COURT OF APPEAL OF KENYA

AT NAIROBI

(CORAM: KARANJA, SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 44 OF 2017

BETWEEN

FREDRICK MASAGHWE MUKASA.....APPELLANT

AND

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

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

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

THE INDEPENDENT POLICE OVERSIGHT AUTHORITY.....4TH RESPONDENT

(Being an Appeal against the Judgment and Decree of the High Court of Kenya at Kajiado (Reuben Nyakundi, J.) delivered on 7th October 2016

in

J.R Case No. 1 of 2016)

****

JUDGMENT OF THE COURT

1. This appeal arises from the judgment of the Honourable R. Nyakundi J delivered in Kajiado on the 7th of October, 2016 dismissing the appellant's substantive Judicial Review application seeking orders in the nature of Prohibition and Certiorari.

2. A brief background of the matter is that the appellant herein moved the High Court in Kajiado on the 29th of February, 2016 by way of a Chamber Summons application of even date seeking leave of the court to apply in the main for;- writs in the nature of orders of **Prohibition** directed at the respondents whether jointly and/or severally from commencing, sustaining and/or proceeding with any criminal proceedings against the appellant in any court herein with respect to matters arising from the incidents occurring at Kitengela Police Station in Kajiado County and within its vicinity on 1st April, 2014.

3. In addition, the appellant sought an order of **certiorari** moving into the High Court and quashing the decision made by the Director of Public Prosecutions in preferring charges, arresting and/or directing the prosecution of the appellant herein, Fredrick Masaghwe Mukasa, in the Chief Magistrate's Court Kajiado or in any other court over the complaint of one Joshua Munene Gachoki.

4. The application, filed under certificate of urgency was supported by the affidavit of the appellant sworn on the 29th of February, 2016, Statutory Statement of Facts dated the same day and the accompanying Verifying affidavit of even date. The application was allowed with the leave sought being granted but the substantive Judicial Review motion was to be filed within 8 days.

5. The appellant filed the substantive motion on the 2nd of March, 2016 and supported the same with his affidavit sworn 29th of February, 2016. The gist of the substantive motion as deponed on the face of the application, affidavits in support and the statutory statement was that the appellant, a Chief Inspector of Police, was the Officer Commanding Station (OCS) Kandara Police Station in Muranga as at the time he filed the motion for Judicial Review. However, in the year 2014 he was in charge of Kitengela Police Station in Kajiado County when he received oral notice of an intended public meeting and demonstrations that were to be led by one Moses Mositet and one Daniel Kanchori, the Senator of Kajiado and the Member of County Assembly (MCA) respectively.

6. According to the appellant the said demonstrations were to be held on the 2nd of April, 2014. He averred that on the morning of 1st of April, 2014 at around 9:30 a.m., one Police Constable, Faith Chepngeno (PC Chepngeno), rushed into his office and informed him that there was a crowd of violent people armed with crude weapons who had demolished the perimeter wall around the Police Station.

7. He averred that before the said officer could complete her briefing, one Joseph N. Nzwili (Joseph), an officer from the Ministry of Agriculture, Livestock and Fisheries, walked into the office and informed him that he had overheard a crowd of people including one Moses Mositet and one Daniel Kanchori saying they would demolish the wall surrounding the Police Station.

8. He continued to state that previously on the 13th of March, 2014 the said Joseph had reported to the police station in Ketengela under OB. NO. 26/27/03/2014 that he had been confronted by the said Daniel Kanchori who had threatened to demolish the perimeter wall surrounding the police station on allegations that the land had been grabbed. The appellant then rushed out of the office in the company of the said Joseph and PC Chepngeno to try and bring the situation under control. He summoned Constables Alice Njanja, one Ngugi and one Jane to accompany him to the scene and further alerted the Kitengela Administration Police Superintendent, one Moses Maritim, whose camp is situated on the same parcel of land, who arrived with a group of Administration Police Officers in riot gear.

9. According to the appellant, he attempted to mollify the crowd by talking to them and pleaded with them to stop behaving in a rowdy manner and invited them to air their grievances in a peaceful manner assuring them that the same would be addressed. His plea nonetheless fell on deaf ears and the unruly crowd continued surging and started demolishing the police station perimeter wall. Afraid that the unruly crowd would overpower the police officers and possibly release the prisoners or at worst break into the armoury and escape with firearms, the appellant fired 2 shots in the air to try and disperse the crowd. It was later alleged that he had shot at and wounded a civilian who was in the crowd.

10. He averred that the police officers at the scene who recorded statements and everyone present at the scene of the incident including hawkers, whose names he mentioned and who had been brought to the scene by Senator Moses Mositet and MCA Daniel Kanchori were all-categorical that the appellant only fired in the air and never witnessed the shooting of the complainant. He averred that the said hawkers recorded statements and confirmed that they had been called by the Senator to be allocated kiosks but on arrival they were ordered to demolish the wall surrounding the police station.

11. He averred that the entire incident had been stage managed and choreographed by the named politicians and some police officers to portray him in bad light. Following the incident, investigations into the matter commenced and his gun, a Ceska pistol No. 4580 was withdrawn from him and forwarded to the Ballistics expert for examination. He maintained that the ballistic expert's report which confirmed that the bullet removed from the complainant was fired from his gun was manipulated, and so was the medical report compiled after the complainant's alleged medical examination.

12. Following investigations which the appellant claims were biased as he was not given a fair hearing, the 4th respondent, Independent Police Oversight Authority (IPOA) recommended that a charge of assault causing bodily harm be preferred against the appellant. On receiving the inquiry file from the 4th Respondent, the Director of Public Investigations (DPP) recommended a charge of unlawful wounding contrary to **section 237(a) of the Penal Code**, and a charge sheet was even drafted for presentation to court.

13. That decision to charge the appellant is what aggrieved him and prompted him to move with expedition to the High Court by way of judicial review to have the same quashed, and for the 1st respondent to be prohibited from preferring against him any criminal charges related to the incident summarized above. The High Court heard the Notice of Motion and the learned Judge exhaustively analysed the facts placed before him and the applicable law and rendered the ruling dated 7th of October, 2019, now impugned.

14. First, the court extensively interrogated the principles governing judicial review proceedings such as the one before it and the circumstances by which a party properly guided can move the court and the principles to be applied in determining such applications. The court also examined the powers of the DPP as vested upon it by the provisions of **Article 157** of the Constitution.

15. Guided by the foregoing principles, the court went further to determine whether the applicant brought himself within the ambit of judicial review. Upon examination of the pleadings and the affidavits presented, the court was of the finding that judicial review proceedings could not extend to determining the merits of the matters in question. In determining whether any of the grounds relied upon by the appellant fell within the realms of certiorari and prohibition orders, the court held that the decision to charge or terminate criminal proceedings was within the sole discretion of the 1st respondent and that such discretion ought to be exercised according to the established law and the Constitution. The court found that there was no procedural impropriety in the manner in which the 1st respondent conducted its affairs regarding the matter in dispute.

16. As to the question whether in reviewing its earlier decision to charge the appellant with the criminal offences amounted to procedural impropriety, the court held that the review of decisions to commence or terminate criminal proceedings is within the jurisdiction of the 1st respondent. The court further held that it cannot infer that the power vested in the office of the 1st respondent by the Constitution and statute was abused by a mere fact of reviewing its earlier decision.

17. The Court further held that in accordance with the provisions of **Article 10** of the Constitution on national values and principles of governance, **Article 35** on access to information, **Article 50** on right to fair hearing and **Article 47** on fair administrative action, a party/citizen is entitled at the end of the day to be provided with reasons for the decision made by a public body or individual in position of authority, and that in the instant case it was not alleged that the appellant was not given a chance to answer to the complaint at the point of inquiry as to whether a cognizable offence has been committed.

18. On whether the respondents acted contrary to the rules of natural justice, the court held that from the evidence and submissions placed before the court, it was not apparent that the 1st respondent acted in excess of its jurisdiction or contrary to the rules of natural justice. The court further held that there was no evidence that in making the decision against the appellant, the 1st respondent was guilty of bias, error of law or irrationality, and had not acted *ultra vires* the Constitution or any other law. In conclusion the trial court stated thus;-

"I am therefore satisfied that the action by the 1st respondent singularly or collectively is not vexatious malicious or an abuse of the process of the court to warrant invocation of judicial review jurisdiction. The applicant in the event he finally takes plea in the criminal court, the contention on facts and evidence will be dealt with on the merits. The applicant's fundamental right to fair hearing is insulated under Article 50 of the Constitution."

19. Aggrieved by the said findings, the appellant preferred the instant appeal vide the Memorandum of Appeal dated the 17th of February, 2017. The appeal is premised on a raft of 21 grounds in the Memorandum of appeal which in our view can be condensed to include *inter alia* whether the learned Judge erred in law and in fact in failing: to find that the appellant had the right to act as he did in the circumstances of this case during the incident subject of the proceedings; to find that the actions of the 1st and 4th respondent were capricious, high handed and calculated to shield perpetrators of serious crime; to exercise his discretion correctly; to find that the investigations done by the only authorized and lawful Criminal Investigations Department had found that the appellant had committed no offence and that as per the investigations no charges were to be brought against him; to appreciate and interpret the investigations report tabled in court; to find that the 1st respondent did not act independently as set out in **Article 157 (10)** of the Constitution; to analyze facts laid before the court as against the law governing writs and supervisory duties of the court and; to grant the orders sought.

20. The appellant filed his written submissions on the 22nd of January, 2018 as well as its list and bundle of authorities and case digest on 20th of February, 2018. The 1st respondent filed its written submissions on the 26th of October, 2018 while the 4th respondent filed its written submissions on the 9th of March, 2018.

21. When the appeal came up for plenary hearing on 19th June, 2019, learned counsel Mr. Mwaura appeared for the appellant, Jalson Makori, Senior Public Prosecution Counsel (S.P.P.C) for the 1st respondent and Mr. David Nderitu appeared for the 4th respondent. All counsel adopted their written submissions and made some oral highlights.

22. Urging us to allow the appeal, Mr. Mwaura set out the background of the case before the Court. He urged strongly that the decision to charge the appellant was unfair and illegal as he had the duty to prevent the unruly crowd from demolishing the perimeter wall, and more importantly, he had the duty to protect the armoury. He posited that the 1st respondent was by law supposed to act independently but in this case he had failed to do so and yielded to pressure from the 4th respondent. He cudgeled the 1st respondent for ignoring recommendations of the only investigation report conducted professionally by an officer mandated in law to conduct such investigations. He submitted that allowing the prosecution of the appellant would be tantamount to ratifying the criminal actions of the mob. Citing the case of **Joram Mwenda Guantai –Versus- The Chief Magistrate Nairobi, Civil Appeal NO. 228 of 2003 [2007] eKLR** counsel extensively highlighted the similarities between the said case and the present proceedings and maintained that the appellant was entitled to protection from the court.

23. Counsel contended that the charging and prosecution of the appellant over the incident of the 1st of April, 2014 amounted to a violation of the appellant's fundamental rights as enshrined in the Bill of Rights. He submitted highlighting instances of violation of **Article 27(1)** of the Constitution on the right to equal protection and equal benefit of the law, **Article 28** on the right to inherent dignity, **Article 47** on the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

24. He further submitted on the functions of the appellant herein in line with the **National Police Service Act, NO. 11A of 2011** on the role and functions of a police officer citing **section 61(2)** of the same Act on conditions as to the proportionate use of force by police officers. He maintained that the actions of the appellant in dealing with the crowd during the incident in question was sanctioned by the provisions of **section 61(2) B** of the National Police Service Act No. 11 of 2014 (sixth Schedule) to use a firearm to repulse the violent crowd. He faulted the learned Judge for failing to consider all these factors when he declined to prohibit the prosecution of the appellant.

25. Counsel for the appellant also submitted that the appellant could not be expected to perform his duties as a police officer with his hands tied at the back and that the appellant had not been accused of misusing his firearm and it is therefore logical that he uses the same for the purposes it was issued to him.

26. Finally, counsel faulted the court for failing to address its mind to the notice of motion before it and instead addressed itself to the chamber summons application dated 29/02/2016, which was heard and determined on the 1/3/2016. He submitted that the chamber summons application on which the Court premised its judgment on the 7/10/2016 was therefore spent and none of the parties submitted on the same.

27. Opposing the appeal, counsel for the 1st respondent submitted that pursuant to the provisions of **section 7 of the Independent Police Oversight Authority (IPOA) Act NO. 35 of 2011** (**IPOA Act)** the 4th respondent is empowered to carry out investigations against any person in the National Police Service in respect to any death or serious injury occurring or suspected of having occurred as a result of police action and thereafter recommend its findings to the 1st respondent for purposes of prosecution as it was done. He further submitted that once the inquiry file was received, a decision was made to institute criminal proceedings against the appellant.

28. He also submitted on the independence of the 1st respondent as created under **Article 157(1)** of the Constitution. He highlighted such functions as spelt out under **Article 157(6)** as read together with **sub-article (7) and (8).** Counsel referred the Court to the Court of Appeal decision in **Charles Munyeki Kimiti v. Cpl Joel Mwenda & Others, Nyeri Civil Appeal No. 129 of 2004 (2010) eKLR** where this Court while addressing the question of liability of police officers in the use of force opined that the decision on whether or not to institute criminal proceedings is made based on the evidence collected. The 1st respondent further relied on the case of **Republic v. Commissioner of Police ex-parte Michael Monari** & **Another (2012) eKLR** to the extent that an order of prohibition is powerless against a decision that has already been made.

29. On the order for certiorari sought, counsel for the 1st respondent submitted that the appellant failed to demonstrate that there was procedural impropriety to warrant issuance of the said orders and that the review of decisions to commence and discontinue criminal proceedings is well within the constitutional mandate of the 1st respondent.

30. On allegations of discrimination towards the appellant, counsel submitted conceding that the 1st respondent chose to prosecute the appellant leaving other persons; that each case was to be considered on its own merits and facts therefore, that the submission by the

appellant that he was discriminated against was ill founded. He contended that criminal trials are a matter of public interest and that the purpose of criminal trials in any system is to protect and promote the rule of law.

31. Counsel for the 4th respondent also opposed the appeal. Placing reliance on the case of **Director of Public Prosecutions v. Crossley Holdings Limited & 2 Others Civil Appeal No. 1 of 2013,** he submitted that in the exercise of the 1st respondent's constitutional prerogative to institute criminal proceedings against any person, the prosecution ought not to be interrupted unless the DPP is abusing his powers. He further submitted that the applicant must demonstrate what would justify the quashing of the 4th respondent's decision to recommend prosecution and the DPP's decision to charge.

32. Counsel further submitted that in the instant case, in exercise of its functions under **Section 6 of the IPOA Act**, the 4th respondent undertook investigations into the allegations leveled against the appellant and upon completion of the investigations, made recommendations to the DPP in line with **Section 29(1) of the IPOA Act**. He maintained that the 4th respondent acted within the law and that the appellant had failed to demonstrate that the 4th respondent either committed an illegality or exceeded its powers or was actuated by malice or bad faith in conducting its investigations.

33. Counsel submitted that grounds 2, 3, 4, 5, 7 and 10 of the Memorandum of Appeal raised evidentiary issues that are for the trial Court, which is the proper forum for hearing and determination. He submitted that this Court would be usurping the functions of the trial Court if it entertained issues of evidence raised by the appellant. Counsel contended that given the special nature of judicial review proceedings, the same is concerned with the decision making process rather than the merits of the decisions, and that judicial review is concerned with the legality rather than the correctness of the decision.

34. Counsel submitted that the appellant neither pleaded nor proved any ground known to judicial review in support of his case, and all that the appellant was doing is pre-arguing his defence in this Court, which is not the proper forum and that none of the grounds raised was sufficient to invoke the judicial review jurisdiction of the Court.

35. In closing he submitted that the appellant had not demonstrated that the learned Judge exercised his discretion wrongly when he declined to grant the reliefs sought and that there was no ground in the memorandum of appeal that challenges the learned Judge's exercise of discretion. He urged the Court not to upset the findings of the High Court.

36. We have carefully considered all the evidence contained in the record of appeal, the written submissions of counsel as buttressed by their oral highlights and the law, including the aspects thereof enunciated in the caselaw cited to us by counsel. Having done so, we are satisfied that the crux of this appeal revolves around the question whether the learned Judge of the High Court exercised his discretion properly in dismissing the appellant's application for Judicial Review.

37. Being a first appeal, the duty of this Court is addressed in a plethora of cases including **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** where this Court stated as follows: -

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kustron (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held inter alia, that:-***
>
> ***'On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence'."***

38. Remedies of judicial review being discretionary, we are also enjoined to consider whether the learned Judge exercised his discretion properly in dismissing the appellant's motion. In doing so, we shall be guided by the well-established principles as set out in **Mbogo & another -v- Shah (1968) EA 93,** where the predecessor this Court stated that an appellate Court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the trial court misdirected itself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

39. In order for this appeal to succeed, the appellant must bring himself within the ambit of the principles set out in **Mbogo Vs Shah** (*supra).* He must demonstrate to the satisfaction of this Court that the trial court exercised its discretion wrongly in making the conclusions that it did. He must for instance satisfy this Court that the learned Judge misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into account and hence arrived at an erroneous decision. We shall revert to this point later.

40. We shall now revisit the evidence presented before the trial court to make our own determination as to whether the appellant's motion ought to have succeeded. The appellant's motion was premised on **Sections 8(2)** and **9 of the Law Reform Act** and **Order 53 of the Civil Procedure Act.** He was therefore invoking the very restrictive jurisdiction of Judicial Review which strictly questions the process or procedure as opposed to the merit of the decision of the 1st respondent to prefer the criminal charges against him. Was the said decision illegal, irrational or was it fraught with procedural impropriety?

41. To properly address these questions, the starting point is examining the role and mandate of the 1st respondent and also the 4th respondent to determine if they exceeded their jurisdiction in making the decisions that ultimately led to the decision to charge the appellant. We start with the 4th respondent.

42. It is not disputed that in exercise of its powers under the provisions of the **IPOA Act, 2011**, the 4th respondent is tasked with investigating complaints against police officers in the National Police Service. It is also not in dispute that the 4th respondent duly received a complaint and conducted investigations and thereafter recommended prosecution of the appellant herein with the offence of unlawful wounding. It is not disputed that the 4th respondent acting on the said recommendations made a decision to prefer charges against the appellant herein. There is nothing to even remotely suggest that the 4th respondent in making the said recommendation acted irrationally or without or in excess of jurisdiction. In any event, the 4th respondent only recommended prosecution and the decision to prefer charges exclusively reposed on the 1st respondent. We find no fault whatsoever in the manner the 4th respondent handled the matter.

43. This brings us to the 1st respondent. The appellant blames the 1st respondent for a litany of things among them; deciding to prefer charges against him saying that the 1st respondent acted contrary to the provisions of **Article 157(11)** of the Constitution; failing to take into account public interest and the interest of administration of justice; that the 1st respondent acted contrary to the provisions of **Article 27(1)** of the Constitution by omitting to charge one Moses Mositet, one Daniel Kanchori and all those in whose statements it was admitted had been invited to demolish the perimeter wall so as to be given plots by the Senator and MCA; acting in a discriminatory manner by preferring charges against the appellant contrary to the recommendations of the investigations conducted by a competent officer of the rank of Officer Commanding Police Division (OCPD) and recommendation of the County State Counsel; prosecution of the appellant amounts to abuse of a public office by the 1st respondent and therefore the prosecution of the appellant is oppressive and malicious.

44. As we determine whether the 1st respondent can be faulted for all the above matters, we need to look at the constitutional underpinning of the power and mandate of the 1st respondent. **Article157** of the Constitution 2010 provides in the relevant part as follows; -

"157 (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 clauses (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).**
>
> **(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.**
>
> **(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**. (Emphasis supplied)

45. The salient provisions of **Article 157** of the Constitution underscore the powers of the DPP and the manner in which such powers may be exercised. The said provisions further underscore the independence of the office of the DPP by providing that in the exercise of its powers or functions shall not be under the direction or control of any person or authority.

46. The question that therefore begs the Court's consideration is whether by adopting the recommendations of the 4th respondent, the 1st respondent's independence was compromised in any way. We observe that the recommendations of the 4th respondent calling for the prosecution of the appellant were not necessarily binding on the 1st respondent. In exercise of its constitutional and statutory duty, the 1st respondent was duty bound to consider the same and exercise its discretion whether or not to institute criminal charges against the appellant based on the evidence presented. That in our view is exactly what the 1st respondent did. It was within the 1st respondent's mandate to consider the recommendation and make an independent decision whether to charge the appellant or not. The reason for not charging the two politicians who were said to have been involved in inciting the members of public is neither here nor there as such decision reposed squarely on the 1st respondent and nobody could force it to charge them.

47. In the case of **Patrick Ngunjiri Maina v Director of Public Prosecutions & 2 others [2019] eKLR** this Court cited with approval the case of **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** where the Court pronounced itself as follows; -

> **"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of**

> **the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."** (Emphasis supplied)

48. We have cited the above decision *in extenso* as we think it is on all fours with the appellant's case. It does not need any embellishment or reiteration. Although it essentially referred to the office of the Attorney General, it is common knowledge that the 1st respondent took over its prosecutorial role from the office of the Attorney General in the new constitutional dispensation. The above decision also talks about application of Judicial Review in the criminal trial process.

49. As stated earlier, Judicial Review questions the process and not the merits of the case. The appellant has extensively analyzed the evidence surrounding the circumstances of the case. The same factual matters of evidence have been extensively pleaded in the Memorandum of Appeal where the appellant faulted the trial court for failing to consider the said material. The factual assertions are evident in ground 1, 2, 3, 4, 5, 7, 10, 11, 13, 14, 19 and 20 of the memorandum of appeal, where the appellant faults the trial court in failing to appreciate certain evidentiary material placed before it. We hold the view that the learned Judge cannot be faulted for failing to consider the material that went into the merit of the case. After re-evaluating the evidence placed before the trial Judge, we are not persuaded that there was any illegality, irrationality or procedural impropriety in the 1st respondent's decision to prefer the charges in question against the appellant.

50. On the issue that there were two conflicting recommendations between the 1st and 3rd respondents concerning the prosecution of the appellant, we hold the view that the mere fact that a decision not to charge a suspect for a criminal offence is later reviewed based on the evidence presented and overturned is indeed one of the functions of the 1st respondent. We agree with the finding of the learned Judge where he expressed that **"It is also worthy to note that the powers donated to the 1st respondent under article 157 of the Constitution can be delegated to other servants, agents, bodies and organizations to act and prosecute on behalf of the 1st respondent. That the delegation is permitted by law. The review of decisions to commence or terminate criminal proceedings is within the jurisdiction of the 1st respondent"** (Emphasis supplied)

51. Adverting to the issue of exercise of discretion by the learned Judge, from the above analysis it is evident that the learned Judge did not misdirect himself or consider any extraneous matters or fail to consider any relevant material before him that would have led him to arrive at a different conclusion. This case does not pass the threshold set by the **Mbogo vs Shah case** (*supra).*

52. Our view of the matter is that the evidentiary material the appellant wanted the High Court and this Court to consider in his favour is material that should be placed before the trial court in his defence should the 1st respondent still decide to proceed with the charges against him. We cite with approval the persuasive High Court decision in **George**

Joshua Okungu & Another –V- The Chief Magistrate's Court, Anti-Corruption Court at Nairobi & Another [2014] eKLR where the court

held as follows;-

> ***"That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the Petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings."***

53. From our above analysis, it is evident that we are not persuaded that there has been any violation of the appellant's Constitutional rights that would necessitate the intervention of the Court by way of Judicial Review orders. We think we have said enough to demonstrate that this appeal lacks merit. Accordingly, we dismiss it but with no order as to costs as the respondents are officers in the public service.

Dated and delivered at Nairobi this 25th day of October, 2019.

W. KARANJA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR