

**IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: MURGOR, LAIBUTA & NGENYE,
J.J.A.) CIVIL APPEAL NO. E046 OF 2022**

BETWEEN

CORNEL L. SHISANYA.....APPELLANT

AND

**GEORGE MWANGI.....1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS
MOMBASA..... 2ND
RESPONDENT DIRECTOR OF CRIMINAL INVESTIGATIONS
CHILDREN DEPARTMENT MOMBASA..... 3RD
RESPONDENT THE DIRECTOR OF NATIONAL
REGISTRATION BUREAU NAIROBI.....4TH RESPONDENT**

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Mombasa (J. Mativo, J.) (as he then was) dated 9th March 2022

in

Petition No. 63 of 2016)

**JUDGMENT OF THE
COURT**

1. By a petition dated 25th November 2016 and amended on 19th March 2018, the appellant (Cornel L. Shisanya) sought as against the respondents in Mombasa HC Petition No. 63 of 2016 the following orders, namely:

“1. A DECLARATION that the minor’s fundamental rights to equal protection from child abuse, child molestation and to early sexual harassments be exercised administratively and the court to order the minor be brought to this court and be detained by the court until further orders.

2. A DECLARATION that the minor be put in a well established children's home for counseling from where she will be staying while going to school at the same time until she completes her education to university level.

3. A DECLARATION that the OCS INUKA POLICE STATION be ordered to track the minor on phone no. 0704 044 412 and the Respondent on phone No. 0714 458 445 for the purpose of causing the arrest of the Respondent and be brought to this court until further orders of this court and pending the hearing and determination of this petition.

4. A DECLARATION that the minor's fundamental rights against being treated in a discriminatory manner as guaranteed by article 19, 20, 27 and 50 of the Constitution of Kenya have been and are likely to continue being violated as placing the minor in a questionable room or house, treating her as being a wife of the Respondent and by removing the minor from continuing with her education the subject of this Petition.

5. Costs of this Petition be borne by the Respondent.”

2. The appellant’s petition was supported by his affidavit sworn on 19th March 2018 essentially deposing to a whopping 31 grounds on which it was founded, but which we need not replicate here, save to observe that the appellant’s petition was intended to secure the protection of his daughter, ZCS (the minor), from child and sexual

abuse; that the minor was born on 14th February 2000; and that she was aged 16 as at the date the petition was filed.

3. The appellant's case was that the 1st respondent (George Mwangi), who was his neighbour, had been "... *meddling and interfering with the minor's life*" and "... *had formed a habit of calling the minor in his house for his selfish ends*"; that the 1st respondent shifted to a place unknown to the appellant; that, before she did her exams, the minor went to live with the 1st respondent in a secret location; that the appellant made a formal report at Inuka Police Station; that, on learning that he was being sought by the police, the 1st respondent transferred the minor to Dandora in Nairobi; that the appellant's attempt to convince the minor to return to school was in vain; that the 1st respondent continued to live with the minor as his wife and bore two children; that the 1st respondent had facilitated the issuance to the minor of a national identity card in his family name; that the appellant had not abandoned the minor, but had continued to sacrifice to cater for her wellbeing; that he was her only guardian and surviving parent following her mother's demise on 19th April 2014; that he was bound to protect her rights; and that the court had the jurisdiction to protect the interests of the minor from child abuse,

sexual abuse and any other acts of lawlessness committed by the 1st respondent.

4. The appellant further sought to have the 4th respondent summoned to explain the circumstances under which ZCS was issued with an identity card indicating her date of birth as 14th February 1998.

5. It is noteworthy that no replies were filed in response to the appellant's petition, which explains the following observations by the trial court in respect of the appellant's subsequent Notice of Motion dated 12th January 2017 (which is not on record), and which was determined vide the ruling of E. K. O. Ogola, J. dated 5th April 2017. The ruling reads in part:

"... the Applicant prays for the following orders:

(1) That the application be certified urgent and service of the same be dispensed with ex-parte at the first instance.

(2) That the honourable court be pleased to give a temporary injunction order restraining the Respondent by himself, his family people and friends and or servants and or agents from further staying or living with the minor herein and treating the minor as his wife pending further orders from this court.

(3) The Honourable Court be pleased to order and direct the OCS Inuka Police Station to track the Respondent's phone number 0714 458

445 for the purpose of causing his immediate arrest and be brought to court and be detained by the court until further orders.

(4)The Honourable Court be pleased to order the minor to be taken and kept in a Children’s Home for protection until further orders.

(5)Costs of this application be in the cause.

....

9. This court has considered the application and the documents in support thereof and has come to the conclusion that indeed the said Zeinab is a minor. There is no controversy as to where she is. She is currently allegedly the wife of the Respondent. I have seen the conversation between the Applicant and the Respondent at paragraph

15 of the supporting affidavit. That conversation, which is not challenged, reveals that the Respondent does not care about his conduct, is arrogant and has taken the minor as his wife. That is a position which is contrary to the law. The Respondent cannot purport to marry a minor or to have sex with a minor. The Respondent shall be arrested and brought to this court for doing illegal acts with the minor.

10. In the upshot the application is allowed as prayed.”

6. It is instructive that no appeal was preferred against the ruling dated 5th April 2017.

7. In its subsequent judgment dated 30th April 2019, the High Court (E. K. O. Ogola, J.) allowed the appellant’s petition with the following observations, orders and directions:

“7. The petition is not opposed. None of the Respondents have filed a response.

8. However, vide a Ruling delivered on 5th April, 2017 on an application dated 12th January, 2017, this Court ordered the 1st Respondent to come to the Court to explain why he had purportedly married a minor. On 12th April, 2018, the said minor came to Court accompanied by her own child and she informed the Court that she is married and lives in her own house and that she was not a minor. On that basis this Court declined to order the minor to be taken into a children's home, since the alleged minor had her own husband, child and home. However, the Court granted the Petitioner the prayer seeking to establish the circumstances under which the alleged minor secured a national identity card.

14. This court has considered the petition and the documents in support thereof and has come to the conclusion that indeed the said Z is a minor. There is no controversy as to where she is. She is currently allegedly the wife of the 1st Respondent. I have seen the conversation between the Petitioner and the 1st Respondent at paragraph 15 of the supporting affidavit. That conversation, which is not challenged, reveals that the 1st Respondent does not care about his conduct, is arrogant and has taken the minor as his wife. That is a position which is contrary to the law. The 1st Respondent cannot purport to marry a minor or to have sex with a minor. The said Respondent shall be arrested and brought to this court for doing illegal acts with the minor.

*15. As the Court retired to write this Judgment, the Court received a letter from the Office of the President, Ministry of Interior and Co- ordination of National Government dated 18th February, 2019
....*

16. The said letter enclosed an application for a national identity card by ZNM

18. From the said letter from the Office of the President it is clear that the information provided to the Registrar of Persons, if they

relate to the minor herein, was false information. The information

misrepresented the age of the minor and her family tree including false names of her mother and her father

20. The 1st Respondent claims to have married the said minor, and it is alleged that it is the 1st Respondent who helped out the minor to secure the said national identity card. It is clear to this Court that if this is true then the 1st Respondent has committed several offences ranging from giving false information to the Registrar of Persons, to marrying a minor. These are matters which this Court has no capacity to determine. Yet, this Court must take action not only to protect the said minor, but also to punish the crimes which may have been committed.

21. In order to establish the facts of these claims, this Court makes the following orders:

(a) A declaration that the minor's fundamental rights to equal protection from child abuse, child molestation and to early sexual harassments has been violated by the 1st Respondent.

(b) A declaration that the minor be put in a Children's home for counselling.

(c) A declaration that the OCS INUKA POLICE STATION be ordered to track the minor on phone No. 0704 44 xxx and the Respondent on phone No. 0714 458 xxx for the purpose of causing the arrest of the Respondent and be brought to this court until further orders of this court and pending the hearing and determination of this petition.

22. A declaration that the minor is not capable of marriage, and that the 1st Respondent should not be seen near the minor at all times.

23. It is further ordered as follows:

(i) The DCI and the DPP to carry out investigations on how the minor secured national identity card.

(ii) The DCI and the DPP to investigate the role of the 1st Respondent in how the minor secured identity card.

(iii) The DCI to arrest and charge the 1st Respondent with relevant offences revealed in their investigations, if any or at all.

(iv) The minor to be arrested and brought to this Court at any time

for directions on the matter.

(v)Mention on 30th May, 2019.”

8. It is not lost on us that, as at the date of the judgment aforesaid (30th April 2019), the appellant’s daughter was aged 19 years, having been born on 14th February 2000, and which puts to question the propriety of the child protection orders thereby made, save for the intended prosecution of the 1st respondent for the various offences, including defilement.

9. When the matter came up for mention on 13th June 2019 to ascertain compliance with the court orders made on 30th April 2019, counsel for the DPP applied for more time to investigate the matter. Accordingly, the trial court issued the following further orders:

“1. That the 1st respondent George Mwangi be arrested and brought to this court to show cause why he cannot face charges of defilement.

2. The Minor Zeinab Cornel be arrested and brought to this court for protection.

3. The police to liaise with the petitioner herein Mr Cornel

Shisanya. 4. Mention 19.6.2019.”

10. On further mention on 19th June 2019, counsel for the DPP submitted that they had complied with the orders issued on 13th June 2019 and applied for an order directing that a DNA test be conducted to determine ZCS's paternity, which the court allowed. When the matter came up for further mention on 27th July 2020, counsel for the DPP indicated that a DNA report had been filed showing that the appellant was not ZCS's father and that, therefore, he lacked the capacity to make a complaint on the minor's behalf. Counsel prayed that the matter be mentioned for further directions, which was scheduled for 29th September 2020.

11. On the day before the mention, the appellant filed a Notice of Motion dated 28th September 2020 seeking orders that the 2nd and 3rd respondents (the Director of Public Prosecutions, Mombasa, and the Director of Criminal Investigations, Children's Department, Mombasa) be cited for contempt of court for allegedly disobeying the orders of the court issued on 30th April 2019; and that the DNA report aforesaid be disregarded in the absence of the DCI's report on how the minor obtained a national identity card when she was underage.

12. His Motion was supported by an affidavit sworn on 28th September 2020 essentially deposing to the alleged disobedience of the above-mentioned orders.

13. From the record as put to us, there appears to be no reply to the appellant's Motion, which was followed by further orders issued on 29th July 2021 on terms, *inter alia*: that, even though the DNA report demonstrated that the appellant was not the minor's biological father, he nonetheless was entitled to institute the proceedings as her only known caregiver; and that, in its judgment, the court had found criminal conduct on the part of the 1st respondent and directed that it be investigated and appropriate action taken. Accordingly, the court directed full compliance by the Attorney General and the DPP with the judgment to ascertain the circumstances under which the minor secured the national identity card as well as the circumstances leading to her underage marriage and, thereafter, file a report within 90 days to facilitate final closing of the proceedings.

14. When the matter came up for mention on 9th March 2022, the DPP told the court that a decision had been reached not to prosecute the 1st respondent. Accordingly, the court (Mativo, J.) (as he then was) rendered a ruling on even date. As observed by the learned Judge:

“Counsel for the DPP says that the DPP reviewed the file and found the opinion that the alleged offenders are not culpable. A special feature of our constitution and Article 157 which established the office of the ODPP vested with powers to undertake criminal prosecution.

After investigations [into] an alleged offence the police [forward] the investigation... to the ODPP which reviews that evidence presented to him [and] forms an independent decision to prosecute or not to prosecute.

It's true that the court issued the orders dated 16.5.2019 and in compliance with the court's order investigations were undertaken and the counsel for the DPP has confirmed that no one is [culpable]. She says it was established that the time the minor obtained the identity card she was 18 years of age and that the petitioner was to avail a birth certificate if [she] was of adult but he has not done.

The Constitution mandates the DPP to make prosecution defence independently Upon reviewing the matter before me I find no reason to fault the decision made by the DPP.”

15. Dissatisfied with the learned Judge's decision, the appellant moved to this Court on appeal on the following 8 grounds set out

in

his Memorandum of Appeal dated 6th May 2022, some of which border on disrespect to the learned Judge:

“1. THAT, the trial Judge with his vast experience as a judge of the High Court in the Republic of Kenya erred in law and fact for upholding the oral statements made by the 2nd Respondent which were not binding in the proceedings of the Superior Court.

2. THAT, the trial Judge also acted on the wrong principles of the law by abusing the hard work which were done by his outgoing brother Justice Eric Ogola by failing to accommodate the ruling delivered on 5.4.2017 followed by a Judgment delivered on 30.4.2019 and further orders given on 29.7.2021.

3. THAT, the trial judge grossly misdirected himself by allowing the 2nd Respondent to address the court orally without written pleadings to enable the appellant file his response despite the outgoing judge having made it clear for the 2nd Respondent to file such pleadings for the purpose of court records and by doing so, he failed to dispense Justice and therefore he has denied Justice in totality and at the detriment of the appellant.

4. THAT, the trial Judge failed to provide ample time to the appellant to explain any necessary word for his understanding and also he could not unmute the appellant when he was muted despite a lot of shouting by the appellant begging for the same and this being a constitutional petition the trial judge denied the appellant's right to a fair hearing.

5. THAT, the superior court has overwhelming documents and evidence which were demonstrated in the decisions of Justice

E. Ogola but the trial Judge when he took over he entirely

overlooked the whole file and did not care to go through it paving way for manipulation to take place.

6. THAT, the 2nd Respondent having been given leave on request to file his report within 90 days from 29.7.2021, he has failed to file and has misled the trial judge and the trial judge has accepted to be misled (paragraph 11 of the orders of the court dated 29.7.2021) suffice.

7. The 3rd Respondent filed their investigation report in the office of the 2nd Respondent but the trial Judge failed on his part to further inquire from the 3rd Respondent how the investigations report with the office of the 2nd Respondent was conducted but the trial judge failed on his part to further inquire from the 3rd Respondent how the investigations were conducted as ordered by the court and they verbally informed the superior court that they have sent the report to the 2nd Respondent for action therefore the trial Judge fell totally blind on this issue and never bothered to know.

8. THAT, the trial judge has passed the test of being incompetent to handle constitutional issues by refusing to fault the verbal statements made by the 2nd Respondent and by doing so has diluted what his predecessor left.”

16. Put simply, the appellant faulted the learned Judge for, *inter alia*: failing to “accommodate” previous decisions and orders of E. K.

O. Ogola, J.; failing to accord the appellant a fair hearing; failing to consider the entire record of proceedings; disregarding the fact that the 2nd respondent had failed to file its report within the time allowed by the court; failing to inquire into the investigation

report filed by

3rd respondent with the 2nd respondent; and for being “incompetent”

to determine “constitutional issues”.

17. In support of the appeal, the appellant filed written submissions dated 27th March 2023 followed by a set of supplemental proceedings dated 15th May 2025, in respect of which he made oral highlights when the appeal came up for hearing on the Court’s virtual platform on 27th May 2025.

18. The 1st and 4th respondents did not file any submissions in rebuttal. On their part, the 2nd and 3rd respondents filed a joint Notice of Grounds Affirming the Decision together with a list of authorities and case digest, all dated 6th May 2025.

19. Counsel cited the case of **Okiya Omutata Okiiti v Director of**

Public Prosecutions; Inspector General of National Police

Service & Another (Interested Parties) [2022] eKLR, submitting

that, once investigations have been conducted and a decision to charge is made by the DCI, the ODPP under Article 157(6) takes

over

and the decision to initiate criminal proceedings against a person rests on the DPP, who does not require the consent of any person or authority for the commencement of criminal proceedings; and that the prosecutor may, in accordance with the powers granted to him by Article 157(11) of the Constitution, decide that, even though a crime was committed and the evidence collected may result in a conviction. The public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process discourages the commencement or continuation of a prosecution.

20. Having considered the record of appeal, the grounds on which it is anchored, the rival submissions of the parties and the law, we find that the appeal falls to be determined on 2 broad issues on which submissions were made, namely: whether the appellant was accorded a fair hearing; and whether the learned Judge was at fault in failing to find that the DPP was mandated to prosecute the 1st respondent. In effect, the appellant's appeal challenges the manner in which the learned Judge conducted the proceedings on the day scheduled for further mention; the

Judge's findings; and the final

orders made in the impugned ruling after consideration of the DPP's investigation report. To our mind, the other issues raised in the appellants grounds of appeal, but on which no submissions were made, stood abandoned.

21. In summary, the appellant submitted that no report into the circumstances under which the minor obtained an identity card was filed by the 3rd respondent as ordered by the Court; that the 2nd respondent doctored the 3rd respondent's report, and that this is why they did not file it in court as ordered by E. K. O. Ogola, J.; that the (undated) Social Inquiry Report filed by the Children's Officer Likoni Sub-County indicated that ZCS obtained an identity card when she was still a minor; that, after going through the particulars of the minor in the identity card, the trial court decreed that they were false in nature; that the court also found that the minor was defiled and sexually abused by the 1st respondent; and that the minor's right to education was interfered with by the 1st respondent.

22. The appellant raised further issues as to whether the DCI's role to investigate any issue is rendered useless in the hands of

the ODPP;

whether the DPP has the power to alter and review the investigations conducted by the DCI and reprimand the file at the same time; whether the DPP is shielding wrongdoers despite overwhelming evidence having been exhibited in the matter and despite the court ordering arrests; and whether the DCI's Office should be scrapped because it has no limbs and is toothless.

23. According to the appellant, the ODPP should not hide under the protection of the Constitution as the facts of the case were already before the court. He submitted that the DPP was misusing the powers bestowed on their office since they were unlawfully reprimanding genuine cases; that they were the ones who delayed this case from being concluded early; that the Court should not close its eyes to this fact; and that the learned Judge did not act wisely in deciding not to fault the DPP's decision not to prosecute anyone for the matters complained of.

24. On the 1st issue, it is noteworthy that the impugned ruling of Mativo, J. (as he then was) dated 9th March 2022 was essentially concerned with the DPP's decision not to prosecute the 1st respondent for allegedly facilitating the issuance of a national identity

card to ZCS at a time when, in the appellant's view, she was a minor. The DPP's decision had been reached in obedience to E. K. O. Ogola, J.'s directions given on 29th July 2021 that the matter be investigated and a report filed in court for further orders.

25. In the words of Ogola, J., *"this court directs full compliance with the judgment by the AG and the DPP to ascertain the circumstances under which the minor secured the national identity card, and circumstances leading to her under age marriage"*. A report on those circumstances was to be filed before the matter came up for mention on 9th March 2022 for further orders. In response to the court's directions, the DPP filed its report dated...It is on that report that the ruling by Mativo, J. (as he then was) was based, thereby prompting the appellant to move to this Court on appeal.

26. Turning to the 2nd issue, the appellant faults the learned Judge for affirming the DPP's decision not to prosecute the 1st respondent having found that, at the time she was issued with a national identity card, ZCS was above 18 years of age; that she

did not wish to have

the matter concerning her alleged under-age marriage prosecuted; and that, therefore, the DPP was not at fault in deciding not to prosecute the 1st respondent.

27. We need to point out right at the outset that this issue revolves around the constitutional powers of the DPP to prosecute as conferred under Article 157(6) of the Constitution, which reads:

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

28. Sub-articles (10) and (11) go further and provide as follows:

(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.

(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.

29. While Ogola, J. had recommended investigation and, if necessary, prosecution of the 1st respondent for assisting ZCS to obtain her national identity card, and for allegedly getting married to her while she was under-age, that was as far as the court could go. The decision to prosecute remained the prerogative of the DPP who, according to Article 157(10), was not subject to the direction or control of any person or authority.

30. The independence of the DPP in exercise of its prosecutorial powers has been the subject of numerous judicial decisions in which courts have pronounced themselves, often pointing out that in certain circumstances such powers are not absolute, and may be subjected to judicial scrutiny and intervention in appropriate cases, such as where there is evidence of abuse of power or of the court

process, none of which circumstances were demonstrated in the instant appeal.

