

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR APP. NO. E 289 OF 2025

CLARE ACHUNGO VIVIAN.....EX-PARTE APPLICANT

VERSUS

DIRECTOR OF PUBIC PROSECUTIONS1ST RESPONDENT
INSPECTOR GENERAL OF POLICE2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

THE CHIEF MAGISTRATES COURT AT MAKADARA.....4TH RESPONDENT

AND

ANNE KARIUKI..... INTERESTED PARTY

JUDGMENT

1. The Ex-parte Applicant filed the applications dated 5th September 2025 which forms the subject of this judgment wherein she seeks the orders that;
 - a. An Order of Certiorari do issue directed to the Respondents to remove in to this Honourable Court for purposes of being quashed the decision of the 1st Respondent to charge and Prosecute the Applicant in Makadara Chief Magistrate’s Court Criminal Case No. E3715 of 2025 for the offence of Conspiracy to commit a felony contrary to Section 393 of the Penal Code.
 - b. An Order of Prohibition do issue directed to the Respondents, whether jointly or severally, prohibiting themselves, their agents, employees, officers or any person acting under their instructions or authority, from processing, pursuing or otherwise continuing with the Prosecution of the Applicant in Makadara Chief Magistrate’s Court Criminal Case No. E3715 of

2025 or in any other criminal proceedings founded on or arising from the same facts and allegations contained in the charge sheet dated 29th July 2025.

The Applicant's case:

2. It is her case that she is a Kenyan citizen, female adult of sound mind, and currently a student pursuing a Diploma in Business Management at Mount Kenya University, and therefore competent to swear this affidavit.
3. She deposes that she has read and understood the contents of the Chamber Summons and the Statutory Statement filed herein and the facts therein are true and correct.
4. She swears this affidavit to verify the correctness of the facts and averments contained therein.
5. She produced "CAV-I" a bundle of copies of documents duly paginated from page 1 to 109 certifying the correctness of the facts herein deposed and are hereafter more particularly described as "the Bundle".
6. More specifically, pages 1 to page 2 show my Identity, pages 3 to 74 is her communication with Mr. Simon in respect to my employment with Lystra Automart, the charge sheet in Criminal case No. E3715/2025 while pages 82 to 109 are witness statements.
7. It is her case that her arrest, detention, and arraignment were unlawful, arbitrary, and unconstitutional, and were intended to scapegoat me in place of my employer, Mr. Simon Mabola, whom she had never physically met and who was the actual party to the disputed transaction.
8. Unless this Honourable Court intervenes and grants the orders sought, she will continue to suffer irreparable injustice, disruption of my education, psychological distress, and permanent damage to my reputation, despite my innocence.

Applicant's Submissions;

- 9.** The applicant invites the court not to interrogate the merits of the criminal case pending before the Makadara Chief Magistrate's Court, but rather the legality, rationality, procedural propriety, and constitutional validity of the decision by the 1st Respondent to institute and maintain criminal proceedings against her in Makadara Chief Magistrate's Court Criminal Case No. E3715 of 2025.
- 10.** These proceedings arise from a set of facts in which, the Ex-parte Applicant, a young university student, newly recruited and barely three days into employment, was arrested, detained, and charged for an offence allegedly committed months before she had any conceivable relationship with the alleged perpetrators, the complainant, or the impugned transaction.
- 11.** The prosecution is premised on bare suspicion arising from her possession of a company-issued mobile phone, which had been confiscated by the police and remains in police custody to date.
- 12.** Notably, the subject mobile phone was confiscated by the police at the time of the Applicant's arrest and has, since then, remained in police custody.
- 13.** In addressing the issue whether the decision by the 1st Respondent to charge and prosecute the Applicant was made without an evidential foundation and is therefore illegal, irrational, and unreasonable.
- 14.** She submits that it is now settled law that although the Director of Public Prosecutions enjoys constitutional independence under Article 157 of the Constitution, that discretion is neither absolute nor immune from judicial oversight.
- 15.** Article 157(11) expressly obligates the DPP, in exercising the power to charge and prosecute, to have regard to the public interest, the interests of the administration of justice, and the need to prevent abuse of the legal process.

- 16.** The autonomy granted under Article 157(10) therefore does not confer carte blanche to institute prosecutions devoid of evidential support or animated by improper considerations.
- 17.** Consequently, where it is shown that a decision to prosecute is unsupported by evidence, is taken for an improper purpose, or is so unreasonable that no rational decision-maker, properly directing their mind to the facts and the law, could have arrived at it, this Honourable Court is not only entitled but duty-bound to intervene and quash such a decision.
- 18.** Her prosecution in Makadara Chief Magistrate's Court Criminal Case No. E3715 of 2025 is devoid of any evidential basis and therefore ceased to be a legitimate exercise of prosecution discretion by the 1st Respondent.
- 19.** She submits that the impugned decision degenerated into persecution rather than prosecution.
- 20.** The decision to charge and prosecute the Applicant was without any facts supporting the prosecution.
- 21.** The Applicant submits that she was recruited by Lystra Automart Company on 24th July 2025. In contrast, the charge sheet alleges that the offence of conspiracy to commit a felony occurred between 28th February 2025 and 28th June 2025, several months prior to her engagement and or her employment. On the date of her employment, that is 24th July 2025, the Applicant was issued with a company mobile phone strictly for official use, and it is this very device that became the sole basis of her arrest. Prior to 24th July 2025, the Applicant had no employment, contractual, agency, or any other relationship whatsoever with Lystra Automart Company, its directors, or the Interested Party.
- 22.** The Applicant argued that she placed before this Court, through uncontroverted WhatsApp messages between herself and the company's director which conclusively demonstrates the chronology and circumstances of her recruitment.

- 23.** These messages show that her employment and arose from a job inquiry she made through the company's publicly advertised contact details, followed by formal email communication wherein she submitted her curriculum vitae, and upon being offered an opportunity, she was instructed to report at the Company's Marurui branch.
- 24.** The first WhatsApp message sent by the Applicant to the company's mobile numbers as displayed on its official website, in which she inquired whether there was an opportunity for employment as a receptionist.
- 25.** That inquiry was responded to, and she was advised to channel her application through the company's official email address, "talktous@lystrautomartke.com".
- 26.** In compliance with those instructions, the Applicant sent an email.
- 27.** It is her case that on 22nd July 2025, her WhatsApp message was again responded to and she was requested to submit her Curriculum Vitae together with a passport-size photograph.
- 28.** She obliged and was thereafter instructed to report to the company's Marurui branch.
- 29.** In obedience to those directions, she reported on 24th July 2025, and on the same date an employment contract was send to her via her WhatsApp number.
- 30.** She got work instructions during her brief tenure of employment prior to her arrest.
- 31.** Through a text message shared on the 25th July 2025 she was informed that she would be issued with an iPhone for purposes of responding to clients and was expressly instructed to switch off the phone upon leaving the workplace.

- 32.** It is her case that taken together, and in the absence of any contestation
by the Respondents, unequivocally demonstrate that the Applicant was employed on 24th July 2025 and was issued with the iPhone in question on 25th July 2025, long after the transactions forming the particulars of the alleged offence had already been concluded.
- 33.** More significantly, the Respondents' own evidence fatally undermines
the prosecution narrative.
- 34.** In her statement recorded at Kayole Police Station on 27th July 2025 after her arrest on 26th July 2025, the Interested Party unequivocally admits that all negotiations, representations, and financial transactions were conducted exclusively between herself and Mr. Simon Mabola, the company's director.
- 35.** She further confirms that she neither knew the Applicant nor had any dealings whatsoever with her during the period when the alleged conspiracy and theft are said to have occurred.
- 36.** The Applicant's sole interaction with the Interested Party was limited to a single telephone call made after the impugned transaction had already crystallized, during which the Applicant openly disclosed that she was a newly recruited employee with no knowledge of the prior dealings.
- 37.** It is on this basis that the interested party has instituted civil proceedings against the Company, its director and other third parties in Mombasa Magistrates Court case no. E1347 of 2025 seeking to recover the same monies without implicating the Applicant.
- 38.** According to her, there is a complete and glaring absence of any evidence, whether direct or circumstantial, placing the Applicant at the scene of the alleged offence, within the timeframe of its commission, or in any form of agreement, common intention, or meeting of minds necessary to sustain a charge of conspiracy under section 393 of the Penal Code.
- 39.** Conspiracy, by its very nature, requires proof of a prior agreement to

commit an unlawful act and in the circumstances of this case, the Ex-parte Applicant, having commenced her employment on 25th July 2025, could not, in logic, in law, or in common sense, have participated in an offence which, by the prosecution's own charge sheet, predates her engagement and before she was issued with the company phone she was found in possession with.

- 40.** The decision to prosecute her is therefore not merely weak or arguable;
it is chronologically impossible and wholly unsupported by the complainant's/Interested Party's statements recorded in the police file.
- 41.** She submits that the impugned decision to charge and prosecute her is
thus, factually perverse and legally untenable, amounting to a classic case of Wednesbury unreasonableness, where irrelevant considerations were taken into account, relevant considerations were ignored, and a conclusion was reached that defies rational explanation.
- 42.** Further, as conceded in the replying affidavit, the Applicant's arrest and subsequent prosecution appear to have been premised solely on her possession of a company-issued mobile phone that had allegedly been used by another person months earlier.
- 43.** She submits that mere possession of a mobile phone which is fitted with the employer's line and was allegedly used previously in communications which turned to be fraudulent, without more, or even showing that the Applicant possessed the Phone for her personal use, cannot translate into criminal culpability.
- 44.** To convert innocent possession into a basis for a charge of conspiracy is to substitute suspicion for evidence and to criminalize proximity rather than conduct. In doing so, the investigators and the prosecution abdicated their duty to conduct impartial, thorough, and objective investigations.
- 45.** The Applicant was prosecuted not because evidence pointed to her guilt, but because she was readily available.

46. This is further evidenced by the investigators' demand that she "produces" Mr. Simon Mabola as a precondition for her release.
47. Coupled with the failure to investigate her actual role, if any, this conduct reveals an improper collateral purpose behind her arrest and prosecution.
48. The criminal process was thus deployed as a tool of coercion rather than a mechanism for the pursuit of justice.
49. Such a prosecution serves no legitimate public interest and instead undermines it by converting an innocent student into a proxy for the real suspect.
50. Allowing it to proceed would be to sanction arbitrariness, reward the Respondents' failure to properly investigate the matter, and normalize the abuse of criminal proceedings as instruments of convenience.

51. Reliance is placed in the case of Sylvester Gaitano Odhiambo Republic [2022] KEHC 1577 (KLR) where the court stated thus:-

"...a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose... The court added that: " ... A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."

52. The 1st Respondent to charge and prosecute her was illegal, irrational, and unreasonable, and therefore amenable to judicial review intervention.
53. It was illegal because it was undertaken in breach of Article 157(11) of the Constitution, in total disregard of the obligation to act in the public interest, to uphold the administration of justice, and to prevent abuse of the legal process, and without any evidential foundation capable of sustaining the offence charged.

- 54.** It was irrational because it defied chronology, logic, and common sense, in that the Applicant was prosecuted for an alleged conspiracy that had allegedly occurred months before her employment, without any evidence placing her within the timeframe of the offence or demonstrating any agreement or common intention on her part.
- 55.** It was further unreasonable in the Wednesbury sense, as the decision was so devoid of factual support, and so detached from the exculpatory statements in the police file that no reasonable prosecutor, properly directing their mind to the law and the evidence, could have arrived at it.
- 56.** According to the Applicant, Article 157(11) of the Constitution is not decorative prose. It commands the Director of Public Prosecutions, in the exercise of prosecutorial discretion, to have regard to public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process. Where these imperatives are ignored, the resulting prosecution is constitutionally infirm and amenable to judicial review.
- 57.** The proceedings were instituted to harass, intimidate, coerce, and to compel ex-parte Applicant to do what the law does not require of her, specifically by being ordered to “produce” the real suspect.
- 58.** The Applicant was arrested, detained, and charged not because she committed, facilitated, or agreed to commit any offence, but because she was physically available and in possession of a company phone previously used by other person suspected to have committed the offence in question.
- 59.** The investigating officers, instead of pursuing the known and admitted perpetrator, sought to convert the Applicant into an investigative tool by demanding that she “produces” Mr. Simon Mabola as a condition for her release.
- 60.** Criminal law does not sanction the arrest and prosecution of one

person as leverage to secure the attendance of another otherwise such conduct transforms prosecution into a coercive instrument and strips it of its legitimacy.

- 61.** The Respondents have also not rebutted the Applicant's assertion that she held the cell phone in question only for work related duties and not for her own use.
- 62.** The Interested Party has already elected to pursue civil remedies in Mombasa Magistrates' Court Civil Case No. E1347 of 2025 against the company, its directors, and other parties directly involved in the transaction.
- 63.** To simultaneously maintain a criminal prosecution against her, in the absence of any incriminating evidence, is oppressive, and manifestly unfair.
- 64.** The prosecution undermines, rather than promotes, the administration of justice and was instituted not only for other collateral purpose but in circumstances that reveal malice, arbitrariness, or absence of factual foundation, hence we invite this court to find and hold that the prosecution in Makadara Magistrates' Court Civil Case No. E1347 of 2025 amounts to abuse of the discretion conferred under Article 157 (11) of the Constitution.
- 65.** The impugned prosecution is a grave violation of Article 47 guarantees every person the right to fair, lawful, reasonable, and procedurally fair administrative action.
- 66.** The decision to arrest and charge the Applicant, without investigating her employment relationship with Lystra Automart Company, without interrogating the evidential record, and in defiance of exculpatory statement made by the interested party, is the very antithesis of fair administrative action.
- 67.** Her dignity was reduced to collateral damage and she was charged solely due to proximity, not culpability.
- 68.** Forcing the Applicant to stand trial where the prosecution evidence,

even if taken at its highest, cannot sustain a conviction, is itself an affront to the right to a fair hearing.

- 69.** The prosecution process instead becomes the punishment.
- 70.** The Applicant's right to education under Article 43(1)(f) has been imperiled due to the repeated court attendances, psychological distress, reputational harm, and financial strain imposed on her family due to these proceedings.
- 71.** The harm occasion to the Applicant is thus not speculative, it is real, continuing, and irreparable. Taken cumulatively, the Respondents' actions amount to a sustained violation of the Applicant's constitutional rights and a continuing threat to her liberties and this Court is constitutionally mandated under Articles 23 and 165 to arrest such violations at their inception.
- 72.** Judicial review remedies are designed for circumstances such as those presented in this case. An order of Certiorari as sought by the Applicant issues to quash a decision that is illegal, irrational, procedurally improper, or unconstitutional, while an order of Prohibition serves to restrain a public authority from persisting in unlawful conduct. It is the Applicant's submission that the decision by the 1st Respondent to charge and prosecute her was reached in the absence of any evidential basis, in disregard of material and uncontested facts, for an improper purpose, and in clear violation of the constitutional obligations binding upon the Respondents, as already demonstrated.
- 73.** That decision is therefore not only irrational, unreasonable or unconstitutional but also amenable to being quashed by an order of Certiorari.
- 74.** Further, unless this Honourable Court intervenes, the Respondents will persist in prosecuting the Applicant on charges which are not supported by any factual foundation, thereby exposing her to continuing prejudice and further violation of her constitutional rights. In these circumstances, an order of Prohibition is necessary to arrest

the ongoing illegality and to safeguard the integrity of the criminal justice system.

75. While this Honourable Court has consistently affirmed that it does not lightly interfere with the discretion of the Director of Public Prosecutions, it has equally emphasized that such discretion is subject to judicial review where it is exercised unlawfully, unreasonably, or in abuse of process.
76. The present case squarely meets, and indeed surpasses, that threshold.
77. The Applicant was not charged on the basis of culpability, but out of convenience. The undisputed chronology of events, beginning with the date of her employment, conclusively exonerates her, and the complainant's own statement does not implicate her in any manner. To permit the continuation of the criminal proceedings in Makadara Chief Magistrate's Court Criminal Case No. E3715 of 2025 would therefore be to sanction arbitrariness, endorse inadequate and incomplete investigations, and reduce the criminal process into an instrument of oppression. Such an outcome would be inimical to the rule of law and corrosive to public confidence in the administration of justice. For these reasons, the Applicant respectfully prays that this Honourable Court be pleased to allow the application dated 5th September 2025.

1st, 2nd and 3rd Respondent case;

78. The 1st, 2nd and 3rd Respondents in opposing the Applications filed a Replying Affidavit dated 28th October 2025 and sworn by Allan Lumumba, Principal Prosecution Counsel.
79. Article 157 (6a) of the Constitution of Kenya provides that:
- “The Director of Public Prosecutions shall exercise state powers of prosecution and may 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.”

80. The 1st Respondent in discharge of his powers and functions enjoys the status of an Independent Office by virtue of Article 157 (10) of the Constitution which expressly provides that the powers and functions bestowed on the DPP shall be exercised without the direction or control of any person or authority.

81. In the case of ***Pauline Raget Adhiambo Agot v DPP and Others (2010) Petition No. 446 of 2015*** the court stated:

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“It must first be stated that the clear intention of the Constitution was to ensure that the Office of the Director of Public Prosecutions was free of any interference or meddling. No person or body including the court ought to instruct or direct the 1st Respondent on how to conduct its business as to investigating crime and prosecuting offenders. Indeed, it is the 1st Respondent who is enjoined under Article 157(4) of the Constitution to direct the National Police Service to investigate any criminal activities. On the other hand, members of the public are also morally obligated to report incidents of crime to the ODPP and DCI.

82. In the case of ***Republic v The Commissioner of Police & the Director of Public Prosecution Ex parte Michael Monari & Another Misc. Application No. 68 of 2011, Nairobi***, in determining whether the ODPP and DCI had abused their statutory and constitutional powers, the Learned Judge stated that:

“... the Police have a duty to investigate any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court.

83. In the instant case, the 2nd and 3rd Respondents were undertaking

a lawful duty by investigating the complaint that had been lodged by the Interested party who also enjoys equal protection and benefit of the law as constitutionally established.

- 84.** It is on the reasonable suspicion that the Applicant was involved in the offence of Conspiracy to commit a felony contrary to section 393 of the Penal code and Stealing by conversion contrary to section 267(2) (a) as read together with Section 275 of the Penal Code with others not availed that the 2nd and 3rd Respondent forwarded the Inquiry file to the 1st Respondent for perusal and advise, which advise and decision to charge was given on the 29th July, 2025 to the effect that the above charges were reasonable for the Applicant and another to answer to.
- 85.** The Applicant herein was found upon tracking in possession of the very devise Iphone XS Imei number 353103106415677 with a physical mobile number 0726089196 and an e-sim card line 0726658001 being a mobile phone that was used to communicate with the Complainant herein being the interested party and also transacted the whole motor vehicle dealings which she immediately switched off after the arrest of the applicant herein when she was allowed to communicate with the accomplice who is at large denying the investigators full disclosure of its contents, and also failed to explain and produce evidence regarding her terms of employment in the said company.
- 86.** The very specifics being that despite not being present at the time of exchange of conversation and monies between the alleged Mr. Simon who is the director of Lystra Automart Company, the Applicant when apprehended and given an opportunity to talk to her boss, she chose to delete vital information from the said company phone in coordination with the said Mr. Simon which would have led to the apprehension of the other suspects and also proved other consequential offences.
- 87.** The Applicant's action to hurriedly delete crucial information from the

alleged phone immediately after talking to her boss and especially in the presence of police officers with an arrest being imminent cannot be said to be an innocent and ignorant act.

- 88.** The Applicant was given an opportunity to call her boss and absolve herself of any wrong doing in furtherance of the principle of natural justice; to be given an opportunity to explain herself.
- 89.** In his judgment, Fortescue LJ in ***R vs. Chancellor Cll Cambridge, (1723) 1 Stra.577 Led Raynn 1334 8 Mod 145*** underscored the quintessence and sanctity of the right to be heard by stating that;
“.....the laws of God and man both give the party an opportunity to make his defence, if he has any ...even “God himself did not pass sentence upon Adam before he was called upon to make his defence. ‘Adam’ (say God) ‘where art thou’ Hast thou eaten of the tree whereof I commanded thee that whereof I commanded thee that thou shouldst not eat?” And the same question was put to Eve...”
- 90.** The Applicant was given an opportunity to distance herself from the above charges but her actions which were done at the full glare of the police could not be said to be accidental nor ignorant, there was an intention to not only defeat justice but also participate in the grand scheme of the conspiracy and theft.
- 91.** The decision to charge was done in accordance with Article 157 of the Constitution and the provisions of the Decision to charge policy which places great burden on the 1st Respondent to exercise that decision as per page 25 of the Guidelines on the decision to charge, 2019.
- 92.** In the absence of proof that the principles of natural justice were not adhered to, this honourable court should be reluctant to interfere with the mandate of the 1st, 2nd and 3rd Respondents.
- 93.** Upon concluding investigations, the 2nd and 3rd Respondent established that there was a reasonable suspicion that offences had been committed, hence prompting them to forward the investigation file to the 1st Respondent for review and directions. In the Michael Monari Case (Supra) the court stated that the police only need to

establish reasonable suspicion that an offence had been committed before any charges can be preferred.

94. In the case of *Cascade Company Limited vs Kenya Association of Music Production (KAMP) & Others, Petition No. 7 of 2014 High court, Murang'a* The court stated as follows-

“... In my view, as long as the enabling legislation is constitutional, the respondent’s actions ensuing therefrom are lawful unless, of course, it can be demonstrated that the ODPP and DCI have in their actions, breached those very provisions or have acted ultra vires to the act. Simply put the Respondents should not be inhibited unnecessarily from exercising their constitutional and statutory mandates.”

95. It is their case that, the Applicants allege that the Respondents made a decision to charge without evidential foundation hence the same is illegal, irrational and unreasonable. That cannot be further from the truth.

96. Evidential foundation connotes that the decision to charge should ensure that there is a prima facie case with a probability of success before charges are preferred. Such a standard is a preserve of the trial court at the close of the prosecution case, upon hearing all the evidence presented through the witnesses.

97. The 1st Respondent is not clothed with the power to determine whether

the case presented in court meets the threshold of prima facie. Especially because such a test will convert the Respondents to both a prosecutor and an arbiter of the case. It was therefore held in ***Ronald Nyaga Kiura vs. Republic [2018] eKLR*** wherein paragraph 22 it is stated as follows:

“It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that prima facie has been made out against the accused person sufficient enough to put him on his defense pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is

established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person.

- 98.** Any evidence that the Applicant has in rebuttal to the prosecution's evidence can be aptly and lawfully presented before the trial court for consideration.
- 99.** The legally accepted standard required of the 1st Respondent at the decision to charge stage is a case with reasonable prospects of conviction. This test is fulfilled, when the 1st Respondent institutes a charge that is not only known in law but also has sufficient evidence to prove it. In the instant case, the Applicant is charged with the offence of Conspiracy to commit a felony contrary to Section 393 of the Penal Code. The said offence is known in law and its elements dutifully prescribed. The accuracy or correctness of the facts gathered in an investigation can only be assessed and tested by the trial court seized with the matter.
- 100.** There is therefore no evidence to suggest that the offence in question is unlawful or that the Respondents acted in excess of their mandate. In the *Michael Monari case (supra)* the court further said that:
- "... As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene. It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party..... it would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment"*
- 101.** It is their humble submission that the Applicant has failed to

demonstrate illegality, irrationality or procedural impropriety in a manner that demands the intervention of this honourable court through Judicial review.

- 102.** In the case of the ***Republic v Attorney General & 4 Others Ex parte Kenneth Kariuki Githii (2014) eKLR Miscellaneous Application No. 151 of 2013 (LOA No. 14)*** it was stated that:

“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.”

- 103.** In the instant case, the 2nd and 3rd Respondents commenced investigations upon receiving a complaint lodged by the Interested Party; the 1st Respondent instituted the Criminal proceedings according to his constitutional mandate upon satisfying himself that the evidence on record was sufficient to mount a criminal trial, and that it would be in the public interest to do so. Moreover, the officers developed reasonable suspicion from the Applicant’s action before she recorded her statement and the file being forwarded to the 1st Respondent.

- 104.** Is there an abuse of process to warrant an order prohibiting the criminal charge? ***In Jago v District Court (NSW) 168 LLR 23, 87 ALR 57)*** Brennan, J. said in part at p. 47-48: -

“An abuse of process occurs when the process of court is put in motion for purposes which in the eye of the law, it is not intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in a conduct which amounts to an offence and on that account is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process.”

- 105.** The 1st Respondent is ready to prosecute the matter in the trial court

based on the evidence gathered while the 2nd and 3rd Respondents are ready to adduce evidence and call witnesses to sustain the above charges as by law required.

- 106.** Sections 107(1), (2) and 109 of the Evidence Act are on the burden of proof. They state as follows:

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2). When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

- 107.** They argue that the Applicant herein has failed to prove that the intervention of this honourable court via judicial review is warranted. Instead, they are simply inviting this court to determine contested issues of fact that are within the purview of the trial court. In effect the Applicants are urging the court to determine the merits of two or more different versions presented before it. The judicial review court has no jurisdiction to determine such a matter and the parties ought to be allowed to submit to the proper dispute resolution forum. In this instance, the trial court.

- 108.** In the case of ***Total Kenya Limited & 9 others vs Director of Criminal Investigation Department and 3 others, 2013*** the Learned Judge found as follows:

“Although this court has inherent jurisdiction to stop abuse of its process by prohibiting criminal proceedings where the same are found to be oppressive or otherwise an abuse of its process, such power must be exercised ever so cautiously so as not to stifle what is otherwise the lawful discharge of constitutional mandate by the police service and the DPP...it is in public interest that crime is detected and those suspected of criminal conduct are brought to face the consequences the law prescribes.”

Analysis And Determination:

The Following are the issues for determination;

- (i) Whether the applicant is entitled to an order sought.
- (ii) Who shall be the cost.

Whether the applicant is entitled to the orders sought:

109. In determining this issue, this court is guided by the case of **Council of Civil Service Unions Vs Minister for the Civil Service (1985) A.C. 374,410** which has now become a reference point in the issuance of judicial review orders, Lord Diplock held as follows:

“My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury un reasonableness” (Associated Provincial Picture

Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

- 110.** Section 35 of the National Police Service Act No.11A of 2011 mandates the Directorate of Criminal Investigations (DCI) to, inter-alia;
 - (i) Undertake investigations on Serious Crimes including homicides, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crimes and cybercrime amongst others.
 - (ii) The interested party as the complainant filed a response to the application.

- 111.** In observing the principles of natural justice that no person shall be condemned unheard and in-order to ensure the investigations are fair and objective, the applicant was invited by the investigating officers

to present her case. The investigating officer gave the applicant the opportunity to help them arrest the accomplice. She instead deleted the evidence from her phone.

112. Her conduct calls for the prosecution to proceed with the prosecution where the truth about the fraud will be disclosed.
113. Section 24 as read with section 35 of the National Police Service Act, 2011 the investigating officers are mandated among other duties to prevent and detect crime, collect criminal intelligence, investigate crime and apprehend offenders.
114. The procedure for handling crime that is embraced under our criminal justice system is initiated by way of a complaint with the police.
115. Since the Interested Party lodged a complaint with the 1st and 2nd Respondents, the Respondents were under a duty to investigate the same and have the investigation file forwarded to the Director of public prosecution who was under a duty to make a decision on whether or not to prefer charges against the Applicant pursuant to Article 157 of the Constitution.
116. The Applicant has not tendered any evidence to prove that the decision to charge her was illegal. The applicant has not demonstrated how the Respondents acted with malice and or illegally.
117. **In Civil Appeal No. E064 Of 2022 Esther Wamuyu V Grace Wangari Mwangi (2024) KEHC**, the court pronounced itself as such;"26. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in ***William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526*** as follows:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to

have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”²⁷.It follows that the Respondent herein had the duty to prove her claim against the Appellant. Courts have belabored the burden and standard of proof in civil cases which I find necessary to lay down as below.

118. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334*, the Court of Appeal held that:

“As a general proposition under Section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”²⁸.It follows that the initial burden of proof was with the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case and the evidence tendered.”

119. The applicant has not proven that the Respondents acted illegally, irregularly or in a manner that amounts to a procedural impropriety.

120. The Applicant’s rights to a fair and a just investigation process were preserved, promoted and protected when she was given a chance to reach out to the accomplice which she insulted when she deleted the evidence from the phone that formed the digital evidence.

121. There is no demonstration that the Respondents have done anything illegal or irrational or disproportionate or unfair or procedurally wrong or improper or done anything beyond their powers as to warrant the issuance of the orders as sought.

122. Article 157 (6a) of the Constitution of Kenya provides that:

“The Director of Public Prosecutions shall exercise state powers of prosecution and may 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.

The Applicant has not demonstrated how The Director of Public Prosecutions violated Article 157 (6a) of the Constitution.

- 123.** From the foregoing analysis it is my finding that the application lacks merit.
- 124.** Further it is this court's finding that to grant the orders sought in the prevailing circumstances would amount to taking away the complainants right to fair hearing.
- 125. In the case of Pastoli -Versus- Kabale District Local Government Council & Others (2008)2 EA 300** where the court had held as follows;

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observation of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision”.

- 126.** The Applicant also sought an order of prohibition.

- 127. In the case of Kenya National Examination Council versus**

Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the Court stated the grounds upon which such an order of prohibition may issue as follows;

“What does an order of prohibition do and when will it issue” It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY&39; S LAW OF ENGLAND, 4th Edition, and Vol.1 at pg. 37 paragraphs 128”.

- 128.** Having arrived at a finding that the applicant is not entitled to 1st prayer, then an order of prohibition cannot avail. Granting such an order would be obnoxious and I so hold.

Determination:

- 129.** The Applicant has not made out a case that can inform the grant of the reliefs sought. The application lacks merit.

Costs;

- 130.** In **Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] Eklr** Odunga, J. thus observed:

“...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle,

the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ...” [emphasis supplied].

131. The applicant shall bear the cost of the suit.

Order:

The application is dismissed with costs.

Dated, Signed and Delivered Virtually at Eldoret this 24th day of April, 2026.

.....
J. CHIGITI (SC)
JUDGE