



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.426 OF 2014**

**BETWEEN**

**PATRICK NTHARIA MWENGESA.....1<sup>ST</sup> PETITIONER**

**JAMES CHEMONGES OLINYO.....2<sup>ND</sup> PETITIONER**

**IBRAHIM SANDE.....3<sup>RD</sup> PETITIONER**

**M. KOPA KENYA LIMITED.....4<sup>TH</sup> PETITIONER**

**AND**

**MILIMANI CHIEF MAGISTRATES COURT.... 1<sup>ST</sup> RESPONDENT**

**PRINCIPAL MAGISTRATE'S CRIMINAL**

**COURT KAPSABET.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS....3<sup>RD</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. The facts leading to the filing of this Petition are that on 27<sup>th</sup> May 2014, the 2<sup>nd</sup> Petitioner was arrested, allegedly for contravening the **Traffic Act** while driving motor vehicle registration number KBW 311 X, a Toyota Station Wagon.
2. On 5<sup>th</sup> June 2014, the 1<sup>st</sup> Petitioner was also arrested for the same reason while driving motor vehicle registration number KBS 683 P, a Toyota Station Wagon.
3. On 30<sup>th</sup> July 2014, the 3<sup>rd</sup> Petitioner while driving motor vehicle registration number KBV 874Y, a Toyota Station Wagon was also arrested for the same reason.
4. All the aforesaid Motor vehicles are registered in the 4<sup>th</sup> Petitioner's name and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>

Petitioners are its employees and were at all material times designated drivers of the motor vehicles. The 4<sup>th</sup> Petitioner also has other motor vehicles which are branded and painted with its colours and all the said motor vehicles have been classified as private motor vehicles as evidenced in their log-books and their insurance covers are of the Class C type generally issued to private motor vehicle owners.

5. The 1<sup>st</sup> – 3<sup>rd</sup> Petitioners, upon arrest, were charged with various offences including driving a commercial vehicle without a valid inspection certificate contrary to **Section 17A(3)(a) and (b) of the Traffic Act, Cap.403 Laws of Kenya** and contravening the use of insurance against third party risks contrary to **Section 5 of the Insurance (Motor Vehicle Third Party Risks) Act**. They were later released on bond and are awaiting trial at Milimani Chief Magistrate's Court (1<sup>st</sup> and 2<sup>nd</sup> Petitioner) and Kapsabet Principal Magistrate's Court (3<sup>rd</sup> Petitioner), respectively.
6. The Petitioners are aggrieved by all the actions of the Respondents and/or their agents in arresting and charging them hence the present Petition.

### **Petitioners' Case**

7. The Petitioners have set out their case in their Petition aforesaid and in support thereof filed Supporting Affidavits sworn on 25<sup>th</sup> August 2014 by the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners together with annexures. In addition, one Chad Larson, Finance Director of the 4<sup>th</sup> Respondent, filed a Further Affidavit sworn on 10<sup>th</sup> October 2014 together with its annexures and Mr. Mureithi, learned advocate for the Petitioners filed written submission and authorities on 24<sup>th</sup> October 2014.
8. While relying on the facts as set out above, the Petitioners' case was that the three motor vehicles that were being driven by the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners were registered as private motor vehicles and therefore the Sections of law against which the charges were framed do not create any offences in respect of private motor vehicles.
9. That by instituting and sustaining the charges against the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners, the Respondents have acted in abuse of the Court process and their actions are also an infringement of their constitutional rights. Further, that those actions amount to an abdication of the duty by the Respondents to uphold the law, conduct investigations and establish that an offence has been committed before charging any person in a Court of law. Specifically, the Petitioners protest that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ought to have considered the charge sheets placed before them and should have declined to admit them. That the 3<sup>rd</sup> Respondent should also have adhered to his mandate under **Article 156(6) and (1) of the Constitution** before preferring the allegedly erroneous charges against them.
10. On alleged constitutional violations, the Petitioners contended that the charges preferred against them were in violation of **Articles 50(1) and 2(n) of the Constitution** which protect the right to a fair hearing because the motor vehicles, subject of the charges, are not commercial motor vehicles. That the acts of the Respondents therefore amount to persecution and not prosecution.
11. The arrest and subsequent charging of the Petitioners before the Subordinate Courts are also said to be in breach of the right to fair administrative action under **Article 47 of the Constitution**. It was their case in that regard that by failing to properly investigate the cases prior to arraignment of the Petitioners in Court, the Respondents violated the said right.
12. On the right not to be discriminated against under **Article 27 of the Constitution**, the Petitioners claimed that by ignoring the fact that the motor vehicles were registered as private and not commercial; by not recognizing that only the National Transport and Safety Authority can make such a classification and by relying on the branding of the motor vehicles as evidence that they were being commercial purposes, the Respondents breached the said right.

13. Relying on **Article 28** of the **Constitution**, the Petitioners also contended that by arresting and commencing proceedings against the them, the Respondents have breached the right to human dignity to which the Petitioners are entitled.
14. Further, that by classifying private motor vehicles as commercial, the Respondents have violated the Petitioners' rights to property as protected by **Article 40** of the **Constitution**.
15. The Petitioners on the issue of the right to freedom and security of the person claimed that **Article 29** of the **Constitution** protected such a right and that by arresting and charging Petitioners, the Respondents took away that right without justification.
16. The Petitioners for the above reasons seek the following orders.

*“(1) A declaration that the actions of the Respondents amount to an infringement of the rights under Articles 27, 28, 29, 35, 40, 47 and 50 of the Constitution of Kenya (2010).*

*(2) A declaration that the offences created under Section 17(A) (3) (a) (b) of the Traffic Act, CAP 403 of the Laws of Kenya and Section 5 of the Insurance (Motor Vehicles Third Party Risks) Act, CAP 405 of the Laws of Kenya are only applicable to commercial vehicles and do not apply to private motor vehicles.*

*(3) A declaration that the branding or painting of motor vehicles as done by the Petitioners does not convert them from private vehicles to commercial vehicles.*

*(4) An order of certiorari to lift and bring to this Court for purposes of quashing the charges and proceedings in Milimani Chief Magistrates Criminal Case No.154854 of 2014, R vs Patrick Mwengesa, Milimani Chief Magistrates Criminal Case No.14611 of 2014, R vs James Chemonges Olinyo and Kapsabet Principal Magistrates Criminal Case No.694 of 2014 R vs Ibrahim Sande.*

*(5) A permanent injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from continuing or proceeding with the hearing or prosecution of Milimani Chief Magistrates Criminal Case No.154854 of 2014, R vs Patrick Mwengesa, Milimani Chief Magistrates Criminal Case No.14611 of 2014, R vs James Chemonges Olinyo and Kapsabet Principal Magistrates Criminal Case No.694 of 2014 R vs Ibrahim Sande.*

*(6) An order of prohibition to prohibit the 3<sup>rd</sup> and 4<sup>th</sup> Respondents from arresting and prosecuting the drivers of the 3<sup>rd</sup> Petitioner's vehicles being KBJ 360 K, a Nissan Station Wagon, KBS 092 F, a Toyota Station Wagon, KBS 128F, a Toyota Station Wagon, KBS 266 S, a Toyota Station Wagon, KBS 468 J, a Toyota Station Wagon, KBT 527 M, a Toyota Station Wagon, KBT 683 M, a Nissan Station Wagon, KBT 742 B, a Toyota Station Wagon, KBU 127 E, a Toyota Station Wagon, KBU 154 C, a Toyota Station Wagon, KBV 874 Y, a Toyota Station Wagon, KBW 913 E, a Toyota Station Wagon, KBX 747 A, a Toyota Station wagon, KBS 683 P, a Toyota Station Wagon, KBX 311 X, a Toyota Station Wagon based on the grounds that the motor vehicles are branded or that they are commercial motor vehicles.*

*(7) An order for award of damages.*

*(8) Costs.*

*(9) Any other relief that the Court shall deem fit.”*

### **Respondents' Case**

17. No.79689, P.C Leonard Kurgat filed a Replying Affidavit sworn on 6<sup>th</sup> September 2014 and in it,

he deponed that the Petition was an abuse of Court process because no infringement of any fundamental right has been proved and that the right forum for the Petitioners to ventilate their grievances is the trial Court. In addition that when the 3<sup>rd</sup> Petitioner was arrested along the Kapsabet-Eldoret Road on 30<sup>th</sup> July 2014, he was driving motor vehicle registration number KBV 874 Y Toyota Probox and at the time, it was obvious to the traffic policemen who flagged him down that the said motor vehicle was being used for commercial purposes hence the charges later preferred against him.

18. Further, that because the said motor vehicle did not have an inspection certificate and a Class B insurance sticker, the charges preferred were proper.

19. For the above reasons, the case for the Respondents is that the Petitioners have raised no constitutional issues for determination and all the issues raised in the Petition should best be canvassed and ventilated before the two Subordinate Courts where charges have been laid against the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners.

### **Determination**

20. Both Mr. Mureithi for the Petitioners and Mr. Murang'a for the Respondents presented a number of authorities touching on the powers of the Respondents to mount and sustain a prosecution as the case may be. From these authorities, the Petition, the response to it and from submissions, I agree with Mr. Murang'a, that the following issues arise for determination;

*(a) Whether the actions and decisions made by the Respondents are consistent with the Constitution of Kenya.*

*(b) Whether any constitutional rights of the Petitioners have been infringed by the Respondents.*

*(c) Whether the Petitioners are entitled to any of the reliefs sought.*

21. I have picked on these three out of the five that he had crafted for conciseness of their determination thereof.

### **Whether the actions of the Respondents are consistent with the Constitution and the laws of Kenya**

22. The summary of complaints made in the Petition are that;

- i. The Police officers who arrested the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners had no lawful basis for arresting the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners.
- ii. The DPP had no lawful reason to mount the prosecution of the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners.
- iii. The Chief Magistrate at the Criminal Court in Milimani, Nairobi and the Principal Magistrate at Kapsabet had no lawful authority or basis to entertain the charge sheets placed before them because none disclosed an offence against the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners.

23. It is a common point that all the above public officers and institutions draw their respective mandates from the Constitution; to arrest, prosecute and try offenders under **Articles 245, 157 and 169** respectively. In my view, there is little purpose in this Court interrogating the arresting powers of the police because ultimately, it is the DPP who determines whether any criminal matter ought to go to Court or not.

24. Similarly, it is not necessarily to determine whether the Subordinate Courts have the mandate to try the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners but I will later in this judgment express myself on the powers of a

Criminal Court when a defective charge sheet is placed before it. This means that, like the Advocates in submissions, it is the powers of the DPP to mount any prosecution that should be the focus of the determination of the issue now confronting me.

25. In that context, under **Article 157(10)** of the **Constitution**, the office of the DPP is an independent office and is not subject to the control or direction of any person or authority.

26. For avoidance of doubt, **Article 157(10)** provides as follows;

(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

***(10) 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.***

27. Despite the above otherwise clear provision, in the performance of his duties, the DPP is also subject to the provisions of **Article 157(11)** of the **Constitution** which provides as follows;

(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

(10) ...

***(11) 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.***

28. The High Court has in numerous cases interpreted **Article 157(11)** to mean that while making the decision to mount a prosecution, the DPP shall not act maliciously, capriciously or arbitrarily nor act contrary to the above constitutional provisions, in bad faith or exhibit conduct that amounts to abuse of Court process – See **Douglas Maina Mwangi & Anor, Petition No.528/2012** and **Elory Kranuel vs the A.G Petition No.153 of 2012** among others.

29. In the present Petition, it has been principally and repeatedly argued that the DPP had no reason to commence prosecution because the motor vehicles subject of the charges were properly registered as private motor vehicles and not commercial vehicles. Can that action be said to be unconstitutional?

30. With respect to the Petitioners, that is precisely the matter that the Subordinate Courts are obligated to determine. As Majanja J properly stated in **R vs Kenya Revenue Authority & 2 Others ex-parte Sundip Patel in J.R Application No.186/2013**;

***“If and in the event a decision is made to charge the applicant with an offence and whether the charge can be sustained as a matter of law and fact is for the trial Court to decide”***

31. In his submissions, Mr. Mureithi argued that the DPP was under an obligation to **“first establish that an offence has actually been committed before instituting and undertaking any criminal proceeding”** and that by not doing so, he had abdicated his duty to comply with **Article 157(11)** thereby bringing the **“administration of Justice into disrepute and has, rather than avoid abuse of legal process, created an avenue to abuse the same”**

32. With respect, that submission cannot be sustained because whereas the DPP is expected to evaluate and analyse all evidence placed before him before making the decision whether to prosecute a suspected offender, it is ultimately the trial Court which must try the offender and determine his criminal culpability or not. Granted, the DPP as earlier stated, must act in the public interest and avoid abuse of legal process but where is the evidence in the present Petition that he has done otherwise?

33. In **Petition No.372 of 2013 Justus Mwenda Kathenge vs DPP & 2 Others**, this Court found that where the DPP mounted a prosecution for manslaughter against the Petitioner who had express orders of the High Court not to interfere with an on-going construction of a building in Embakasi, Nairobi and which building later collapsed with a number of construction workers being killed, he was acting against the fair administration of justice. The same cannot be said of the present situation and I need not say more.

34. Turning back to the powers of the Subordinate Court to interrogate a charge sheet placed before it, **Section 89(5)** of the **Criminal Procedure Code** proves as follows;

***“Where the Magistrate is of the opinion that a complaint or formal charge made or presented under this Section does not disclose an offence, the Magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.”***

35. The above Provision is available to the Petitioners and they can properly challenge the charge sheets before the trial Courts if they are minded to do so. I have seen nothing in any event to warrant my interference with the discretion of those Courts to properly manage the matters placed before them for determination.

36. In the end, I do not see how either of the Respondents acted in excess of their constitutional and

lawful mandates as alleged by the Petitioners.

**Whether any Constitutional Rights of the Petitioners have been infringed by the Respondents**

37. It has been alleged by the Petitioners that the following rights have been violated by the actions of the Respondents in arresting, prosecuting and trying the 1<sup>st</sup> – 3<sup>rd</sup> Respondents.

- i. Right to a fair hearing under **Article 50(1) and (2) of the Constitution.**
- ii. Right to fair administrative action under **Article 47 of the Constitution.**
- iii. Right to equality and freedom from discrimination under **Article 27 of the Constitution.**

**Right to Fair hearing**

38. **Article 50(1) of the Constitution** provides as follows;

1. *Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*
2. *Every accused person has the right to a fair trial, which includes the right—*
  - a. *to be presumed innocent until the contrary is proved;*
  - b. *to be informed of the charge, with sufficient detail to answer it;*
  - c. *to have adequate time and facilities to prepare a defence;*
  - d. *to a public trial before a court established under this Constitution;*
  - e. *to have the trial begin and conclude without unreasonable delay;*
  - f. *to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*
    - (g) *to choose, and be represented by, an advocate, and to be informed of this right promptly;*
    - (h) *to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
  - i. *to remain silent, and not to testify during the proceedings;*
    - (j) *to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*
  - j. *to adduce and challenge evidence;*
  - k. *to refuse to give self-incriminating evidence;*
  - *to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;*
    - (n) *not to be convicted for an act or omission that at the time it was committed or omitted was not—*

(i) *an offence in Kenya; or*

(ii) *a crime under international law;*

(o) *not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;*

(p) *to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*

(q) *if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”*

39. It is obvious to me that the above Articles, more so **Article 50(2)** refer to conduct of matters during an actual trial. Where is the evidence that the charges laid at the trial Courts will not receive the fair attention of those Courts and that the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners would not receive a fair hearing? I see none and the fact that the Petitioners are unhappy with the charges which they consider outrageous is no basis for invoking **Article 50(2)**,

40. Regarding **Article 50(1)**, where is the evidence that either the Chief Magistrate’s Court at Milimani, Nairobi or Principal Magistrate’s Court at Kapsabet are not lawfully constituted or that they lack the requisite independence to try the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners, fairly?

41. Again I see no such evidence before me and Mr. Mureithi’s submissions that “**there is no prima facie case by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to present the charges in Court**” are matters best left to those Courts.

### **Right to fair Administrative Action**

42. **Article 47** of the **Constitution** provides as follows;

(1) *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

2. *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

(3) *Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*

(a) *provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*

(b) *promote efficient administration.*

43. If I understood the Petitioners well, the alleged violation of **Article 47** arose out of the DPP’s decision to prefer charges against them when no action on their part created any cognizable offence in traffic law.

44. Elsewhere above, I have held and found that in determining whether to prefer criminal charges, the DPP is to be guided solely by the provisions of **Article 157(11)** of the **Constitution**. Whether that decision is administrative or otherwise matters not because once I have found that he acted within his constitutional mandate, then the said decision cannot otherwise be questioned.

45. In any event, I see no breach of **Article 47** of the **Constitution** as alleged.

## Right to Equality and Non-Discrimination

46. **Article 27(1)** of the **Constitution** provides as follows;

**(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

47. I have read the Petition and also Mr. Mureithi's submission in the context of the above provision and I have not seen a single statement pointing to any breach of the right to equality and protection of the law. Can the instance of arrest and prosecution be said to be actions in breach of the Constitution and the Bill of Rights? Certainly not and I have shown why. It has also not been shown that the Petitioners were specifically targeted and others in their category were left to roam scot free.

48. As explained elsewhere above, had the action of the Police and the DPP been shown to be arbitrary and/or *mala fide*, then a Court can properly interfere – See **Banskatha District Fire Association vs D.M. Banskatha A.I.R. 1989 Guj.48 at 50**. That principle is inapplicable to the present Petition.

49. In a nutshell, the Petitioners have failed to show how **Article 27** of the **Constitution** was violated by the Respondents.

## Protection from Inhuman and Degrading Treatment and Right to Freedom and Security of the Person

50. **Articles 28** and **29** of the **Constitution** provide as follows;

**28. Every person has inherent dignity and the right to have that dignity respected and protected.**

**29. Every person has the right to freedom and security of the person, which includes the right not to be—**

a. **deprived of freedom arbitrarily or without just cause;**

**(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;**

**(c) subjected to any form of violence from either public or private sources;**

**(d) subjected to torture in any manner, whether physical or psychological;**

g. **subjected to corporal punishment; or**

**(f) treated or punished in a cruel, inhuman or degrading manner.**

51. In his submissions on this issue, Mr. Mureithi merely stated that the right has been infringed as the 1<sup>st</sup> - 3<sup>rd</sup> Respondents have been subjected to unwarranted arrest by the 4<sup>th</sup> Respondent and unlawful proceedings against them thereafter.

52. As to how the above allegation can be said to amount to a breach of the **Articles 28** and **29** rights, nothing was said at all. I see no reason to delve into any analysis of those rights in such a context save to say that no such rights have been breached by the Respondents.

## Right to Property

53. **Article 40** of the **Constitution** provides as follows;

53.(1) **Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—**

(a) **of any description; and**

(b) **in any part of Kenya.**

(2) **Parliament shall not enact a law that permits the State or any person—**

- a. **to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**
- b. **to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).**
3. **The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**
  - a. **results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**
  - b. **is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**
    - i. **requires prompt payment in full, of just compensation to the person; and**
    - ii. **allows any person who has an interest in, or right over, that property a right of access to a court of law.**
4. **Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**
5. **The State shall support, promote and protect the intellectual property rights of the people of Kenya.**
6. **The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

56. Only two issues were raised in the application of the above provisions;

- i. That the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners paid “**colossal amounts of money as bail pending trial**” and;
- ii. The 4<sup>th</sup> Petitioner risks having its motor vehicles being impounded on the allegation that the said motor vehicles were being used for commercial purposes.

57. It is obvious to me that the payment of bail in criminal proceedings can never be an act in breach of the right to property. If it were so, why is it a fundamental right under **Article 50(1)(h)** of the **Constitution**? A Constitution must always be read wholistically and to read it selectively would defeat its purposes and intents.

58. As to the fear of motor vehicles belonging to the 4<sup>th</sup> Respondent being impounded, the basis for such a supposition was not laid and I am therefore unable to discern its context.

59. Ultimately, on the material before me, the right to property has not been breached as alleged.

## **Whether the Petitioners are entitled to the Reliefs sought**

60. Elsewhere above, I reproduced all the prayers made in the Petition. I have held that neither **Articles 27, 28, 29, 40, 47 and 50** of the **Constitution** have been violated. As regards **Article 35** on the right to information, nothing was said of it in the body of the Petition nor in Submissions. Its applicability in the present Petition is therefore unclear but suffice it to say that Prayer 1 of the Petition cannot be granted and is dismissed.
61. On Prayers 2 and 3, the question whether **Section 17(A) (3)(a) and (b)** of the **traffic Act, Cap.403** and **Section 5** of the **Insurance (Motor vehicles Third party Risks) Act, Cap.405** are applicable to commercial vehicles and not to private motor vehicles is a matter squarely within the jurisdiction and mandate of the trial Courts and I have said why.
62. Similarly whether the branding or painting of motor vehicles converts them from private to commercial vehicles is a matter for the trial Courts. Consequently, Prayers 2 and 3 in the Petition are hereby dismissed.
63. Prayers 4, 5 and 6 seek the consequential orders of certiorari and prohibition as well as an injunction to quash the on-going criminal trials and prohibit arrests and prosecutions of drivers of other motor vehicles belonging to the 4<sup>th</sup> Respondent and further to restrain the Respondents from further action. I have already said enough without going to any details of the nature of the orders of certiorari and prohibition to show that I see no wrong-doing on the part of the Respondents.
64. In any event, in **R vs Secretary of State for Education and Science, ex-parte on CC (1991) C A 558** it was held that certiorari can only be issued where the Court considers that a decision was reached without or in excess of jurisdiction or in breach of the rules of natural justice; or contrary to law. I have shown why such an order is not available to the Petitioners.
65. As regards prohibition, in **Kenya National Examinations Council vs Republic Ex-Parte Geoffrey Gathenji Njoroge & Others, Civil Application No.266 of 1996 (unreported)**, the Court stated that where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Further, that **“prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision”**
66. It is obvious in that context why Prayers 4 and 6 cannot be granted neither can Prayer 5 which seeks to restrain the Respondents from continuing with the hearing of the criminal cases before the trial Courts.
67. As for Prayer 7 on damages, no basis for such an award was made at all. It is quickly dismissed.
68. Lastly, on costs, I have considered the nature of the Petition and the issues raised. Whereas I have dismissed all the Prayers by the Petitioners, I am certain that important issues remain to be resolved at the trial Courts. To saddle any party with costs would, in the circumstances, be unfair. Let each party therefore bear its own costs.

## **Conclusion**

69. In **Macharia & Anor vs Republic Misc. Appl. No.322 of 1999**, the Court stated that a prosecution is improper if it is for a purpose other than the upholding of the criminal process; amounts to an abuse of the criminal process; amount to a harassment and is contrary to public policy and is in contravention of the Applicant's constitutional right to freedom. I have found no reason to find that the 1<sup>st</sup> – 3<sup>rd</sup> Petitioners' Petition has met that criteria.
70. Further, in **Meixner & Anor vs AG (2005) 2 KLR 189**, the Court stated that it is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support

the charge and that **“it would be a subversion of the law regulating criminal trials if the judicial review Court (read the High Court) was to usurp the function of a trial Court.”**

71.I have read the very elaborate submissions by Mr. Mureithi and they are best placed before the trial Courts as they touch largely on the merits of the defences to be tendered in those Courts.

72.This matter is at an end and having found as above, let the Petitioners ventilate and canvass all their grievances at the Subordinate Courts.

**Disposition**

73.From all the foregoing, it follows that the proper order to make is that this Petition be and is hereby dismissed.

74.Each party shall bear its own costs.

75.Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF SEPTEMBER, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kazungu – Court clerk

Mr. Odhiambo holding brief for Mr. Mureithi for Petitioner

No appearance for Respondent

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**

**11/9/2015**