31. In **Saisi & 7 others v Director of Public Prosecutions & 2 others** [2023] KESC 6 (KLR), the Supreme Court held that:

“82. Stemming from these provisions of the law, the courts have consistently held that whenever it seems that the DPP is utilizing criminal proceedings to abuse the court process, to settle scores or to put an accused person to great expense in a case which is clearly not otherwise prosecutable, then the court may intervene It also includes the case of Cyrus Shakhalinga Khwa Jirongo v Soy Developers Ltd & 9 others, SC Petition No 38 of 2019; (2021) eKLR where this court held that although the DPP is not bound by any direction, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising and make appropriate orders. The court found the following guidelines read alongside article 157(11) of the Constitution to be a good gauge in the interrogation of alleged abuse of prosecutorial powers:

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

ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings, eg. want of sanction;

iii. Where the allegations in the First Information Report or the complaint take at their face value and accepted in their entirety, do not constitute the offence alleged; or

iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

83. We are also minded of this court's decision in Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others, SC Petition No 42 of 2019; (2021) eKLR where the court upheld the High Court's position to the effect that in matters involving exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised. Further that the only exception where a court can compel a public agency to implement a recommendation is where 'there is gross abuse of discretion, manifest injustice or palpable excess of authority' equivalent to denial of a settled right to which the petitioner is entitled, and there is no other plain, speedy and accurate remedy."

32. The appellant's case involved the exercise by the DPP of its judgment and discretion as to whether or not to prosecute the 1st respondent in the face of ZCS's refusal to co-operate in the investigations and lodge a formal complaint, particularly after becoming of age. In principle, a public agency can only be

directed

by the court to take action, but cannot be directed in the manner or the particular way the discretion is to be exercised. The appellant did not demonstrate that the DPP acted in gross abuse of discretion, manifest injustice or palpable excess of authority to warrant intervention or directions by the learned Judge. Moreover, the DPP's decision was founded on an investigation report in respect of which the trial court found no reason to impeach. Accordingly, the learned Judge's decision was by no means in error.

33. In Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] KECA 182 (KLR), this Court pronounced itself on the independence of investigatory agencies and held that:

“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an

unfortunate result for courts to

interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] KLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR 69.”

34. In Diamond Hasham Lalji & another v Attorney General
&

4 others [2018] KECA 856 (KLR), this Court held that:

“[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in Mohit v Director of Public Prosecutions of Mauritius [2006] 5 LRC 234:

‘these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP’s decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...’

In Regina v. Director of Public Prosecutions ex-parte Manning and Another [2001] QB 330, the English High Court said partly at para 23 page 344:

‘At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.’

Although the standard of review is exceptionally high, the court’s discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP ”

35. While the DPP’s decision not to prosecute in the instant case was by no means immune to review, the appellant failed to show the basis on which he faulted the learned Judge in light of the fact

that

he was merely recording his findings on the DPP's decision not to prosecute, and the reasons therefor, when the matter came for mention to confirm whether an investigation had been undertaken and a report made to enable the trial court reach a determination of his (the appellant's) constitutional petition. For the avoidance of doubt, the learned Judge was not sitting on review of the DPP's decision, and the court had not been moved to undertake such review beyond final determination of the petition.

36. Finally, it is observed that the appellant did not make any submissions on the alleged breach of his right to fair hearing when the matter came before Mativo, J. (as he then was) or for further orders. Accordingly, nothing turns on this issue and, consequently, the related grounds of appeal fail.

37. Having carefully considered the record of appeal, the grounds on which it is founded, the rival submissions and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed in its entirety. Consequently, the Ruling and Orders of the

High Court of Kenya at Mombasa (J. Mativo, J.) (as he then was) dated 9th March 2022 are hereby upheld.

38. Given the public nature of the petition leading to the instant appeal, we hereby order and direct each party to bear their own costs of the appeal. Orders accordingly.

Dated and delivered at Mombasa this 5th day of December 2025.

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR