Mbuthia v Attorney General & 3 others (Civil Appeal 377 of 2017)
[2022] KECA 980 (KLR) (26 August 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 377 OF 2017

W KARANJA, A MBOGHOLI-MSAGHA & F TUIYOTT, JJA

AUGUST 26, 2022

BETWEEN

PETER NJUGUNA MBUTHIA ..... APPELLANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 2ND RESPONDENT

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE . 3RD RESPONDENT

S. N. KORIR ..... 4TH RESPONDENT

(An appeal arising from the Judgment and Decree of the High Court of Kenya at Nairobi (Mativo, J) dated 21st February, 2017in CONSTITUTIONAL PETITION NO. 40 OF 2016)

JUDGMENT

1. Here, just as at trial, Peter Njuguna Mbuthia (the appellant) has been verbose.

2. Shorn of the many words, the appellant's case is simply this. That he, along with one Msafiri Njoroge (Msafiri), were wrongfully arraigned in court and charged with stealing contrary to section 268 as read with section 275 of the *Penal Code*. The particulars being that on the 7th day of September, 2014 at Eastleigh area in Kamukunji District within Nairobi County, stole pairs of shoes valued at Kshs. 30,000. the property of Eunice Kabura Njoki (the complainant) The two were arraigned before the Chief Magistrate's court at Makadara (the criminal case court) in Criminal Case No. 4896 of 2014. The appellant was not just aggrieved about being charged.He also complained that the criminal case court deprived him of a fair hearing. Hearing commenced on 29th January, 2015 when the complainant testified fully. Further hearing was fixed for 8th May, 2015 but adjourned, at the instance of the prosecution, to 13th October, 2015. The appellant contended that the adjournments were contrary

to the time permitted by section 205 (1) of the *Criminal Procedure Code* and negated the timely conclusion of the case thereby violating his right to fair trial.

3. At the High Court, the appellant's case was that the delay in prosecuting the criminal case had caused him substantial injustice, loss and prejudice which he set out in paragraph 58 of the petition. That the proceedings had deprived him of funds held up in cash bail; he is dyslexic which affects sequencing and organization of his work thereby taking longer to complete the preparation of the case; as a pro se litigant he has had to spend considerable time in the library preparing his case; and his right to defend the trial has been eroded due to numerous adjournments.

4. Somewhat, the appellant pleaded this case in some 75 paragraphs. Most narrated evidence, others cited case law, while others were repetitive. Ultimately he sought the following prayers: -

   (a) That a declaration that the fundamental rights and freedoms guaranteed to your Petitioner especially under Article 25(c), 27(1), 28, 29(a), 39(1), 50(1) & 50(2)(c-e) of *the Constitution* have been contravened by the respondents.

   (b) That the Honourable Court do quash the theft charge preferred against the accused in the Chief Magistrate's Court Criminal Case No. 4896/14 – Republic versus Peter Njuguna Mbuthia & another and the applicant be discharged forthwith;

   (c) That a declaration do issue that the Petitioner is entitled to the payment of damages and compensation for the violation and contravention of its fundamental human rights by the respondents herein as provided for under Articles 50(1), 50(2)(e), 27(1), 28, 29(1) & 39(1) of *the Constitution* of Kenya, 2010;

   (d) That general damages, exemplary damages and aggravated damages under Article 23(3) of *the Constitution* of Kenya 2010 for the unconstitutional conduct of the 1st, 2nd & 3rd respondents;

   (e) Cost of the petition

5. The Hon. Attorney General (the AG) was the 1st respondent to the petition as he is in this Appeal. The AG resisted the petition through grounds of opposition dated 1st August 2016. The AG contended that the petition was grossly and incurably defective in substance and should be struck out at the earliest; Article 157 (1) of *the Constitution* provided that the Director of Public Prosecution shall not be under the direction or control of any person or authority in order to commence any investigations or any criminal proceedings against any person; the Kenya Police Service was duty-bound to investigate any complaint made to the police and they would be failing in their constitutional mandate if they do not detect and prevent crime and in doing so they only need to establish a reasonable suspicion before preferring charges and as the prosecution acted in a reasonable manner, the High Court should be reluctant to intervene.

6. It was also the AG's defence that under Article 245 (2) (b), (4) (a) & (b) of *the Constitution*, the Inspector General of the National Police Service was required to exercise independent command over the National Police Service, without direction or control of any person or authority in order to investigate any particular offence or enforce the law against any particular person. The AG contends that the detention of the appellant and his co-accused one Msafiri Murage was within the confines of the law and *the Constitution* since he was taken to court within 24 hours. Regarding the provisions of section 205 of the Criminal Procedure Code, the AG takes a view that it allowed the court to permit applications for adjournment during the hearing of the case and the decision whether to grant an adjournment or not is discretionary.

7. As for the Director of Public Prosecutions (the DPP or the 2nd respondent), his position was articulated in the replying affidavit sworn by Cpl Joel Korir (the 4th respondent). At the time of making the affidavit on 28th July 2016, he was the OCPD at Evergreen Police Post. He states that the complaint by Eunice Kabura Njoki was legitimate. The investigations revealed that the appellant and Msafiri were owners of a store in which the complainant's shoes were stored at a fee of Shs.400 per month and the goods were lost while under the custody of the appellant and his co-accused.

8. As to the criminal case proceedings, he explained that the complainant testified at the first hearing of 30th January 2015 and that the matter was then adjourned with no objection from the accused persons. On 8th May 2015, the matter could not proceed because witnesses were not bonded. Again there was no objection to the application for adjournment. On 13th October 2005, the police did not avail the police file and when the prosecution sought an adjournment, it was opposed but allowed with it being marked as the last adjournment. On the next date of hearing, 12th February 2016, no witnesses were present and as no further adjournment could be granted, the prosecution chose to withdraw the case under section 87(a) of the Criminal Procedure Code.

9. Hearing of the constitutional petition was by way of affidavit evidence and in a judgment dated 21st February, 2017, Hon. Mativo, J (as he then was), found the petition to be without merit and dismissed it with costs to the respondents.

10. Before us, the appellant raises a whopping 30 grounds but thankfully clustered them under six (6) headings in his written submissions. The appellant contends that the judgment is defective and contrary to section 35 (1) of the *High Court (Organization and Administration) Act* No. 27 of 2017 for lacking essential ingredients. We are told that essential ingredients in a judgment are that it is a concise of the case, points for determination, the decision thereon and reasons for such a decision. This would be pursuant to Order 21 Rule 4 of the *Civil Procedure Rules* 2012 and cited to us in support is the decision of *Shalimar Flowers Ltd. vs Noah Muniango Matianyi* [2011] eKLR. It was urged before us that the trial court disregarded the evidence presented by the appellant which included the record and proceedings before the Subordinate Court. On another front, the trial court is said to have misconceived the evidence before it. For instance, that it made a finding that the appellant had admitted being supplied with witness statements contrary to the evidence on record.

11. Putting grounds 14 and 19 together, the trial court is charged with raising issues not pleaded by the parties. It was submitted that the learned Judge unilaterally raised the issue of inordinate delay which was outside the pleadings of the parties. The appellant cited this Court's decision in *Epaphrus Muturi Kigoro v William Mukui Nyaga* [2015] eKLR for the proposition that a trial court is only empowered to frame, record and determine issues emanating from the pleadings of parties. The appellant's further contention is that because of this error on the part of the trial court, he did not get opportunity to respond to the issues unilaterally raised by the trial court, this to his prejudice. This Court shall examine the issues said to have been improperly introduced by the court.

12. The appellant lumps grounds 4, 5, 6, 7, 8, 10, 11, 13 and 14 together under the heading "failure to consider my representation." He however rashes the arguments already made on a court's duty to frame and consider issues arising from pleadings,substantially a repetition of the contention set in the preceding paragraphs of this Judgment.

13. In ground 18, the appellant complains that while the responses implicitly admitted that the charges instituted against him were fabricated, the learned trial Judge held that there was evidence on record to justify the bringing of charges.

14. In grounds 8, 9, 10, 23 and 28, the appellant contends that the judgment is contradictory and was an opaque decision making. Under this heading he again repeats that the learned Judge made an inaccurate finding that he had being supplied with witness statements; ignored the contents of the record of the subordinate court and; finding existence of evidence this was at odds with the record. He also submits that the learned Judge erred by neglecting to give reasons for upholding the lawfulness of his detention and institution of false theft charges. The appellant asked us to find that notwithstanding proof that there was no reasonable suspicion to limit his liberty and failure by the respondents to demonstrate the basic level of fairness before investigation, the learned Judge made findings to the contrary.

15. The appeal also challenges the award of costs made in favour of the respondents. He argued that his was a public interest litigation which is exempt from payment of costs under rule 26 of the *Constitution of Kenya (Protection of Rights And Fundamental Freedoms) Practice and Procedure Rules*, 2013 (Mutunga Rules). The rationale being to facilitate access to justice. He argues that the Deputy Registrar of the High Court had granted him leave to file and prosecute the petition in forma pauperis and the learned trial Judge erred in law in declining to consider that he was a pauper litigant. The appellant further argues that the grant of leave by the court to proceed as a pauper litigant demonstrated that the petition was not frivolous, given also that it went to full hearing and the opposing party did not question *the constitution* forum.

16. Although all the three respondents oppose the appeal, only the 2nd respondent filed submissions before us, the 1st respondent choosing to rely on the submissions made before the High Court.

17. The 2nd respondent submits that other than alleging violations, the appellant has not demonstrated in a justiciable manner how the rights were violated. The DPP takes a view that while the allegations may amount to inconveniences they are not a violation of rights.

18. The 2nd respondent defends the High Court judgment from the attack that the learned trial Judge did not frame issues for determination and that he introduced matters that were not canvassed in the pleadings. It is submitted that all matters raised by the parties to the proceedings were framed and discussed in the judgment.

19. It is the further contention of the 2nd respondents that the appellant ought to have filed an appeal against the conduct of the lower court and not a constitutional petition.

20. This Court was told that the law empowers the DPP to institute and undertake criminal proceedings against any person. Citing the decision in *Charles Munyeki Kimiti –vs- Cpl. Joel Mwenda & Others* Nyeri Civil Appeal No. 129 of 2004 [2010] eKLR, the DPP submits that once investigations established reasonable suspicion that a person committed a crime, then he ought to be charged in a court of law. Furthermore, that the decision to institute criminal proceedings by the D.P.P. is discretionary and is not subject to the direction or control by any authority and courts should be reluctant to intervene.

21. This is a first appeal in which we are required to evaluate the evidence afresh with a view to reaching our own conclusions. As trial before the High Court was by way of affidavit evidence, we stand in the same place as the trial court and suffer no handicap in carrying out the duty of re-evaluating the evidence.

22. This Appeal invites us to consider the following issues: -

    1) Did the learned Judge base the decision on unpleaded matters?

    2) Did the appellant demonstrate breach of the constitutional rights he pleaded?

    3) Did the learned Judge err in making an order of costs against the appellant?

23. Emerging from the pleadings filed by the appellant, his complaints can be discussed under three broad themes. He asserted that the police were unjustified in investigating him and arresting him. His second complaint is against the D.P.P. Here, he alleges that the DPP breached his constitutional right by bringing unfounded charges against him. Third, the appellant assails the subordinate court for the manner in which it granted various adjournments to the prosecution. It is his conviction that the grant of the adjournments was not only contrary to statute but resulted in violation of his right to fair trial.

24. Under section 24 of the Kenya Police Service Act, a function of the Kenya Police Service is to investigate, prevent and detect crime. When the complaint gave evidence before the subordinate court she stated that she stored shoes worth Kshs.30,000 at a fee, in a store belonging to Msafiri. When she returned on 5th October 2014 she found the shoes missing, and did not find Msafiri. The person at the store was the appellant who told her that he did not have information as to the whereabouts of Msafiri. On subsequent visits, Msafiri was not in the store but the appellant was present. Under cross examination by the appellant she stated:

> "You asked me to look at the store I did not see my shoes. You told me that you had moved some goods to another store."

In the Petition, the appellant admits that he is the owner of the store.

25. The circumstances of the complaint are not disputed. The complainant left shoes in a store belonging to the appellant, the shoes went missing in circumstances which the appellant and Msafiri could not explain. The shoes were therefore lost while in the custody of the appellant and Msafiri. The complainant lodged a complaint about that to the police. Given the mandate to investigate crime, can it be said that the police were not entitled to investigate the complaint made and eventually to arrest the appellant? While the conduct of the appellant and Msafiri could give raise to civil liability, there could have been an element of criminal culpability, always remembering that the law contemplates that there will be certain set of circumstances that give rise to both (section 193A of the *Criminal Procedure Code*). On our analysis of the evidence before the Constitutional Court, we cannot fault the following finding by the learned Judge:

> "Section 24 of the *National Police Service Act* sets out functions of the Kenya Police Service. In my view, the petitioner has not demonstrated that the investigations and prosecution in question constitute an abuse of process or police powers, nor has the petitioner proved malice or bad faith. The duty and mandate of the police was appreciated in Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another where it was held that the police have a duty to investigate any complaint once a complaint is made. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. 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. I find absolutely nothing in this case to suggest the police acted unreasonably or maliciously."

26. Next we turn to the role of the DPP in regard to commencing a criminal prosecution. Article 157(11) of *the Constitution* provides:

> "(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."

27. In addition, section 4 of the *Office of the Director of Public Prosecutions Act* (ODPP, Act) sets out the fundamental principles that guide the ODPP in carrying out its mandate. Relevant to the matter at hand is that the office, in fulfilling the mandate, is to serve the cause of justice, prevent abuse of legal process, further public interest, observe the rules of natural justice and *the Constitution*.

28. Regarding its specific prosecutorial role, the DPP has formulated the National Prosecution Policy. This was done pursuant to powers conferred upon him by section 5 (1) (c) of the ODPP Act which directs the DPP to formulate and keep under review a public prosecution policy. The policy sets out two tests that overarch a decision as to whether or not to commence a prosecution; the

Evidential Test and the Public Interest Test. As regards the Evidential Test paragraph 4 (B) (2) reads;

> " 2. The Evidential Test Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available? To make this determination, Public Prosecutors should therefore consider the following:
>
> a) If the identity of the accused is clearly established through admissible evidence.
>
> b) The strength of the rebuttal evidence.
>
> c) Would the evidence be excluded on the basis of its inadmissibility, for instance under the hearsay and the bad character rules?
>
> d) Reliability of the evidence considering; whether there would be concern about accuracy, credibility or motivation of the witnesses? What is the suspect`s explanation?, Is the confession believable?, How was evidence obtained?
>
> i. Is there further evidence which would be required? The standard of evidence required under the Evidentiary Test is less than the Court`s "beyond reasonable doubt" standard for conviction.
>
> ii. In some cases the available evidence at the time may not be sufficient to determine the Evidential Test, that is, "realistic prospect of conviction". In such circumstances, Public Prosecutors should apply the "Threshold Test" in order to make the decision whether or not to charge.
>
> iii. For example, relevant expert evidence or evidence required to determine bail risk may not be available within the limited time of arraignment of a suspect before court. Such are the instances that necessitate the application of the Threshold Test.
>
> iv. A prosecutor shall considers the following conditions in applying the Threshold Test:
>
> i. The evidence available is insufficient to apply the Evidential Test.

ii. There are reasonable grounds to believe that evidence will become available in good time.

iii. The seriousness of the matter and the circumstances of the case justify the making of an immediate decision to charge

v. The obtaining circumstances necessitate the making of an application for the denial of grant of bail.

vi. If the obtaining circumstances do not fall within the conditions above a decision to charge should not be made.

vii. Where the case does not pass the Evidential Test it must not go ahead, no matter how serious it may be. Public Prosecutors can only apply the Public Interest Test when the Evidential Test is satisfied."

29. It is not in contest that in exercise of his constitutional mandate the DPP ought not to be under the direction or control of any person or authority (Article 157 (10) of *the Constitution*). This Court has times without number underscored that courts should be reluctant to interfere with the discretion of the DPP to prosecute and has developed limiting principles on when it can properly do so. The applicable principles were set in detail in *Diamond Hasham Lalji & Another v The Attorney General & 4 others* [2015] eKLR to be;

> "(32) As regards the jurisdiction of the High Court in enforcing *the Constitution*, Article 165(3) (d) (ii) of *the Constitution* gives the High Court jurisdiction to hear: "the question whether anything said to be done under the authority of this Constitution or any other law is consistent with, or in contravention of this Constitution."
>
> This jurisdiction is distinct from the common law inherent jurisdiction of the High Court or indeed any other court to control its own process by preventing the prosecution of a criminal proceeding which amount to abuse of the process of the court. 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.
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> 33. 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.
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> In Ramalingam Ravinthran v Attorney General [2012] SGCA 2, the Court of Appeal of Singapore said at para 53: "The Attorney General is the custodian of prosecutorial power. He uses it to enforce criminal law not for its own sake but for the greater good of the society, i.e. to maintain law and order as well as to uphold rule of law.

Offences are committed by all kinds of people in all kinds of circumstances. It is not the policy of the law under our legal system that all offenders must be prosecuted, regardless of the circumstances in which they have committed offences. Furthermore not all offences are provable in a court of law. It is not necessary in the public interest that every offender must be prosecuted, or that an offender must be prosecuted for the most serious possible

offence available in the statute book. Conversely, while the public interest does not require the Attorney General to prosecute any and all persons who may be guilty of the crime, he cannot decide at his own whim and fancy who should or should not be prosecuted and what offence or offences a particular offender should be prosecuted for. The Attorney General's final decision will be constrained by what public interest requires."

That passage applies with equal force to the considerations that the DPP must employ.

The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, inter alia, that persons reasonably 'suspected of committing a crime are prosecuted and convicted, punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by state and citizens.

33. 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.

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."

30. We have, in discussing and upholding the decision of the National Police Service to investigate and arrest the appellant, set out the circumstances of the case here. While the evidence only may not ultimately have led to a conviction and the appellant was in fact discharged under section 87(a) of the Criminal Procedure Code, we have no doubt that the circumstances revealed a prima facie case necessitating prosecution.

31. We turn to the complaint regarding his trial before the subordinate court.

He complains that the trial court violated the provisions of section 205 (1) of the *Criminal Procedure Code* by unlawfully enlarging adjournment timelines to the detriment of his right to a fair hearing. Those statutory provisions reads;

> "(1) The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may allow the accused person to go at large, or may commit him to prison, or may release him upon his entering into a recognizance with or without sureties conditioned for his appearance at the time and place to which the hearing or further hearing is adjourned: Provided that no such adjournment shall be for more than thirty clear days, or, if the accused person has been committed to prison, for more than fifteen clear days, the day following that on which the adjournment is made being counted as the first day."

32. There is this part of the decision of the learned trial Judge;

> "The petitioner complains of unnecessary adjournments in the criminal trial. The record shows that the first application for adjournment was made on 30th January 2015 but the same was not opposed. The second application for adjournment was made on 8th May 2015. Clearly, the petitioner and his co-accused are recorded as saying that they had no objection. The first objection for adjournment was made only by the petitioner on 13th October 2015 and the court granted a last adjournment to the prosecution. On the next hearing date on 12th February 2016, the case was withdrawn under section 87a of the *Criminal Procedure Code*. The adjournments granted are provided under the law and I find that it was within the magistrate's discretion to grant or refuse the adjournments. Further, if the petitioner was dissatisfied with any orders of the magistrate, the remedy available in law is to appeal not to file a constitutional petition."

33. We think there is some merit in the argument by the appellant that the learned Judge misconstrued his complaint as regards adjournments. It was not so much that they were unnecessary but that they were granted for more than the period permitted by section 205 (1), in this case thirty (30) days as the appellant was out on bond.

34. The policy objective behind the provisions of section 205 (1) is not hard to see. It is intended to actualize the constitutional imperative that a criminal trial shall begin and conclude without unreasonable delay,an important ingredient to the right to fair hearing. Somewhat as a paradox, in attempting to demonstrate that the manner in which the subordinate court had granted the adjournments violated the backlog policy of the Judiciary, the appellant produced an extract of a report by the title "Judiciary Case Audit and Institutional Capacity Survey" which showed that no more than 27% of cases pending in courts were for a period of less than 12 months. Indeed, going by the records of the various criminal appeals this Court deals with, the provisions of section 205 (1) are honoured more in breach than in observance, often due to the sheer number of criminal cases that lead to congested diaries of the trial courts. This is not to say that the statutory provisions are to be ignored but it is a statement of the current stress of case backlog suffered by our trial courts.

35. It is not all the time that violation of section 205 (1) of the CPC results in breach of the right to fair hearing. A person alleging that breach must show that the violation is so flagrant or perverse that it has hampered his ability to prepare or carry out his defence or has caused some other prejudice.

36. With this in mind, let us examine the circumstances of this case. There was an adjournment from 30th January, 2015 to 8th May, 2015 and then to 13th October, 2015 and eventually to 12th February, 2016 when the case was withdrawn under section 87 (a) of the Criminal Procedure Code. The period from when trial commenced on 30th January, 2015 to when he was discharged on 12th February, 2016 would be slightly under thirteen (13) months. We cannot say this to have been an overly delayed trial. Even more fundamental, however, is that the appellant was unable to demonstrate, as he had alleged,that the delay hampered his ability to defend himself or caused him financial hardship or that the time he spent in the library, which he says was considerable, was necessary for preparing his defence or dedicated entirely to the preparation of his defence. Put simply, the appellant did not prove any violation or loss. For reasons different from those of the learned trial Judge, we too find no merit in this limb of complaint.

37. Finally, on the appeal against the award of costs, it must always be remembered that costs is at a discretion of the court, always to be exercised judiciously without losing sight that the general rule is that costs follow the event. Although public interest litigation would generally be exempt from costs, we have no doubt that the constitutional petition in this matter was a personal grievance and bore no semblance of a public interest litigation as we understand it. A public interest litigation being defined in the Black's Law Dictionary (Sixth Edition) to be;

> " .... a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

38. As to whether the appellant should be insulated from costs simply because he was permitted to prosecute the petition as a pauper, we know of no law that provides this shield. We note, from the record of the High Court, that the appellant did not make any arguments for exemption of costs and we are unable to fault the discretion of the learned Judge which was consistent with the general rule that costs follow the event.

39. Ultimately, we dismiss this appeal but on our part, make no order on costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

W. KARANJA

JUDGE OF APPEAL

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A. MBOGHOLI MSAGHA

JUDGE OF APPEAL

.....

F. TUIYOTT

JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR