



**Mutua v Inspector General of Police & 2 others; Law Society of Kenya & another
(Interested Parties) (Constitutional Petition 40 of 2020) [2024] KEHC 392 (KLR)
(Constitutional and Human Rights) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 392 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 40 OF 2020**

AC MRIMA, J

JANUARY 25, 2024

BETWEEN

ERIC KYALO MUTUA PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

AND

LAW SOCIETY OF KENYA INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

JUDGMENT

Background:

1. In the year 2009, the Ministry of Information and Communication sought to buy land. It advertised for its supply and eventually, Malili Ranch Limited was awarded the tender.
2. The Petitioner, Eric Kyalo Mutua, through his Law firm Messrs. E.K. Mutua & Co. Advocates, was instructed by Malili Ranch Limited to conduct the transaction on its behalf. To that end, he received the Board of Directors resolution to sell the parcel of land, L.R No. 9918/3.
3. Subsequent upon finalizing the transfer, some shareholders of Malili Ranch Limited, instituted High Court Civil Case No. 2 of 2010 at Machakos Law Courts seeking to nullify and to stop the payment of



- the purchase price. Interim orders were issued in the case but later discharged for having been overtaken by events.
4. Sometimes in December 2010, an individual by the name Stephen King'oo Mbuti lodged a complaint at the Director of Criminal Investigations, the 2nd Respondent herein. He claimed that the sale of L.R No. 9918/3 was fraudulent in that the Petitioner's Law firm had irregularly made payments to some members and Directors.
 5. Following the complaint, Criminal Case No. 2141 of 2009 was commenced against two Directors of Malili Ranch Limited. In the case, the Petitioner was a witness for the prosecution.
 6. At the close of the prosecution's case, the Court found that the accused persons had no case to answer. The Directors were accordingly acquitted.
 7. In the year 2014, a fresh complaint was lodged against the sale of L.R No. 9918/3. The Director of Public Prosecutions, the 3rd Respondent herein, charged certain persons including the Directors of the Malili Ranch Company in Nairobi Anti-Corruption Case No. 19 of 2014. In the case, the Petitioner herein was made the prosecution witness. The case is ongoing.
 8. On 10th February 2020, the Petitioner was taken to the Director of Criminal Investigations (DCI) Headquarters where he was informed that there were instructions from the Office the 3rd Respondent to charge him with the offence of theft of the money belonging to Malili Ranch Limited and that of making a false document; being Minutes of Malili Ranch Limited.
 9. At the DCI Headquarters, the Petitioner's fingerprints were taken. He was thereafter released with the instruction to appear in Court on 12th February 2020. On the said date, he was presented with a Charge Sheet in Criminal Case No. 2 of 2020.

The Petition:

10. Aggrieved by the turn of events, the Petitioner instituted the Petition dated 12th February 2020 supported by his Affidavit deposed to on a similar date and a Further Affidavit deposed to on 9th March 2020.
11. The Petitioner pleaded that he has never been involved in any wrongdoing because, in relation to procurement of the land, he only participated in forwarding a tender letter on behalf of his client and could not be held responsible for any decision by the Ministry's Tender Committee.
12. The Petitioner posited that he could not have committed an offence under Public Procurement and Disposal Act based on the claim that he fraudulently and unlawfully sold the property since he is not a Director of the Vendor Company.
13. It was his case that there was a Board resolution appointing him as the Counsel in the transaction. The resolution was reached at by the Board and the Members of Malili Ranch Limited.
14. The Petitioner claimed further that he could not have been at fault legally for the sale of the land since at the time of the sale, the property was registered in favour of the Company and as such was in a position to sell it.
15. The Petitioner contended further that pursuant to the transaction, the Government obtained unchallenged possession and the sale has never been nullified by any Court.
16. It was his case that he could not be said to have stolen from the Government since it (the Government) did not lose any money in the transaction.



17. He averred that he could not have defrauded the shareholders since every payment he did was authorized in writing by the Company and that he has availed a comprehensive list of all payments showing the particulars of the persons paid, the cheque number, amount and date.
18. The Petitioner pleaded that in the event there was a complaint that some shareholders were paid less than what they believed they were entitled to, he could not be the one answerable since his role was limited to payment as advised by his Client, the Company.
19. It was his position that the complaint by some shareholders to the Advocates Complaints Commission revealed that he did not commit any professional misconduct.
20. The Petitioner pleaded that neither the Company nor the Directors had complained against him and no suit had been brought to claim any unpaid balance by any shareholder.
21. In the Further Affidavit, the Petitioner stated that the Respondent was out to mislead the Court in paragraph 27 by making the deposition that Criminal Case No. 2141 of 2009 and the on-going Criminal Case ACC No 19 of 2014 are not related when in fact, the two are.
22. The Petitioner deposed that, having been a witness in Criminal Case No. 2141 of 2009 he could not be an accused person in the subsequent case which raised similar issues.
23. It was further his deposition that contrary to what was deposed to by one Mr. Momanyi, the 3rd Respondent had already taken a decision not to prosecute him. The decision in Republic -vs- Director of Public Prosecutions & 4 Others -vs- ex-parte Senator Johnston Ndunya Muthama (2015) eKLR was referred to.
24. The Petitioner deposed that he sought this Court's protection since he was not shown or provided with the document that was made by him without authority.
25. The Petitioner further deposed that the charges were a clear fabrication given that a DCI Officer Mr. Kiragu had been hell-bent to charge him. That, the said officer had even asked two Directors to disown their earlier statements and to record new ones implicating him and Senator Johnson Muthama otherwise they be locked up.
26. The Petitioner recalled that he had been unfairly targeted for his position in the then on-going Building Bridges Initiative (BBI) where he had given his personal position in Australia on whether *the Constitution* be amended in terms of the BBI. He recalled that the said Mr. Kiragu had openly asked him why he was concerning himself with the issue of BBI. To the Petitioner, the criminal case was meant to silence him from further engaging in any discourse on the BBI.
27. It was the Petitioner's further contention that the matter had taken over 10 years and that some of his witnesses could not be found, further to the fact that many of his documents that would constitute his defence were taken by the DCI Officers and have never been returned to him and that no explanation has since been given.
28. It was his case that the foregoing was a violation of his right to fair administrative action.
29. On the foregoing factual backdrop, the Petitioner prayed for the following reliefs;
 - a. A conservatory Order/perpetual order of injunction restraining the respondent by themselves, or agents and or employees from arresting detaining, charging and or prosecuting the Petitioner in relation to the above stated matters.



- b. A restraining order against the respondents whether by themselves agents and servants and whomsoever acting under their authority or instruction from charging, prosecuting arrest continued harassment questioning or intimidation of the petitioner in the above stated matter.
- c. An order of Certiorari do issue to bring into this court to quashing the charges in Nairobi Criminal Case No. ACC 2 of 2020 Republic -vs- Eric Kyalo Mutua.
- d. An Order of Stay of Nairobi C.M Criminal Case No. ACC 2 of 2020 Republic -vs- Eric Kyalo Mutua.
- e. A declaration that the arrest charging prosecution of the Petitioner is unconstitutional and therefore null and void ab initio.
- f. A declaration that the arrest continued harassment questioning and intimidation of the Petitioner amounts to violation of Articles 27,28,29,35, 39, 47 and 50 of *the Constitution*.
- g. General Damages including aggravated and exemplary damages.
- h. Costs of this Petition and interests thereon on (g) above at court rates from the date of judgment until payment in full and final satisfaction of the decree herein.
- i. Any other further relief that this Honourable Court may deem fit and just to grant.

The Submissions:

- 30. The Petitioner filed written submissions dated 21st October 2020. He identified the issues for determination as; whether the criminal proceedings against him constitute an abuse of the legal process, whether the discretion of the 3rd Respondent in Article 157 is being abused and whether his right have been violated or threatened.
- 31. On the first issue, the Petitioner submitted that the institution of criminal proceedings against him pursuant to the complaint by Stephen Kingoo Mbuti is an abuse of criminal justice system since there is evidence of an advertisement by the Government of Kenya calling of tenders to purchase land for the ministry of ICT.
- 32. It was his case that upon due process being followed, the Ministry of ICT forwarded to the Attorney General copies of instruments relating to the procurement, copy of the official search, copy of the valuation report fair copy of the Sale Agreement whereafter the AG in his letter of 26th May 2009 stated that the draft sale agreement was in order from a legal point of view.
- 33. It was his submission that on 17th June 2009, an agreement for sale of 5000 acres being portion of L.R No. 9918/3 was executed between the Permanent Secretary to the Treasury of Kenya on behalf of the Ministry of ICT and the Company on the other side.
- 34. It was his submission that the consideration of the agreement was Kshs. 1 Billion with a 40% thereof being a deposit of Kshs. 400,000,000/- payable upon execution.
- 35. The Petition submitted that the Respondents in their response to the Petition have not contradicted nor contested the foregoing payments nor has it alleged that the Petitioner paid funds against instructions or for his benefit.
- 36. The Petitioner asserted that the criminal proceedings in ACC No. 2 of 2020 Republic -vs- Eric Kyalo Mutua stems from a dispute that revolves around a conveyance transaction that the Petitioner's firm acted for Malili Ranch Limited. It was his case that allegation of breach duty of trust of directors and



- disagreement between dissatisfied shareholders and the Company on the distribution of proceeds are causes of action that are civil in nature.
37. The Petitioner submitted that when Stephen Mbuti and 6 other shareholders failed to stop the sale in High Court Civil Suit No. 2 of 2020, they instituted Criminal Case No. 2141 of 2010 against Peter Kanyi and Julius Kilonzo for alleging theft of Company funds but the two were acquitted.
 38. It was the Petitioner's case that the Criminal case against him is Stephens Mbuti's advancement of frustrations of the unsuccessful civil dispute that he always had with Malili Ranch Limited which is an abuse of Court process should it proceed.
 39. It was his case that there are remedies in Civil law for Stephen Mbuti including derivative suit against Malili Ranch limited under the *Companies Act*.
 40. In reference to the decision in Republic -vs Chief Magistrates Court at Mombasa Ex-Parte Ganijee & Another (2002) 2 KLR the Petitioner submitted that the proceedings on ACC Nc. 2 of 2020, constitute abuse of process which should be prohibited by this Court.
 41. As regards the second issue, the Petitioner, in reference to his Further Affidavit submitted that despite the finding in High Court Criminal Appeal No.189 of 2015 that acquitted Julius Kilonzo Maweu for being the same as ACC No. 19 of 2014, it was his case that the prosecution relied on the letter of complaint of 7th January 2019 from Stephen Kingoo Mbuti to commence his prosecution despite having been a prosecution witness in the case which Julius Kilonzo Maweu was acquitted.
 42. The Petitioner submitted, therefore, that the Respondents' case as deposed by Willy Momanyi that the decision to charge him had never been made, was an act of perjury.
 43. The Petitioner further submitted that the decision to prosecute him was contrary to his legitimate expectation that requires application of good administration or administrative fairness.
 44. To bolster his position on the entitlement to legitimate expectation, among others, the decision in Keroche Industries Limited -vs- Kenya Revenue Authority & 5 Others (2007) KLR 240 and the Court to Appeal decision in Ndiara Enterprise Ltd. -vs- Nairobi City County Government (2018) eKLR were relied upon.

The Interested Party's case:

45. The Law Society of Kenya (hereinafter referred to as 'the LSK') supported the Petition through the Replying affidavit of Mercy Wambua, its Chief Executive Officer, deposed to on 6th March 2020.
46. It was her case that the LSK had received two separate complaints related to this matter and dealt with them internally.
47. It was her case that the LSK's position is that Advocates should not bear criminal responsibility when executing instructions on behalf of their clients.
48. She deposed that since the Petitioner was not asked to write a statement or to explain the issue relating to the charges he faced, his right to fair trial will be prejudiced.
49. It was her case that the 3rd Respondent's action to charge the Petitioner whilst he was a prosecution witness in Criminal Case No. 2141 of 2009 over the same subject matter would deprive him the right to not give self-incriminating evidence provided for under Article 50(1)(l) of *the Constitution*.
50. It was her case that the Petitioner has the right to freedom and security and the right to institute these proceedings to protect his rights and fundamental freedoms.



51. She urged the Court to allow the prayers sought in the Petition.

The Submissions:

52. The Interested Party filed written submissions dated 19th January 2022. It was its case that the Respondents' action interferes with the independence of lawyers and the Bar, a position that threatens the rule of law.
53. The Interested Party urged the Court to be guided by Article 2(5) and (6) of *the Constitution* and embrace the United Nations Basic Principles on the Role of Lawyers (adopted in 1990 on Havana, Cuba by the 8th United Nation Congress on the prevention of Crime and treatment of Offenders) where it was observed inter-alia that lawyers should not be identified with their clients or their client's cause as a result of the discharge of their functions.
54. It was its case further that according to the charge, the Response by the Respondents does not disclose any complaint having been lodged by the Petitioner's client. The decision Prof. Tom Ojienda -vs- Director of Public Prosecutions & 3 Others (2020) eKLR was relied upon where it was observed among other things that the DPP has the obligation to take into consideration both inculpatory and exculpatory evidence.
55. In demonstrating the Respondents' bad faith in instituting the suit, the Interested Part submitted that 3rd Respondent had not tendered any document which would include minutes of Directors of Malili Ranch Limited, witness statements from any of the Directors dissociating themselves with the Minutes and handwriting expert opinion (document examiner) to the effect the purported minutes were fraudulent.
56. As such, the Interested Party submitted that in absence of such documentary evidence, it could not be said that Count II was preferred in good faith.
57. They urged the Court to allow the Petition as prayed.

The Respondents' case:

58. The Inspector General of Police, the Director of Criminal Investigations and the Director of Public Prosecutions opposed the Petition through the Replying Affidavit of Willy Momanyi deposed to on 17th February 2020.
59. It was his case that under Article 157(6) and (11) of *the Constitution* as read with section 5(1)(b) of the *Office of the Director of Public Prosecutions Act*, the Director of Public Prosecutions has powers to institute and undertake any criminal proceedings against any person in respect of any offence.
60. Pursuant to the foregoing, Mr. Momanyi deposed that the 3rd Respondent acted within its powers in directing the arrest and charging of the Petitioner in Criminal Case No. ACC 2 of 2020 since the decision to charge had not been made.
61. It was his deposition that the decision to charge the Petitioner was arrived at after reviewing the inquiry file together with all documents related to the case.
62. He referred to the letters of the Complainant of Stephen Kingoo Mbuti of 26th November 2018 indicating that was one of the shareholders who was pad Kshs. 300,000 instead of 1,560,000/-. He also referred to the letters of the said person of 15th January 2019 and 18th January 2019 which state that the Petitioner paid the shareholders less than the amount disbursed by the Government of Kenya.



63. He deposed that upon inquiring into the complaints, the 3rd Respondent, pursuant to section 5(4)(e) of the Office of the Director Public Prosecutions Act directed the Petitioner to be arrested and charged.
64. It was his case that it is unfounded and untrue that the Petitioner's arrest and arraignment before the Court are geared towards assisting some of the shareholders in their cases including, Judicial Review Application No. 73 of 2016.
65. The deponent conceded that it is indeed true that the Petitioner testified as prosecution witness No. 9 on 3rd December 2010 and on 1st March 2011 in Criminal Case No 2141 of 2009 R. -vs- Peter Munya Kanyi and Julius Maweu Kilonzo for stealing 78,100,000/= and Kshs. 52,000,000/= respectively.
66. He deposed that the Petitioner herein is being charged with the offences of stealing Kshs. 553,831.731.15/- in Count 1 and making false document in Count 2, the offences having occurred in diverse dates between 25th June 2009 and 19th March 2010.
67. He deposed further that in addition to the charge of stealing, the Petition was charged with making a false document which was not included in Criminal Case No. 2141 of 2009.
68. It, therefore, was his case that it is not true that the Petitioner is charged with an offence in the same subject matter as one he testifies as a prosecution witness.
69. It further was his case that even if the Petitioner was a prosecution witness in Criminal Case No. 2141 of 2009, such was not a bar to his prosecution in ACC No. 2 of 2020 as there is no nexus between the two cases and double jeopardy would not arise.
70. It was his case that the Petitioner is being charged of the first time in the offences in ACC No. 2 of 2020 and there is no scheme to harass or intimidate him.
71. He deposed that it is not true that the Petitioner will be put in danger of self-incrimination. He stated that during his arrest, the Petitioner's right under Article 49 was protected since he was informed of the reason for his arrest and the charge and cautionary statement read out to him.
72. He maintained the position that he has not in any way abused the legal process and that of administration of justice. He deposed that it is just and fair that the stay orders be vacated.

The Submissions:

73. In their written submissions dated 17th March 2022, the Respondents fortified its case of being an independent constitutional body by referring to various decisions among them the decision in Elory Kraneveld -vs- The Attorney General & 2 Others, where it was observed inter alia;

.... It is not the duty of the Court to go into the merits and demerits of any intended charge to be referred against any party. It is the function of the Court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against the accused person.
74. It was the Respondents' case that the Petitioner had not proved how any of his constitutional rights had been violated. It stated that according to the decision in Andrew Okoth Onanda -vs- Inspector General of police & 2 Others [2018] eKLR, the Petitioner ought to have set out with precision the rights infringed or threatened.
75. The Respondent asserted the position that there was no discrimination in the process leading to the decision to prosecute him since it is not in his place to decide for the Prosecution who to charge and who not to.



76. In rebutting the claim of violation of legitimate expectation, the Respondents submitted that it was well within its right and powers to relook into a matter even if it had proposed closure of original investigations.
77. It was its case that a further review of the file was necessitated by new evidence not earlier in its custody, including the letters annexed in Mr. Momanyi's Affidavit.
78. It was its case that it found out that in the course of its investigations, it unearthed some evidence that some shareholders in Malili Ranch Limited were paid only Kshs. 300,000/- instead of Kshs. 1,560,000/-.
79. It was its submission further that the shareholders complained that they had not authorized the amalgamation of their individual parcels of land for sale to the Government and the witness statements indicated that the Petitioner was a conspirator to the illegal, irregular and fraudulent sale of the land.
80. The Respondents maintained that there was sufficient evidence including witness statements, documentary exhibits and the Petitioner's own statement which informed their decision to charge.
81. The Respondents further submitted on the need that this Court ought to abide by the doctrine of separation of powers. It was its case that any intervention by one arm of Government against the other must be guarded and properly justified.
82. To that end, the decision in Misc. Application No. 31 o 2016, Dr. Alfred Mutua -vs- The Ethics and Anti-corruption && Others was relied upon. In the case, it was observed;
- In principle it is not the work of Courts to interfere with other state organs unless it can be shown that they violate *the Constitution*.
83. In the end, the Respondents were emphatic that the decision to review the decision that closed the inquiry file is justified, non-discriminatory, constitutional and lawful.
84. It urged this Court to find the Petition is an abuse of process meant to circumvent the criminal justice system and to prevent the Respondents from discharging their constitutional functions. It urged the Court to dismiss it with costs.

Analysis:

85. Having patiently perused the Petition, the response, the Affidavits, the parties' written submissions and the decisions referred to, this Court finds that there is one fundamental issue for determination in this matter.
86. The issue is whether, in totality of the evidence and the law, the intended prosecution of the Petitioner is in violation of his rights and fundamental freedoms guaranteed in the Bill of Rights and/or whether the said prosecution is also in violation of Article 157(11) of *the Constitution*.
87. In dealing with this issue, the Court will address the following sub-issues: -
- i. The Petitioner's role in the impugned conveyance.
 - ii. Whether there was legitimate expectation on the part of the Petitioner that he was a witness in the matter of the impugned conveyance.
 - iii. Whether the prosecution of the Petitioner was intended for ulterior motives.
 - iv. Whether the time taken before the institution of the prosecution is prejudicial to the Petitioner.



88. A consideration of the above sub-issues now follows.

a. The Petitioner's role in the impugned conveyance:

89. The Petitioner is an Advocate of the High Court of Kenya. He was instructed by Malili Ranch Limited to conduct a conveyance on its behalf in selling the Company's land to the Ministry of Information and Communication. To that end, he received the Board of Directors resolution to sell the parcel of land, L.R No. 9918/3.
90. The Petitioner discharged his duties as Counsel up to the completion of the transaction. He further dispersed the consideration according to the directions and resolutions of the Board of Directors. However, some shareholders were aggrieved by the way some payments were made and lodged a Civil case at the High Court of Kenya in Machakos. The suit was unsuccessful.
91. The matter did not end there. Further complaints were laid before the Directorate of Criminal Investigations (DCI) and the Advocates Complaints Commission. The Petitioner was put through the due process by the Commission where the complaints were heard and Counsel was eventually absolved of any professional misconduct.
92. The DCI and the Director of Public Prosecution (DPP) also undertook investigations. The Petitioner recorded statements and explained his role in the impugned transaction. The investigations which were led by a Senior Counsel Mr. Muite also found out that the Petitioner kept within his professional lane and not otherwise. It was, hence, resolved that the Petitioner be treated as a witness and the Petitioner was duly informed.
93. This Court has had an opportunity to go through the documents in support of the transaction in issue. The documents were approved and exchanged between the Petitioner's Law firm and the Office of the Hon. Attorney General of the Republic of Kenya. The conveyance was completed successfully.
94. There is also evidence on how the purchase price was disbursed. The Petitioner received a resolution of the Company to that end. There is no evidence that the Petitioner acted outside those instructions. That was among the reasons the Petitioner was absolved of wrong-doing by the Advocates Complaints Commission and in the joint investigations by the DCI and the DPP.
95. Having found as such, unless otherwise proved, the Petitioner is insulated from any penal consequences both under *the Constitution* and the law of our land as well as under the UN Basic Principles on the Role of Lawyers (as adopted in 1990 in Havana, Cuba, by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders). Some of the principles relevant herein include: -
- Principle 16: Governments shall ensure that lawyers – (a) are able to perform their professional functions without intimidation, hindrance, harassment, or improper interference.
- Principle 18: Lawyers shall not be identified with their clients or their clients' causes as a result of discharge of their functions.
- Principle 20: Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a Court, tribunal, or other legal or administrative authority.
96. This Court, therefore, affirms the position that the Petitioner, as an Advocate in the impugned transaction, discharged his duties, lawfully, and as directed by the client.



(b) Whether there was legitimate expectation on the part of the Petitioner that he was a witness in the matter of the impugned conveyance:

97. The settled legal principles guiding the doctrine of legitimate expectation were discussed by the Supreme Court of Kenya in Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment). The Court delineated the principles as follows: -

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.

98. On a party to successfully rely on the doctrine of legitimate expectation, the Supreme Court further referred to the English case of Council of Civil Service Unions and others v Minister for the Civil Service [1983] UKHL6; [1984] 3 All ER 935, it was held by the House of Lords, inter alia that: -

An aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority affected him by depriving of some benefit or advantage which in the past he had been permitted to continue to enjoy and which he could legitimately expect to be permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had given the opportunity of making representations against the withdrawal.

99. Considering the above expressions of the law, this Court agrees with the Petitioner that a legitimate expectation arose when the DPP and DCI conducted joint investigations and resolved that the Petitioner be treated as a witness in the matter.

100. As a result of the said decision, the Petitioner testified as a witness in a criminal case and is yet to testify in another pending criminal case.

101. Having made the Petitioner to rely on the position that he was a witness and in fact went ahead and acted on such, then any departure therefrom ought to have complied with Article 47 of *the Constitution* and the Fair Administrative Actions Act.

102. Speaking to the essence of Article 47 of *the Constitution*, the Court of Appeal in Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR held as follows: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.



103. Article 47 of *the Constitution* states as follows -

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - a. provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
 - b. promote efficient administration

104. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. No. 4 of 2015.

105. Section 4 thereof provides that: -

1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Every person has the right to be given written reasons for any administrative action that is taken against him.
3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard;
 - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to section 6;
 - e. notice of the right to legal representation, where applicable;
 - f. notice of the right to cross-examine or where applicable; or
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
4. The administrator shall accord the person against whom administrative action is taken an opportunity to-
 - a. attend proceedings, in person or in the company of an expert of his choice;
 - b. be heard;
 - c. cross-examine persons who give adverse evidence against him; and
 - d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.



5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
 6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.
106. Further, Section 2 of the Fair Administrative Act defines an ‘administrative action’ and an ‘administrator’ as follows: -

‘administrative action’ includes -

- i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

107. Emerging from the above, there is no doubt the DPP’s decision to renege on its earlier decision to treat the petitioner as a witness and instead to recommend charges was an administrative action. In sum, it was an administrative action because the decision affected the legal rights and interests of the petitioner. As such the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.
108. According to the record, the impugned decision to charge the Petitioner did not conform to the requirements of article 47 of *the Constitution* and Fair Administrative Actions Act. At a minimum, to meet the constitutional and statutory threshold, the investigators and the DPP had to: -
- i. Formally inform the petitioner of the currency and nature of the further and fresh investigations over the matter.
 - ii. Accord the petitioner an opportunity to respond to any issue which would have concerned him.
109. In this case, however, none of the above was undertaken. The Petitioner was just picked from his office and taken to the DCI Headquarters where he was informed of the decision to charge him and he was consequently processed for Court appearance. He was only informally informed of the charges against him. He was not accorded any opportunity to respond to the charges neither was his statement taken. It is, therefore, apparent that a decision to charge the Petitioner even without hearing his response had been long made.
110. The cumulative effect of such actions of the Respondents is that the Petitioner’s rights under Articles 27, 28, 47 and 50 of *the Constitution* as well as the Fair Administrative Actions Act were grossly infringed.

(c) Whether the prosecution of the Petitioner was intended for ulterior motives:

111. The Petitioner deposed that a DCI officer one Mr. Kiragu informed him that the reason he was charged was as a result of his position on the then constitutional amendments on the basis of the then Building Bridges Initiative (BBI) undertaken by the Executive.



112. That disposition was not rebutted.
113. The Petitioner further disposed that witnesses had been coerced and threatened by the said Mr. Kiragu with being charged if they were not going to alter their earlier statements in order to implicate Petitioner and one Senator Muthama.
114. Again, there was no rebuttal by the said Mr. Kiragu.
115. The Respondents casually glossed over the issue by stating that it made its decision based on new and further evidence it had gathered. Respectfully, that response was inordinately inadequate. Such averments called for a proper rebuttal by the said Mr. Kiragu who was the officer at the helm of arresting and preferring charges against the Petitioner. Alternatively, Mr. Monda, from the DPP's office who was also at the heart of the matter ought to have dissociate himself and Mr. Kiragu of the said averments. None of them saw the need to do so.
116. Had the said evidence been availed, this Court would have looked at it under the guidance made by the Supreme Court in *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) where the Court discussed the extent and role of a judicial review Court and/or a Constitutional Court in merit review of evidence. Given the lapse, this Court has been denied that opportunity of a guided scrutiny.
117. This Court, therefore, takes judicial notice that by the time the Petitioner was arrested and was to be charged, the Executive was under a sustained campaign to amend *the Constitution* through the BBI. As a Government initiative, many of those who appeared to be opposed to it were otherwise dealt with including by way of arrests and arraignment before Courts.
118. With such a background and without any rebuttal of the Petitioner's averments by any of the Respondents, this Court finds and hold that indeed the abrupt turn of events that resulted to the Petitioner being arrested and be charged were an attempt to silence the Petitioner from taking a contrary position than that of the then Executive over the BBI matter.
119. As such, this Court further finds and hold that the prosecution was intended for purposes other than the proper administration of justice. The prosecution amounted to an abuse of the Court process.

(d) Whether the time taken before the institution of the prosecution is prejudicial to the Petitioner:

120. The Petitioner vehemently complained of the time taken before the charges were preferred. It was a period of over 10 years. The investigations over the matter had been long closed and a decision that the Petitioner was a witness made. The Petitioner, as said before, had even acted on that decision and testified in a criminal case.
121. The Petitioner further protested that as a result of the lapse of time, he was unable to trace his witnesses and that others had even died.
122. Further, the Petitioner posited that the police had collected many documents from his office during investigations which were still in their custody and that the police were unwilling to release any of them to him.
123. It was the Petitioner's case that the time lapse of over 10 years highly prejudiced his position to properly and adequately defend himself over the allegations.
124. The legal position in respect of the length of time criminal investigations ought to take is not pronounced in law. When a Court is dealing with the aspect of delay, the focus is on the effect of the delay on the suspect.



125. The Court of Appeal in *Wycliffe Oparanya Ambetsa v Director of Public Prosecution* [2016] eKLR in concurring with yours truly had the following on the issue of delay: -

21. The High Court, citing *MARTIN V TAURANGA DISTRICT COURT* (1995) 2 LRC 788, held that delay to prosecute a case cannot, in itself be taken to be a basis of stopping a prosecution case, it is the effect of the delay that had to be considered.

The learned judge stated:

“For a Petitioner to succeed on such a limb, he has to go further and demonstrate by way of credible evidence that as a result of the delay, a trial fair to him cannot be possible. No such allegations have, however, been made in the petition before Court. The Court has equally not been addressed on the nature of the prejudice that the petitioner stands to suffer which prejudice infringes on his right to a fair trial. No allegations were brought forth that the petitioner will not be able to secure the attendance of some witnesses or that due to the passage of time witnesses’ memories have faded.”

We respectfully agree with the learned Judge’s holding as quoted hereinabove.

126. The Petitioner in this case ably demonstrated the prejudice he was likely to suffer given the period that lapsed before the charges were preferred. The reasons were profound. The Respondents did not deny holding and refusing to return the documents the police recovered from the Petitioner. There was also no explanation given as to why the Petitioner had to be charged over 10 years later and why the investigations were re-opened.

127. The Respondents only contended that they received further evidence against the Petitioner that necessitated the fresh investigations. Even with that position, the Respondents did not accord the evidence to the Petitioner and neither were his documents returned nor any explanation given.

128. It is in public interest that investigations ought to be carried out expeditiously otherwise sound reasons ought to be given. In this case, public interest militates against the Respondents.

129. It is, therefore, the finding of this Court that the lapse of over 10 years before preferring the impugned charges would highly prejudice the Petitioner in the unique circumstances of this case.

Conclusion:

130. From the foregoing discussion, this Court believes that it has said enough to demonstrate that the Petitioner was only and unfairly targeted for his position in the BBI matter and not otherwise.

131. The Petitioner’s rights and fundamental freedoms which were infringed include Article 27(1) for not according the Petitioner equal protection and equal benefit of the law, Article 28 for infringing on the Petitioner’s dignity, Articles 47(1) and 50 for failing to accord the Petitioner a fair administrative action and a hearing.

132. The impugned conduct as well contravenes Article 157(11) of *the Constitution* for not serving public interest or the interests of the administration of justice and amounts to an abuse of the Court process.

133. The Petitioner is, hence, entitled to appropriate reliefs.

134. However, this Court is convinced that appropriate declarations and other orders are adequate and that there is no need to award any compensatory awards.



Disposition:

135. In the end, the Petition is hereby determined as follows: -

- (a) A declaration that the arrest, continued harassment, questioning, intimidation, charging and the prosecution of the Petitioner amounts to violation of Articles 27(1), 28, 47, 50 and 157(11) of *the Constitution*. Such and any acts are hereby declared as unconstitutional hence null and void.
- (b) An Order of Certiorari do hereby issue bringing into this Court the charges in Nairobi Criminal Case No. ACC 2 of 2020 Republic -vs- Eric Kyalo Mutua to be quashed. The said charges are hereby quashed.
- (c) The Respondents shall jointly bear the costs of the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JANUARY, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Kaguri, Learned Counsel for the Petitioner.

No appearance for the Learned Counsel for the Respondents.

Duke – Court Assistant.

