal Case No. 521 of 2014, she was again arrested and taken to the Flying Squad headquarters, where she was informed that she would be charged with another offence of obtaining by false pretences, this time on the complaint of the 2nd interested party, Zakayo Gitonga. She avers that she was remanded in custody until the following day, the 25th of April 2014. She applied for the consolidation of the cases on 7th May 2014.
15. The 1st petitioner avers that the investigating officer has threatened her that there was a minimum of five similar charges against her and that each would be filed independently; that more than a month had elapsed since her last court attendance and she had not yet been summoned by the investigation officer to answer to any complaints despite the prosecution having indicated that there were more charges to be leveled against her; and that going by previous conduct, she was apprehensive that the investigating officer would have her arrested when she attends court for the hearing of other cases.

16. The 1st petitioner claims that the investigating officer and the group that she was working for are using the criminal justice system to punish, intimidate and harass her and her family, and that she has received death threats against her and her family which she has reported under OB No 26/22/2/2014 and OB No 21/7/6/2014 at the Muthangari Police Station. She claims that the death threats were received from phone number 0789369435; that they reported the threats to the Human Rights Commission which referred her to the Independent Policing Oversight Authority.
17. The 1st petitioner alleges that the interested parties are driven by ulterior motives with no element of criminality and are actuated by a desire to punish and oppress her. She alleges, further, that the investigating officer is acceding to their demands and instituting similar charges in a selective and piece-meal way. It is her contention that she will not be afforded a fair trial because of the selective and piecemeal institution of similar charges, on the basis of similar allegations from members of the same group as the prosecution is being used to ensure that she faces multiple arrests.
18. It is also her contention that her arrest in the presence of her brother and her 3 year old daughter is cruel and degrading treatment as contemplated by the constitution.
19. In her further affidavit sworn on 14th October 2014, the 1st petitioner avers that the criminal cases against her were consolidated on 18th June 2014 with another complainant included, one Lawi Mwenwa Mwobobia. She reiterates the averments in her earlier affidavit and also gives details of how she would run errands for the group by receiving money, depositing it in her account, and then withdrawing it and distributing it to members of the group.
20. She also denies that she resisted arrest and asserts that the arresting officers used excessive force against her.
21. With respect to the complaint by the 3rd interested party, it is her averment that the 3rd interested party had paid her the money in question for the purchase of land in Meru. She also denies the allegations by the 3rd interested party with respect to the money being for a local purchase order from Gulf Energy Ltd.

Submissions by the 1st Petitioner

22. In his submissions on behalf of the 1st petitioner, Learned Counsel, Mr. Gichigo, submitted that the issue before the Court is whether it should intervene and quash proceedings against the petitioners pending before the Chief Magistrate's Court.
23. It was his submission that on the basis of Article 157(11), the Court has previously stepped in to prevent an abuse of court process, and all that an applicant has to show is how the process is being abused and how his/her rights are being undermined. Counsel relied on the case of **Kuria & Others vs Attorney General (2002) eKLR**.
24. It was his submission that the proceedings against the 1st petitioner amount to abuse of process; that the charges are made as a way of intimidating, harassing and punishing the petitioners for the loss of US £40,000; that correspondence between the petitioner and the group show that the group alleges that it gave her money to carry on business; that they expected to be paid back with profits which becomes a loan; and the criminal charges are simply means to get the petitioners to admit to the civil debt.
25. It was Mr Gichigo's submission, further, that the fact that the criminal charges amount to abuse of process can be gleaned from the conduct of the 3rd respondent and the interested parties. He submitted that the interested parties had admitted to making the complaints at Kilimani Police Station but had refused to go back to record statements, instead of which they rushed to the Flying Squad Headquarter. He contended that there was no proof to show how the complaints against the petitioners were transferred to the Flying Squad Headquarters, and in the petitioner's view, this was forum shopping by the interested parties for an investigative officer who would further their

cause using the criminal process to harass the petitioner. It is also the petitioner's contention that the filing of charges against her piecemeal is intended to embarrass her and increase the multiplicity of charges facing her.

26. Counsel submitted that there was therefore a violation of the petitioner's rights under Article 49(1) on the right to be promptly informed of the charge she was to face as well as Article 50(2)(b) on the right to fair hearing.

The case for the 2nd Petitioner

27. The 2nd petitioner avers that he is married to the 1st petitioner and they have two children. He states that he was formerly employed by Gulf Energy Limited as an Office Administrator until 16th May 2014 when he was asked to resign on the basis of what he refers to as unresolved fraud allegations made against him.

28. He states that the 1st petitioner had then been charged with Criminal Case No 521 of 2014 and 601 of 2014. After his wife's arrest, he went to the Milimani Flying Squad offices where he was informed that a complaint had been made against him by the 3rd interested party with respect to a Local Purchase Order (LPO) from Gulf Energy Ltd dated 2nd August 2013 drawn in favour of Riziki Cereals and General Merchants. He also makes further averments with respect to the said LPO and a land transaction between the 1st petitioner and the 3rd interested party.

29. The 2nd petitioner states that he was charged in court on the basis of the complaints by the 3rd interested party in Criminal Case No 722 of 2014. He also avers that he has been receiving death threats directed at him and his wife and children which he has reported to Muthangari Police Station. It is his averment that the charges against him are intended to make him and his family suffer.

30. The 2nd petitioner has also sworn a second affidavit in reply to the affidavit sworn on behalf of the 2nd and 3rd respondents by PC Kamwaro and the affidavits in reply of the interested parties. In this latter affidavit, the 2nd petitioner denies that the 3rd interested party lost money as a result of an LPO; denies that he has any knowledge of Riziki Cereals and General Merchants, and alleges that he first saw the LPO in question when he visited the Flying Squad offices at Milimani. He avers, further, that the LPO had been signed by five people, all of whom were his colleagues at Gulf Energy Limited, yet he is the only one who was summoned to record a statement and later charged with respect thereto. He contends that the investigations were in pursuit of a malicious scheme, that he did not receive money from all the complainants nor deposited money in their respective accounts. He avers that it is only the 3rd interested party who deposited Ksh500,000/- in his account, which money was for purchase of land.

31. The 2nd petitioner further contends that the real genesis of the institution of charges against him and his wife is the loss of USD \$40,000 which the 1st petitioner allegedly lost when she was accosted by thieves on 18th of December 2014 (sic).

32. The 2nd petitioner further avers that the selective preferment of charges against him is an act of malicious selective prosecution intended to intimidate and harass him and amounts to violation of his fundamental rights enshrined in Article 27 of the Constitution.

33. In his submissions on behalf of the 2nd petitioner, Mr. Kibet submitted that the petitioner was alleging violation of Articles 27(1), (2)(3) and (5), Article 50 and section 4 of the Director of Public Prosecutions Act.

34. Mr. Kibet submitted that the preferment of charges against the 2nd petitioner was done in a

discriminatory manner as the LPO was signed by four other people, all working with Gulf Energy Ltd where the 2nd petitioner was an employee, yet it was only the 2nd petitioner who was charged in Court on the complaint of the 3rd interested party.

35. The 2nd petitioner relied on the decision in **Peter K. Waweru v Republic [2006] eKLR** and **Willis v The United Kingdom, No. 36042/97, ECHR 2002 – IV** and **Okpisz v Germany, No. 59140/00, 25th October 2005** to support his contention that he was entitled to equal protection and benefit of the law.

36. With regard to violation of Article 50, the 2nd petitioner argued that the office of the DPP ignored and failed to accommodate the 2nd petitioner's story regarding the alleged LPO, which was addressed to Riziki Cereals and General Merchants, from Gulf Energy Limited. Mr. Kibet submitted that the prosecution failed to do its job properly as it did not carry out investigations to establish the ownership of Riziki Cereals and General Merchants Limited.

37. With respect to the complaint by the 3rd interested party, the 2nd petitioner argues, first, that Gulf Energy Limited has not complained about the LPO, and further, that the amount the 3rd interested party paid to him was for the purchase of land, with respect to which the 1st petitioner and the 3rd interested party had agreed that a sum of Kshs500,000 would be deposited in the account of the 2nd petitioner.

38. Counsel submitted that the Court has power under Article 23 to grant the relief that the petitioners were seeking.

The Case for the 2nd and 3rd Respondents

39. Through Learned Prosecution Counsel, Mr. Ashimosi, the 2nd and 3rd respondents opposed the petition. Their case is that the present petition is without merit, and the petitioners have not demonstrated a violation of their rights by the respondents.

40. The respondents' case is set out in the affidavit of Cpl. Gerald Kamwaro sworn on 17th July 2014 and submissions dated 7th November 2014. Cpl Kamwaro states that he is a police officer attached to the Flying Squad Unit in Nairobi and was the investigating officer in the matter.

41. In his affidavit, Cpl. Kamwaro makes various depositions with respect to the complaints made against the 1st petitioner by various parties, including the interested parties herein. With regard to the 1st interested party, his complaint was that the 1st petitioner, who had been introduced to him by a friend, pretended that she was in the business of supplying food stuffs and other humanitarian goods to charitable organizations; and that she wanted to co-operate with him in financing tenders received and thereby earning profits after supplies have been paid for. As a result, the 1st interested party, between the 17th June 2013 and 13th August 2013, deposited cash into the 1st petitioner's account. The 1st petitioner also allegedly deposited some money in the 1st interested party's account, said to be in respect of profits made after some supplies had been made.

42. Cpl Kamwaro states that he recorded the interested party's statement, carried out investigations and decided to make an arrest.

43. He further deposes that he went to the 1st petitioner's home in the Muthangari area in the company of another officer, a Cpl. Jane Nyambura, but that the 1st petitioner became hostile and resisted arrest, but they managed to take her to their offices and interviewed her.

44. According to Cpl Kamwaro, the 1st petitioner denied that she was in the business she was purported to be involved in and could therefore not account for the monies she had received from

- the 1st interested party. She, however, produced copies of bank deposit slips indicating monies she had deposited into the 1st interested party's account. He preferred charges against her on 10th April 2014 in Criminal Case No 521 of 2014 with the offence of obtaining money by false pretences. He states that she was represented in Court by her lawyer, who raised no complaint regarding the alleged harassment.
45. Cpl. Kamwaro makes further depositions with regard to the complaints by the 2nd interested party, as a result of which the 1st petitioner was charged with the offence of obtaining money by false pretences from the 2nd interested party in Criminal Case No 601 of 2014. A third complainant, one Lawi Mwenda, also recorded a statement on 22nd April 2014 of having been defrauded by the 1st petitioner, who is also his cousin. The 3rd interested party recorded a statement on 23rd April 2014 alleging that she had lost money as a result of being duped with a Local Purchase Order (LPO) No 123456 allegedly from Gulf Energy Ltd by the 1st and 2nd petitioner, and that some of the money in question had been deposited in the account of the 2nd petitioner.
46. Cpl. Kamwaro deposes that he summoned the 2nd petitioner and upon interrogation established that he was an employee of Gulf Energy Ltd; that he contacted Gulf Energy Limited with respect to the LPO No 123456 and the said Gulf Energy Ltd. established the LPO to be fake. He deposes that the 2nd petitioner was then summoned on 13th May 2014 and given a free bond to appear in court on 19th May 2014, when he was charged in Criminal Case No. 722 of 2014. A request was made for the said case to be consolidated with the cases against the 1st petitioner and the three cases facing the petitioners were consolidated on 18th June 2014.
47. The respondents deny that there was any malice in the arrest and prosecution of the petitioners. They state that the investigations were only launched after the complaints were made and from the evidence adduced by the complainants. They also assert that the evidence indicates that the petitioners received money from the complainants, which can be confirmed from the petitioner's bank accounts. Further, they state that from their investigation of the petitioners' bank accounts, they have not encountered a dollar account from which the 1st petitioner obtained the amount she alleges to have lost in the robbery incident purported to have occurred in Muthangari, nor has she disclosed in her petition where she obtained such a substantial amount of money.
48. In his submissions on behalf of the respondents, Mr. Ashimosi noted that the petitioners were alleging selective prosecution of the 2nd petitioner on account of an LPO issued by Gulf Energy Limited. It was his submission that the investigating officer had visited Gulf Energy Limited and established that the LPO was a forgery and had recommended prosecution, and that the office of the DPP had considered the evidence and made a decision to charge the petitioners.
49. It was also his submission that none of the petitioners had clearly demonstrated breach of any constitutional right or statutory provision by either the DPP or the investigating officer, and as this was a constitutional petition, that would have been the only basis for halting their prosecution.
50. Counsel further observed that the petitioners had both admitted receiving money, which they were alleging was for the purchase of land. Yet, according to the respondents, the documents that the petitioners were relying on as evidence of the sale of land-annexure **JK 9**, was not a sale agreement but a document which was signed only by the 1st petitioner.
51. Counsel submitted that the petitioners had not met the test for constitutional relief set in the case of **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012** to warrant the grant of the declarations that they were seeking. He further relied on the decision in **Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997]eKLR** to submit that the Court could not issue the orders of certiorari that the petitioner

was seeking.

52.It was their case that the DPP had exercised his discretion properly and the petition should be dismissed with costs.

The Case for the 1st and 4th Respondents

53.Mr. Obura for the 1st and 4th respondents associated himself fully with the submissions made on behalf of the DPP.

The Case for the Interested Parties

54.The interested parties' case is contained in the affidavits sworn on 10th September 2014 and submissions filed on their behalf dated 26th September 2014.

55.In their respective affidavits which are similar in content, the interested parties have deposed to the facts relating to their complaints to the police as captured in the affidavit of Cpl. Kamwaro. They have also specifically denied the existence of a group of 15 members alleged to have employed the 1st petitioner whose money she alleges to have been robbed of. They contend that the only thing they have in common is that they were all defrauded by the same parties, the petitioners.

56.The interested parties aver that the criminal cases arising from their respective complaints against the petitioners were consolidated, and the petitioners were given favourable bail terms. They further observe that the petitioners have, at prayer c) of the petition, conceded that an offence was committed but argue that because other persons who were involved have not been charged in court, they should be acquitted.

57.The interested parties assert, further, that the petitioners' right to a fair trial has been guaranteed in accordance with the Constitution. They submit that the petitioners are seeking to argue the merits of their defence before this Court, yet that is the role of the trial court. They therefore pray that the petition be dismissed with costs.

58.In the submissions made on their behalf by Mr. Liko, the interested parties argue that nothing constitutional has been raised in this petition. In their view, what is before the Court is an attempt to review the evidence that will be produced before the trial Court. The interested parties rely on the decision in **Jane Mikwana Muringa vs DPP High Court Petition No 69 of 2014** to submit that it is the trial court that has jurisdiction to determine whether there is a case against the petitioners, not this Court.

59.The interested parties further submit with regard to the petitioners' complaints about the multiplicity of charges that first, the complaint raises no constitutional issues but secondly, that under section 135 and 136 of the Criminal Procedure Code, offences may be charged together in the same charge if founded on the same facts. It was their submission that what cuts across the charges is obtaining by false pretences from many parties. They submitted that section 135(3) allows the court to order separate trials where a multiplicity of charges may embarrass a person charged, but it cannot acquit on this basis.

60.With respect to the claim that the petitioners' right to non-discrimination has been violated, the interested parties rely on the case of **Thuita Mwangi & 2 Others -vs- The Ethics & Anti-Corruption Commission & 3 Others Consolidated Petitions No. 153 & 369 of 2013** to the effect that to establish whether or not there is discrimination, one must weigh the evidence, which is for the trial court to do. The interested parties join the respondents in praying that the petition be dismissed with costs.

Issues for Determination

61. Having considered the pleadings and submissions of the parties which I have set out above, I take the view that only one issue arises for determination: whether there has been a violation of any of the petitioners' rights under the Constitution in their being charged in Nairobi Chief Magistrate's Court Case Nos. 521, 601 and 722 of 2014. It is common ground that these cases were consolidated on 18th June 2015.

62. I start from the position taken by this Court in several decisions, which in my view accords with the Constitution: the institution of criminal charges against a person is not in itself a violation of constitutional rights. As I stated in **High Court Petition No 482 of 2013 (Consolidated with Petition No 483 of 2013) Weldon Kechie Langat & Another vs The Director General of Police & Another:**

“...the fact that criminal charges are preferred against a person is not a violation of constitutional rights. The criminal justice system is underpinned by the Constitution, with safeguards placed in the Constitution and statute to ensure protection of the rights of accused persons. Further, the discretion on when and whether to bring criminal proceedings against a party is vested in the Director of Public Prosecutions, who under Article 157(10), must be independent and not subject to the direction or control of any party.”

63. Secondly, the petitioners, particularly the 2nd petitioner, cannot be heard to complain that there is discrimination because the respondents have chosen to lodge criminal prosecutions against one party instead of another. It is within the discretion of the DPP, in exercise of the powers vested in his office under Article 157 of the Constitution, to consider a matter and, if satisfied that there is sufficient evidence to justify prosecution, to proceed with such prosecution.

64. In the present case, the 2nd and 3rd respondents have deposed that complaints were received from the interested parties, inter alia, which pointed to the commission of criminal offences. They investigated the matters, and were satisfied that there was sufficient evidence to justify charging the 1st and 2nd petitioners with the offence of obtaining by false pretences. It is not for this Court to weigh the respective cases of the parties and determine whether or not there is sufficient evidence to justify charging the petitioners. That is the role of the trial court.

65. What this Court has the mandate to do is to consider whether there has been a violation of the rights of the petitioners under Articles 27, 28, 29 and 50 of the Constitution.

66. Article 27 guarantees to everyone the right to **“equal protection and equal benefit of the law,”** and it prohibits the state or any other person from discriminating against a person on any of the grounds set out in Article 27(4), including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

67. In this case, the petitioners have not stated or shown on what grounds or in what manner the alleged discrimination arises. It is not enough that one person is charged in Court and others are not for one to allege discrimination. The DPP is constitutionally mandated to prefer charges on the basis of evidence before him. For the 2nd petitioner to allege discrimination on the basis that he was the only one who was charged with respect to the forged LPO when it was allegedly signed by others is to put himself in the position of the DPP with respect to whom and what evidence is sufficient to establish a basis for criminal prosecution.

68. The petitioners have also alleged violation of their rights under Article 50. However, their trial had not, at the time this petition was filed, commenced, so there was no basis for alleging violation of the rights guaranteed under Article 50 of the Constitution. From the evidence, the petitioners have been informed of the charges facing them, have been given the witness statements and all documents relating to the charges against them, and have not demonstrated, as required, how their

rights under Article 50 have been violated.

69. With regard to the alleged violation of the 1st petitioner's rights during her arrest, I am unable, on the material before me, to make a finding that there was a violation of either Article 28 or 29 with respect to her. Section 21 of the Criminal Procedure Act, which the 1st petitioner alleges was violated, provides as follows:

21. (1) In making an arrest the police officer or other person making it shall actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action.

(2) If a person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, the police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section shall justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender."

70. The petitioner does not deny that the police have powers of arrest under the Criminal Procedure Code. They can also, under the provisions of the said Code, enter into premises where the person sought to be arrested is present or is thought to be hiding. I note from the affidavit of Cpl. Kamwaro that he went to the petitioners' house accompanied by a female officer, and there is no evidence before me, other than the 1st petitioner's averment, that any force or any unreasonable force was used against the 1st petitioner.

71. At any rate, however, even had there been a violation of any of the petitioners' constitutional rights made out, which is not the case, the remedy for the petitioners would have been an award of damages in accordance with the decision of the Court of Appeal in **Julius Kamau Mbugua vs Republic Court of Appeal Civil Appeal No. 50 of 2008**. It would not be an order of prohibition of the prosecution, or an acquittal.

72. Finally, the petitioners have made factual averments and produced documents in their affidavits, essentially inviting this Court to consider the facts and determine whether charges should have been lodged against them. In this regard, I repeat the words of Warsame J in **Michael Monari & Another vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011**:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

73. The upshot of my findings above is that this petition has no merit. It is hereby dismissed with costs to the respondents and interested parties.

Dated, Delivered and Signed at Nairobi this 15th day of July 2015

MUMBI NGUGI

JUDGE

Mr Gichigo instructed by the firm of Nyambura Munyua & Co. Advocates for the 1st petitioner.

Mr Kibet instructed by the firm of Kiptoo Kibet & Co. Advocates for the 2nd petitioner.

Mr Ashimosi instructed by the Director of Public Prosecutions for the 2nd and 3rd respondents.

Mr Obura instructed by the State Law Office for the 1st and 4th respondents.

Mr Liko instructed by the firm of Liko & Anam & Co. Advocates for the interested parties.