Ongera v Director of Public Prosecutions & another (Civil Appeal 282 of 2019) [2025] KECA 1980 (KLR) (21 November 2025) (Judgment)

Neutral citation: [2025] KECA 1980 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 282 OF 2019

SG KAIRU, J MOHAMMED & WK KORIR, JJA

NOVEMBER 21, 2025

BETWEEN

JUSTUS ONGERA ..... APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION ..... 2ND RESPONDENT

(Being an appeal against the ruling and order of the High Court of Kenya (ACECA) at Nairobi (J.N. Onyiego, J.) dated 30th January 2019 in JR Misc. App. No. 20 of 2017)

JUDGMENT

1. What has given rise to this appeal is the ruling of J. N. Onyiego, J. dated 30th January 2017 in Judicial Review Miscellaneous Application No. 20 of 2017 through which he dismissed the appellant's notice of motion dated 11th June 2018, through which the appellant had sought an order of certiorari to quash the decision of the 1st respondent to institute criminal proceedings against him. Also sought was an order of prohibition against the 1st and 2nd respondents barring them from arresting, incarcerating, instituting, and/or undertaking or proceeding with any criminal charges against the appellant in connection with the alleged irregular procurement of the Audit Vault Software (AVS) by the office of the Auditor General. After hearing the application, the learned Judge dismissed it, holding as follows:

> "Having scrutinized the proposed charges against the applicant and further having examined the relevant material placed before the respondents, I am satisfied that there are high prospects of a conviction against the applicant for giving misleading information or professional advice thus causing his boss the Auditor General and the tender committee to award a tender through single sourcing which they could not have done had true and correct information been given. Having held that the respondents properly acted within their Constitutional and statutory mandate in recommending prosecution of the appellant,

it then follows that the prerogative orders of certiorari and prohibition are not applicable. Consequently, the application herein is dismissed and the interim prohibitory orders issued on 14th February 2017 vacated. Regarding costs, I find the matter bordering on public interest litigation and protection of individual rights and freedom. Each party shall bear own costs."

2. The appellant is now before us dissatisfied with that holding and has raised eighteen grounds of appeal through the Memorandum of Appeal dated 27th June 2019. We condense the grounds of appeal as follows: that the learned Judge erred in finding that the 1st respondent's powers were not amenable to censure; that the learned Judge erred by failure to set out, consider, evaluate and determine all the evidence adduced by the appellant thereby arriving at a wrong conclusion; that the learned Judge erred in failing to find that the charges contravened the *Fair Administrative Action Act* thereby infringing on the appellant's rights to fair trial; that the learned Judge erred in applying wrong standards in determining the judicial review application thereby arriving at a wrong conclusion regarding the extent of powers to be exercised by a criminal court; and, that the learned Judge erred in making a finding that the case had a high probability of a conviction, which finding was prejudicial to the appellant. It is the appellant's prayer in this appeal that the impugned judgment be set aside and the notice of motion dated 11th June 2018 be allowed as prayed.

3. The appellant's case before the trial court was hinged on the grounds on the face of the notice of motion dated 11th June 2018 together with the supporting affidavit, the chamber summons application for leave dated 14th February 2017 plus the annexures thereto, and a supplementary affidavit sworn on 3rd August 2018.

4. In brief, the appellant's case was that he was employed at the Office of the Auditor General as the Director of ICT. In 2013, alongside the IT Audit Manager, Annete Mwangi, they were tasked with conducting due diligence on prospective suppliers of an AVS, which was to be used in auditing processes on the Integrated Financial Management Information System (IFMIS) platform. According to the appellant, their instructions were limited to establishing and recommending the firms that would supply the software. He averred that upon conducting due diligence, they recommended that only OSI Kenya Limited, a subsidiary of OSI Slovenia, was known to have supplied the system in Kenya and the African region, and that Oracle supported this finding via a letter dated 18th June 2013. He further averred that he communicated this finding to the Tender Committee and the Auditor General, who proceeded to approve the purchase of the software through direct sourcing, which decision also received the blessings of the Executive Committee.

5. The appellant averred that he was neither a member of the Tender Committee nor the Executive Committee that approved the direct sourcing, hence he could not have influenced their decision. He averred that the whistleblower's letter to the Treasury in 2017, claiming that the office of the Auditor General had irregularly purchased the AVS for Kshs. 100 Million instead of 18 million was malicious. He termed the 2nd respondent's recommendation that he be charged with the offence of knowingly deceiving the principal contrary to section 41(2) of the Penal Code as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act* (ACECA) as ill-informed. He further stated that upon receipt of their recommendation, the Auditor General wrote a letter dated 19th January 2017 seeking to confirm whether Oracle Partners was one and the same with Oracle Kenya Ltd, and that on 8th February 2017, Oracle Partners responded in the affirmative. He maintained that the contents of these letters supported his recommendation to the Tender Committee, the Executive Committee, and the Auditor General. He annexed a letter dated 13th February 2017, in which he drew the attention of the

1st respondent to the two letters. According to him, the 1st respondent ought to have considered this new evidence and rescinded the recommendation to prosecute him.

6. The appellant faulted the 1st respondent's decision declining to charge the Auditor General and members of the Executive Committee, terming it discriminatory, irrational, an abuse of the court process, and borne of external considerations and ulterior motives. He also contended that the decision to charge him did not take into consideration the relevant factors that led to the recommendation that OSI Kenya be awarded the tender. He denied any wrongdoing, responsibility, or ever misleading his employer. He maintained that the Tender Committee and Public Procurement Regulatory Authority had approved the award of the tender and argued that he was discriminated against by being charged, yet he acted lawfully.

7. The 1st respondent opposed the application through a replying affidavit sworn by Nicholas Mutuku on 17th February 2017. It was the 1st respondent's case that it acted appropriately and independently after reviewing the evidence presented to it by the 2nd respondent. He averred that the appellant's memo dated 18th June 2013 stating that OSI Kenya Ltd was the only accredited Oracle provider of an AVS, was false and misleading, as there were several other accredited Oracle providers of the software. He referred to a letter dated 8th July 2015 from Oracle to the 2nd respondent stating that there were other accredited partners in Kenya with the capacity to supply and install an AVS. He further averred that several partners of Oracle, including Indra Systems, KPMG, and Netronics Communications Ltd, recorded statements confirming that they were accredited partners of Oracle with the capacity to supply and install the system. He maintained that by the appellant recommending OSI Kenya Ltd as the only partner of Oracle in Kenya, he not only misled the principal but also committed a criminal offence, which led to the charges preferred against him. In urging that the motion be dismissed, the 1st respondent contended that the issues raised by the appellant were capable of being canvassed in the criminal trial.

8. For the 2nd respondent, its position was captured in the averments of its investigator, Mulki A. Ummar, in the affidavit sworn on 27th July 2018. The 2nd respondent cited the appellant's memo dated 18th June 2013 to the Auditor General recommending OSI Kenya Ltd as the only accredited partner of Oracle in Kenya as a trigger to the single sourcing of the software. The 2nd respondent averred that the letter dated 8th February 2017 stating there was only one partner of Oracle in Kenya was contradicted by the letter 21st April 2017 confirming that there were several Oracle accredited partners. The 2nd respondent additionally averred that upon investigation, it was established that Kshs 36,899,990 was paid to Stephen Ndungu Kinuthia, the Deputy Auditor General Corporate Services, as a kickback from OSI Kenya. Additionally, it was found that Charles Gichobi, a Sales Executive with OSI Kenya Ltd, received Kshs. 500,000 from Stephen Ndungu Kinuthia, as well as Kshs.10,000,000 directly from his employer, in kickbacks. Further, that recovery proceedings for Kshs. 46, 089, 966 had been commenced through Civil Suit No. 5 of 2018. The 2nd respondent consequently denied any illegal, irrational, or malicious acts on its part, maintaining that it discharged its mandate within the law.

9. This appeal was heard on 28th May 2025 when learned counsel, Mr. Nyangena, appeared for the appellant, while learned counsel Ms. Matiru represented the 1st respondent and Ms. Murugi appeared for the 2nd respondent. At the hearing, whereas Mr. Nyagena and Ms. Matiru opted to rely entirely on their written submissions, Ms. Murugi proceeded to orally highlight her written submissions.

10. For the appellant, learned counsel, Mr. Nyangena, relied on submissions dated 13th February 2020. Counsel submitted that the proposed prosecution undermined *the Constitution* by violating the appellant's fundamental rights, including the right to a fair trial, equality, freedom from discrimination, and the right to fair administrative action. He relied on the principles of natural

justice and legitimate expectation, arguing that the 1st respondent ought to have strictly adhered to the legal and constitutional threshold for prosecution. He maintained that the decision to prosecute the appellant was irrational and unreasonable, as the decision-makers failed to ask the right questions, consider relevant information, and instead considered irrelevant matters. The decision in Municipal Council of Mombasa vs. Republic & Another [2002] eKLR was cited for the submission that in a judicial review matter the critical questions a court grapples with are the process of arriving at the decision; whether those who made the decision had power or jurisdiction to make the decision; whether those affected by the decision were given a hearing before the decision was made; and, whether the decision maker took into account relevant matters or irrelevant matters. According to counsel, the process of arriving at the decision to charge the appellant did not comply with the tenets of the law.

11. Counsel submitted that the appellant's role was peripheral as he only conducted due diligence and made a recommendation regarding the procurement of AVS, and that he could not have influenced the tender process. Relying on section 138 of the Public Procurement and Assets Disposal Act and Article 236 of *the Constitution*, counsel argued that the appellant was shielded from prosecution because he conducted his professional duty in good faith. According to counsel, the proposed prosecution lacked a proper factual foundation because the direct tendering method was approved by higher committees. Counsel further submitted that the intended prosecution of the appellant was ill-motivated, discriminatory, irrational, and an abuse of the court process as it arose from a process which lacked a proper factual foundation, thereby undermining *the Constitution*. Counsel referred to Diamond Hasham Lalji & Another vs. Attorney General & 4 Others [2014] eKLR to urge that in executing his mandate, the 1st respondent is required to consider the constitutional threshold for prosecution and the need to ensure that administrative action must be lawful, reasonable, and procedurally fair, notwithstanding that a suspect has no right not to be prosecuted.

12. Counsel criticized the 2nd respondent for conducting incomplete and misdirected investigations by failing to explore whether other service providers had previously installed AVS in the Kenyan public sector. He argued that the investigation was selective and overlooked new evidence that supported the fact that OSI Kenya Limited was the sole certified integrator with local references. Citing Onyango Oloo vs. Attorney General [1986-1989] EA 456, counsel emphasized that a breach of the rules of natural justice cannot be remedied by asserting the decision would otherwise have been correct. Counsel faulted the High Court for not scrutinizing the charges and relevant documents, which had it done, would have found that the prospect of conviction was unrealistic. Reliance was placed on Njuguna S. Ndung'u vs. Ethics & Anti-Corruption Commission (EACC) & 3 Others [2018] KECA 47 (KLR) to argue that the High Court was duty bound to scrutinize the charges, the relevant documents and reach a conclusive and objective decision on whether or not the charges had any legal or factual realistic prospect of conviction. Finally, counsel invoked Aussie Airlines Pty Ltd vs. Australian Airlines Ltd [1996] 139 ALR 663 and Njuguna S. Ndung'u vs. Ethics & Anti-Corruption Commission (EACC) & 3 Others (supra) to urge that where an applicant, as was the case herein, adduces sufficient evidence to demonstrate that the intended prosecution is oppressive and violates constitutional rights, then the issuance of declaratory orders is warranted.

13. In opposition to the appeal, learned counsel, Ms. Matiru, for the 1st respondent, relied on submissions dated 17th September 2020. Counsel urged that the appellant did not prove any procedural irregularity, illegality, abuse of discretion, and breach of the rules of natural justice by the 1st respondent to warrant the intervention of the trial court. According to counsel, the judgment by the superior court was well-reasoned and should not be interfered with. She pointed out that judicial review is concerned with the decision-making process and not with the merits of the decision. She also submitted that judicial review orders being discretionary, the discretion of the trial Judge can only be interfered with if the appellant demonstrates that he misdirected himself in some matter and as a result arrived at a wrong

decision, or that it is manifest from the case as a whole that he was clearly wrong in the exercise of discretion and occasioned injustice. She maintained that the appellant had not established any ground to warrant such an interference with the exercise of the trial court's discretion.

14. In order to demonstrate that there was no procedural impropriety, Ms. Matiru pointed to section 13(2)(c) of the Ethics and Anti- Corruption Commission Act 2011 and sections 23 and 35 of the *Anti-Corruption and Economic Crimes Act*, and argued that the 2nd respondent properly submitted recommendations to the 1st respondent for prosecution of the appellant. She emphasized that the 1st respondent, an independent office established by Article 157(1) of *the Constitution*, could initiate criminal proceedings without the consent of any person. Asserting that courts are reluctant to interfere when prosecutorial decisions made by the 1st respondent, counsel cited Republic vs. Commissioner of Police ex parte Michael Monari [2012] eKLR to highlight that the police are obligated to investigate complaints upon reasonable suspicion, and the trial court decides on the charges. She additionally referred to Peter Ndirangu Kinuthia vs. Officer Commanding Kikuyu Police Station [2003] KECA 114 to argue that seeking to prevent charges was premature. She also referred to Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223 to highlight the limits of judicial review and Stanley Munga Githunguri vs. Republic [1986] eKLR to highlight the limited grounds of proving arbitrary exercise of discretion by the Director of Public Prosecutions.

15. Ms. Matiru challenged the appellant's claim of abuse of office by referencing Jago vs. District Court (NSW) - [1989] HCA 46 - 168 CLR 23, stating that an abuse of process occurs when court procedures are misused and to argue that the appellant had failed to demonstrate any abuse of process. She emphasized that the criminal court has a duty to consider evidence from both sides prior to determining the case. Citing Leonie Marshall Appellant vs. The Director of Public Prosecutions, Privy Council Appeal No 2 of 2006, counsel argued that while judicial review of the prosecutorial decisions of the Director of Public Prosecutions is theoretically available, it is a highly exceptional remedy. She referred to John Mwangi King'ori & 4 Others vs. Steve Flavian Mwangi & Another [1994] KECA 82 (KLR) for the proposition that judicial review is granted only in exceptional circumstances and when other remedies have not been pursued. Ultimately, counsel submitted that the appeal lacks merit and should be dismissed.

16. On her part, learned counsel, Ms. Murugi for the 2nd respondent relied on submissions dated 21st September 2020, arguing that the decision to recommend charges was based on relevant factors regarding the procurement of the AVS. She submitted that the 2nd respondent's mandate to investigate corruption stems from *the Constitution*, the *Anti-Corruption and Economic Crimes Act* (ACECA), and the *Ethics and Anti-Corruption Commission Act*, which empowers it to arrest, charge, and make recommendations to the Director of Public Prosecutions. Counsel emphasized the 1st respondent's independent prosecutorial powers under Article 157 of *the Constitution*, asserting that its decision to charge the appellant followed a thorough review of the evidence gathered. Citing Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited (supra) and Suchan Investment Limited vs. Ministry of National Heritage & Culture [2021] KECA 160 KLR, counsel argued that the courts' role is limited to assessing the decision-making process.

17. Ms. Murugi stressed that the learned Judge acted correctly in declining the appellant's request to interfere, maintaining that in judicial review, the court focuses on the process of decision- making and not on substituting its own judgment with that of the decision maker. Relying on Kenya National Examination Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR, counsel supported the learned Judge's refusal to grant the orders sought by the appellant, arguing that courts should be cautious in interfering with such discretion. She outlined the investigations, highlighting allegations of irregular procurement of the AVS implicating several individuals, including

the appellant, in a scheme to defraud the government. Counsel asserted that the appellant had ample opportunity to present evidence at the criminal trial. She also argued that section 138 of the *Public Procurement and Asset Disposal Act* did not apply to him as it covers only acts done in good faith. She concluded by urging the court to follow the Supreme Court's holding on legitimate expectation and dismiss the appeal with costs.

18. We have considered the record of appeal, the submissions, and the authorities cited by counsel for all the parties. This being a first appeal, our mandate flows from rule 31(1) of the Court of Appeal Rules, and it entails re-appraising the evidence and drawing inferences of fact. The Court in Equity Bank Limited vs. Neptune Credit Management Limited [2016] KECA 385 (KLR) summarized this mandate thus:

19. Guided by the foregoing, to determine the appeal, we must address the following two issues. First, whether the 1st and 2nd respondents failed their constitutional and statutory duties regarding the criminal investigations and prosecution in respect of the appellant. Second, whether the appellant was entitled to the reliefs sought.

20. The crux of the judicial review application lodged by the appellant was that the 2nd respondent erred in its investigations and recommendation that he be prosecuted and that the 1st respondent ought not to have prosecuted him based on the recommendation of the 2nd respondent. His argument was that the decision was not supported by the evidence. Further, that the respondents' decisions and actions contravened Articles 2, 10, 21, 22(1)(3)(4), 23, 25, 27, 47, 50, 73, 157(11), 159, 165(3), and 232 of *the Constitution* and, as such, led to discriminatory action against him.

21. The 2nd respondent, which is established pursuant to Article 79 of *the Constitution*, is mandated under section 11(1)(d) and (e) of the *Ethics and Anti-Corruption Commission Act* to, among other things:

> "(d) Investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of *the Constitution*;
>
> (e) Recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct."

22. Regarding the 1st respondent, Article 157 (6)(a), (10) and (11) of *the Constitution* and sections 5 and 6 of the *Office of the Director of Public Prosecutions Act*, 2013, mandates the Director of Public Prosecutions to independently undertake state powers of prosecution subject to constitutional values and principles and that the Director does not require the consent of any person or authority in the exercise of his powers or functions under *the Constitution*.

23. As rightly appreciated by counsel for the parties, the prosecutorial discretion of the 1st respondent is not absolute as it is hemmed in by the constitutional requirement that the power be exercised with regard to public interest, the interests of the administration of justice and the need to prevent and to avoid abuse of the legal process. The authority being one donated by *the Constitution* must then be exercised in accordance with the constitutional principles and values, including the supremacy of *the Constitution*, the rule of law, human dignity, transparency, accountability, and fundamental rights and freedoms, including the right to fair administrative action and fair hearing. In the circumstances, Article 165(3) (d) (ii) of *the Constitution* gives the High Court jurisdiction to determine whether anything said to be done under the authority of *the Constitution* or any other law is consistent with, or in contravention of, *the Constitution*. It is on this basis that the High Court has the jurisdiction to entertain a question concerning the deployment of the powers of the respondents, being constitutional bodies.

It therefore requires no further argument that the respondents, although independent creatures of *the Constitution*, do not possess absolute powers but are subject to *the Constitution*, and their discretion is therefore subject to judicial review.

24. Our statement of the law is not new as in Diamond Hasham Lalji & Another vs. Genral & 4 Others [2018 KECA 856 (KLR) the Court held that:

> "... However, considering that the DPP has a constitutional duty to prevent and avoid abuse of legal process and that what constitutes abuse of legal process is the same in both jurisdictions, the exercise of discretion by DPP could be impugned by the High Court on constitutional grounds without invoking the inherent jurisdiction of the court.
>
> From the foregoing, there cannot be any doubt that the prosecutorial discretion of DPP is not absolute. It is limited by Article 157(11) which specifies the mandatory considerations that underlie the exercise of discretion; by the constitutional principles to which we have referred and by statute."

25. The Court went further to set out the grounds upon which the High Court can interfere with the 1st respondent's prosecutorial independence as follows:

> "It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2)(d)(ii) of *the Constitution* ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.
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> The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. (Matululu and Anor v. DPP [2003] 4 LRC 712). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction."

26. Challenging the actions of the respondents, the appellant before us contended that the 1st respondent discriminated against him without justification when, contrary to the recommendation of the 2nd respondent, the 1st respondent set free the members of the tender committee who awarded the tender, the subject of the intended prosecution. He further argued that the decisions by the respondents will deny him the right to a fair hearing, thus undermining Article 50 of *the Constitution*. In our view, the appellant did not establish grounds for interfering with the decisional independence of the 1st respondent. The appellant did not present any cogent reason to the learned Judge to support his allegation that the decision was biased against him. On the contrary, his plea that his advice did not bind the tendering committee and that a subsequent letter absolved him were issues that would serve as part of his defence in a criminal court.

27. It must also be recalled that the High Court sitting as a judicial review court must not conduct itself as if it were hearing an appeal against the decisions of the respondents, but should be concerned with the exercise of powers by the respondents and the process which yielded the decision. In saying so, we appreciate that although historically judicial review has been limited to a consideration of the process leading to the making of an impugned decision, it is now agreed that it may entail an element of merit

review. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd (supra), the limited scope of judicial review in the pre-2010 constitutional epoch was expressed as follows:

> "The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

28. However, the Supreme Court in Saisi & 7 Others vs. Director of Public Prosecutions & 2 Others [2023] KESC 6 (KLR) summarized the scope of judicial review in the present constitutional dispensation as follows:

> " The Fair Administrative Actions Act provides the parameters of judicial review to be the power of the court to review any administrative or quasi-judicial act, omission or decision of any person, body or authority that affects the legal rights or interests of an aggrieved person. The judicial review court examines various aspects of an act, omission or decision including whether the body or authority whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. These parameters are better set out extensively in section 7 of the Fair Administrative Actions Act (FAAA)." (Emphasis applied)

29. The Supreme Court though emphatic that judicial review must entail some "measure of merit analysis", nevertheless went ahead to endorse this Court's holding in Judicial Service Commission & Another vs. Njora [2021] KECA 366 (KLR) that such merit analysis should be limited to the examination of uncontroverted evidence as controverted evidence is best addressed by the person, body or authority in charge of the matter. In this appeal, the appellant's main contention was that the respondents failed to consider a letter dated 19th January 2017, through which Oracle confirmed that OSI Kenya Ltd was the only accredited partner for the installation of the AVS system in Kenya. However, according to the replying affidavit by the 2nd respondent, this statement by Oracle was contentious as other companies came forward and recorded statements affirming their capabilities to install the system. Additionally, the 2nd respondent had another letter from Oracle, which indicated that there were other agencies accredited locally to deal in AVS. These averments raised contentious issues that, if the High Court were to conduct a merit analysis on, would result in usurping the powers of not only the 1st respondent but also those of the criminal court. Thus, the Court in Uwe Meixner & Another vs. Attorney General [2005] KECA 292 (KLR) held that:

> " Having regard to the law, we agree with the finding of 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. 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 an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. 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."

30. We further add that before a court is called upon to conduct a review of an impending charge, the appellant ought, of necessity, to demonstrate that the contested proceedings serve a purpose other than the genuine pursuit of criminal justice. The application before the trial court lacked credible evidence to suggest that the intended prosecution was serving an ulterior motive, rather than the pursuit of justice. What we got as appellant's plea was the fact that his letter of 13th February 2017 was not considered and that the 1st respondent discharged other members of the tendering committee. Neither the appellant nor the respondents delved into the circumstances under which the other possible accused persons were not charged. However, we must recall that criminal culpability is always individual. The 1st respondent retains the powers to prosecute, and unless it is shown that the power was exercised irrationally, which has not been demonstrated herein, then our interference must be disbarred. Therefore, it is our view that the appellant did not lay a basis for a review of the criminal charges. Essentially, the judicial review court should avoid the transforming judicial review into mini criminal trials. We therefore uphold the learned Judge's finding that a scrutiny of facts was not necessary without evidence of an ulterior motive in the decision by the 1st respondent to charge the appellant.

31. To the appellant's contention that the learned Judge erred in finding that it was the place of a criminal court to try the disputed facts, we refer to the wisdom of the Supreme Court in Khalid & 16 Others vs. Attorney General & 2 Others [2019] KESC 93 (KLR) that:

> "It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it will not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence(s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount.
>
> We hasten to add that even upon trial, if it is found that the accused was arrested and charged with an offence unknown in law, he/she still has recourse in the civil justice system by way of seeking damages. The remedy for an apprehension of such a 'mis-trial' happening, where it has not been proved is not to vitiate the trial itself. It will be pragmatic that the appellants let the trial commence and conclude, during which trial they raise all the issues they have as against the law under which they are charged, if successful, it is only then that they will pursue their rights in civil proceedings."

32. The Supreme Court reiterated these views in Saisi & 7 Others vs. Director of Public Prosecutions & 2 Others (supra) in a pronouncement that resonates fully with our holding hereinbefore, when it opined that:

> " It is our considered opinion that these are not issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. In Hussein Khalid and 16 others vs. Attorney General & 2 others, SC Petition No 21 of 2017; [2019] eKLR this court held that it was not for the High Court as a constitutional court to go through the merits and demerits of the case as that is the duty of the trial court. Similarly, and as we have held hereinabove, it not for the judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.
>
> We are emphatic that the High Court, whether sitting as a constitutional court or a judicial review, may only interfere where it is shown that under article 157(11) of *the Constitution*, criminal proceedings have been instituted for reasons other than enforcement of criminal law or otherwise abuse of the court process."

33. As to whether the appellant was deserving of the orders sought, we think not. As we have already pointed out, the appellant failed to provide sufficient basis for the court to invoke its judicial review powers to countermand the decision of the 1st respondent to prefer charges against him. Consequently, the orders of certiorari and prohibition could not and cannot issue in the circumstances of this case.

34. Even though the use of the words "I am satisfied that there are high prospects of a conviction against the applicant" by the learned Judge may have been too strong in the circumstances of the case, we do not find that they were prejudicial to the appellant's intended criminal prosecution because a criminal trial is governed by its own rules. As for the claim by the respondent that he acted in good faith and was thus protected by section 138 of the *Public Procurement and Asset Disposal Act*, we can only say, that will be determined by the criminal court after hearing the evidence adduced.

35. We have said enough to show that we are satisfied that the learned trial Judge came to the correct decision on the matter before him, and we must uphold his judgment. In the end, this appeal lacks merit and is hereby dismissed.

36. Concerning the costs of this appeal, we recall the general principle that costs follow the event, and the award of costs is discretionary. The respondents shall therefore have the costs of the appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2025.

S. GATEMBU KAIRU, FCIArb. C.Arb.

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JUDGE OF APPEAL JAMILA MOHAMMED

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.