



**Sat v Director of Public Prosecutions & 4 others (Petition E053 of 2021)
[2024] KEHC 2131 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E053 OF 2021**

OA SEWE, J

FEBRUARY 29, 2024

**IN THE MATTER OF ARTICLES 1, 2(4), 10, 21, 22, 23, 27, 28, 35, 47, 48,
49, 50, 157, 159, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE DECISION TO CHARGE
THE PETITIONER WITH ABUSE OF OFFICE**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27, 29, 48 & 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE PENAL CODE CHAPTER 63 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND ACT, NO. 6 OF 2012

AND

**IN THE MATTER OF THE NATIONAL POLICE ACT
& THE DIRECTOR OF PUBLIC PROSECUTIONS ACT**

BETWEEN

HASHIM GOT SAT PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

ALEXANDER M HOSEA 4TH RESPONDENT



JUDGMENT

1. As at the 23rd September 2021 when the instant Petition was filed, the petitioner was the Land Registrar, Narok. Prior thereto, he had served as the Land Registrar in Mombasa on or about the year 2013. He averred that, in his capacity as the District Land Registrar Mombasa, he received a letter from the 4th respondent, dated 29th March 2010, to the effect that advertising order No. 1728 of 1998 was fraudulently obtained from the Court and used as a basis for transferring the property, known as Mombasa/Block IX/332 (hereinafter, “the suit property”) to the 5th respondent.
2. The petitioner added that upon perusal of the records at the time, he noted that, on the 26th March 2013, another letter from M/s Gekonde & Co. Advocates, Mombasa, was received by the District Land Registrar, confirming the fraudulent vesting order purportedly issued by the court; and that an advertisement to that effect had placed in Kenya Gazette No. 9163 of 5th July 2013. He explained that, since the Notice had a typographical error in that the suit property was described as Mombasa/Block IX/322 instead of Mombasa/Block IX/332, that error was subsequently corrected by another advertisement in the Kenya Gazette.
3. The petitioner further averred that he was arrested on 30th August 2021 and detained at the CCIO’s office, Mombasa, by virtue of his role as the Lands Registrar, Mombasa. He was subsequently charged with the offence of abuse of office in respect of the role he played in connection with the suit property. He was thereafter issued with Police Cash Bail of Kshs. 100,000 and informed to attend court on 6th September 2021. He averred that, given that he had already recorded statements over the matter and even provided the 1st, 2nd and 3rd respondents with all the copies of the documents he relied on when issuing the title in his capacity as the Lands Registrar, the act of charging him was simply intended to embarrass, intimidate and frustrate him from conducting the functions of his office.
4. Accordingly, the petitioner alleged violation of his rights under Articles 10, 20(1), (2) and (3), 23(1) and (3), 25, 27, 47 and 48 of the Constitution and prayed for the following reliefs:
 - (a) A declaration that the intended initiation, maintenance and prosecution of a criminal case of abuse of office against him is an abuse of the criminal justice system and contravenes his rights to freedom and security, right to fair hearing, right to equality and freedom from discrimination;
 - (b) A declaration that he exercised his discretion and mandate in relation to Mombasa/Block IX/332 professionally and as required of a District Land Registrar;
 - (c) A declaration that the intended institution, maintenance and prosecution of a criminal case of abuse of office against him is oppressive, malicious and an abuse of the court process;
 - (d) An Order prohibiting any charges against him in relation to the property known as Mombasa/Block IX/332;
 - (e) Costs of the Petition;
 - (f) Any other or further orders and/or directions as the Court shall deem fit to meet the ends of justice.



5. The Petition was opposed by the respondents. The 1st respondent relied on the Grounds of Opposition dated 4th October 2021, and stated that the Petition before the court was devoid of merit and was therefore filed in abuse of the court process as it was merely aimed at preventing the 1st respondent from exercising its powers under Article 157 of the Constitution. Further, the 1st respondent averred that, investigation of crime being a statutory process, ought to be allowed to run a full course; and that challenges thereto, if any, can only be raised after the process has been concluded, unless they are proved to be *ultra vires*. The 1st respondent added that the petitioner has not shown in what manner the decision to prosecute him is bad in law, procedurally unfair, or unreasonable.
6. Further to the foregoing the 1st respondent pointed out that the process sought to be stopped had not even commenced; and therefore the Petition has been filed with a view of circumventing the law. The 1st respondent also stated that the petitioner had, on the 21st August 2021, filed for a review of the decision to prosecute him and that a response thereto was yet to be given; and therefore that the Petition was premature.
7. The 2nd and 3rd respondents relied on the Replying Affidavit sworn by No. 82333 Police Constable Christopher Kipkemboi who is the investigating officer in respect of the complaint forming the subject matter of this Petition. He deposed that the complaint was made at Makupa Police Station vide OB No. 31/16/12/2015 by Michael Gitau Ngae, the 5th respondent herein, to the effect that he had bought a parcel of land at the Jua Kali area in the year 2001; but that the title had been fraudulently transferred to another person. PC Kipkemboi further averred that, the matter was transferred to the County Directorate of Criminal Investigations due to its complexity; and that upon investigations it was established that the property in question, Land Parcel No. Mombasa/Block IX/332, was initially part of government land and was registered in the name of the 4th respondent on behalf of the Jua Kali Association. He further explained that they established that the suit property was thereafter put up for sale by public auction in connection with a decree passed in Mombasa Civil Suit No. 1728 of 1998. The property was consequently sold to the 5th respondent and a vesting order issued by the court in his favour.
8. PC Kipkemboi also confirmed that the petitioner played a role in the registration of the vesting order and the issuance of the pertinent Gazette Notices. He confirmed that the petitioner was, in that capacity, invited to the DCI offices, Mombasa, to assist with the investigations in connection with the 5th respondent's complaint. He added that after investigations, sufficient evidence was found to support a charge of abuse of office against him. He further deposed that the petitioner applied for a review of the decision to prosecute him; and that a decision was yet to be taken by the 1st respondent in respect of the request for review. Thus, the 2nd and 3rd respondents asserted that the issues raised in the Petition are issues of fact that can best be tried and resolved by the criminal court; and therefore that no violation or threatened violation of the petitioner's rights has been proved herein. They consequently prayed for the dismissal of the Petition with costs.
9. On his part, the 4th respondent relied on his Replying Affidavit filed on the 25th October 2021. He deposed that he was one of the people who were allocated the property known as Mombasa/Block IX/332 by the former president, Daniel Toroitich Arap Moi; and that he occupied the property until 2013 when he sold it to one Edward Maingi. The 4th respondent further averred that on or around 1997, he leased a portion of the property to one Julius Mbabu M'Mweti and gave him a copy of the title for registration at the Mombasa Municipal Council. He added that he thereafter cancelled the transaction after the expiry of the 6 months' lease. He explained that, although he refunded the total sum of Kshs. 36,000/= to Julius Mbabu M'Mweti through his advocate, Mr. S.K. Kimani after he



failed to take occupation of the land during the lease period, the said Julius Mbabu M’Mweti went ahead and prepared a vesting order for the property in his favour without his knowledge or permission.

10. The 4th respondent further averred that, upon learning of the vesting order, he wrote a letter of complaint to the District Land Officer, among other government offices; and that the said letter was the basis for the intervention by the petitioner. He mentioned that he was summoned by the petitioner on 14th February 2013 along with the 5th respondent; and that the 5th respondent failed to appear even after several attempts had been made to contact him. Consequently, the petitioner went ahead and prepared the Gazette Notice No. 9163 dated 5th July 2013 which upon being corrected, had the effect of cancelling the Certificate of Lease issued to the 5th respondent. He therefore expressed his surprise that the 1st, 2nd and 3rd respondents took a decision to charge the petitioner with abuse of office.
11. The 5th respondent also filed a Replying Affidavit in opposition to the Petition. He averred that he is the beneficial owner of the suit property, land parcel No. Mombasa/Block IX/332. He pointed out that there is a pending civil suit in respect of the property instituted by Pauline Nyambura Irungu and Paul Mwangi Njuki against him and the petitioner, among other cases in connection with the ownership of the property. At paragraph 8 of his affidavit, the 5th respondent averred that he had pleaded fraud in the suit; which fraud must have been perpetrated and/or facilitated by the petitioner in his capacity as the Land Registrar in Mombasa at the time. It was therefore the assertion of the 5th respondent that, in those circumstances, the Petition lacks merit and ought to be dismissed with costs.
12. In his written submissions filed on 21st April 2022, the 5th respondent took issue with the fact that the Supporting Affidavit is dated 22nd September 2021 while the Petition itself is dated 23rd September 2021. Thus, in the submission of the 5th respondent, the Petition is incompetent. The 5th respondent also relied on *Anarita Karimi Njeru v Republic* [1979] eKLR and *Francis A. Mbelanga v Cecilia Waema* [2017] eKLR in urging the Court to expunge the petitioner’s affidavit from the record and for the Court to find that the Petition does not raise any constitutional issues for determination.
13. As to whether the petitioner discharged his duties in good faith, the 5th respondent submitted that that is a matter of evidence to be evaluated by the court handling the criminal matter. In his view, the petitioner has failed to demonstrate abuse of process to warrant the intervention of the Court. He accordingly prayed for the dismissal of the Petition.
14. In the premises, the issues for determination are:
 - (a) Whether the Petition satisfies the threshold for constitutional petitions; and if so
 - (b) Whether the petitioner has demonstrated the violations complained of herein.

A. On the Threshold for Constitutional Petitions:

15. It is imperative that, before engaging in a merit consideration of the Petition, the issue of jurisdiction and competence of the Petition be settled first. Indeed, in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, it was held:

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction...”



16. Needless to emphasize that jurisdiction is donated either by the Constitution or Statute, and is therefore not left to conjecture. The Supreme Court made this clear in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR, thus:

“...A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”

17. The approach taken by the 1st respondent was that the Petition does not raise constitutional issues; for the reason that the Supporting Affidavit that the petitioner relied was predated the Petition itself. He relied on the case of Anarita Karimi Njeru v Republic [1979] eKLR in which it was held:

“...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

18. The principle was affirmed by the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR as hereunder:

“(42)...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and



thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

19. There is therefore no doubt that it was imperative for the petitioner to plead his case with the precision recommended in the Anarita Karimi case. I have looked at the Petition and note that at paragraphs 18, 19, 20 and 21 the petitioner set out the provisions of the Constitution that are pertinent to his Petition. He likewise set out the particulars of breach of public trust as well as the constitutional provisions in issue at paragraphs 23 to 32 of the Petition. In particular, the petitioner relied on Articles 10, 20(1), (2) & (3), 23(1) & (3), 25, 27, 47, 48 of the Constitution of Kenya. Accordingly, not much turns on the respondents’ contention that the Petition does not meet the requisite threshold simply because the Supporting Affidavit predated the Petition. Indeed, Rule 10(3) and (4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, recognizes that:

- “(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.”

20. Accordingly, I fully endorse the expressions of Hon. Odunga, J. in Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another (*supra*) that:

“On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in Anarita Karimi Njeru vs. Attorney General (*supra*), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation...”

21. Indeed, in Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR, the Court of Appeal pointed out that:

“...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”



22. In this respect, the Court of Appeal reiterated the viewpoint taken by a 3-judge bench of the High Court in *Trusted Society of Human Rights Alliance v Attorney General & 2 Others* [2012] eKLR in which it was held that:

“We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case...”

23. Looked at from that angle, there can be no doubt that the Petition is compliant. That notwithstanding, it is also a cardinal requirement that the issues raised in the Petition be serious enough to warrant consideration as constitutional issues. It is now trite that where there exists an alternative remedy through statutory law, then such a remedy ought to be pursued instead. Hence, In *Patrick Mbau Karanja v Kenyatta University* [2012] eKLR Hon. Lenaola, J. (as he then was) held:

“I should only say this as I conclude; in *Francis Waitbaka v Kenyatta University* Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in *Teitinnang v Ariong* [1987] LRC (const.) 517 where it was held as follows: -

“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. the *Constitution*, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by the *Constitution* under the fundamental rights provisions are owned by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the *Constitution* no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

24. Hon. Lenaola, J. further stated, and I entirely agree with him on this: -

“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and



be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights.”

25. Hon. Chacha, J. was of a similar view in *Godfrey Paul Okutoyi & others v Habil Olaka & Another* [2018] eKLR, thus:

“65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the *Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

26. With the foregoing in mind, I have given consideration to the Petition and note that the only complaint is that the respondents acted in breach of Articles 10 and 157 of the *Constitution of Kenya*. The Petitioner has accused the 1st to 3rd Respondents of being agents of the 5th Respondent and lacking independence in making its decision to prosecute. In essence, the petitioner is, here, contending that the decision to prosecute him was made for collateral reasons. That in my view is a valid constitutional point.

27. There is no gainsaying that the 1st respondent is vested with the prosecutorial function under Article 157 of the *Constitution*. However, the said discretion is not absolute; for Article 157(11) of the Constitution dictates that it be exercised with due regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process. Moreover, Section 4 of the *Office of the Director of Public Prosecutions Act* No. 2 of 2013, is explicit that the Office of the Director of Public Prosecutions shall be guided by the *Constitution* as well as the guiding principles set out therein in fulfillment of their mandate. It is noteworthy that Section 4 (f) of the aforementioned Act reiterates the need to serve the cause of justice, prevent abuse of the legal process and public interest.

28. It is therefore plain that, a constitutional court has the mandate to question the exercise of the 1st respondent’s prosecutorial discretion if it is shown that the decision to prosecute was made in disregard of public interest or the cause of justice. Hence, in *Jirongo v Soy Developers Ltd & 9 others* (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) (Judgment), the Supreme Court held: -

81. Under article 157(6) of the *Constitution*, the DPP is mandated to institute and undertake criminal proceedings against any person before any court. Article 157(6) provides as follows:

- (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.”

Article 157(4) provides that:

- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.”



However, Article 157(11) stipulates that:

- (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.”

82. Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.

B. Whether the Petitioner has Demonstrated The Violations Complained of Herein:

29. In the present Petition, the main issue raised by the petitioner was that the Gazette Notices in question were issued in the course of his normal duties. Thus, he was of the conviction that the decision to prosecute him for abuse of office was made in violation of Article 157 of the Constitution and the principles laid down in its derivative legislation, the Office of the Director of Public Prosecutions Act. In particular, the petitioner contended that the decision amounts to abuse of the process of court in so far as he did not step outside his mandate in accomplishing the impugned tasks. In other words, the petitioner was of the posturing that the decision to prosecute him, having been taken without a proper factual basis, was taken for collateral purposes.

30. In the case of Anthony Murimi Waigwe v Attorney General & 4 others [2020] eKLR, the court held: -

48. It is no doubt clear that under Article 157 (1) of the Constitution the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article 159(2) of the Constitution is crying loudly everyday, every hour that “justice shall be done to all, irrespective of status”. Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.

49. The Petitioner in support of interest of administration of justice Dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: “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?

50. In the case of Republic v Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No. 78 of 2015 while quoting the case of R vs. Attorney general ex Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001; the Court held;

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a



reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”

31. Similarly, in the *Jirongo Case* (*supra*) the Supreme Court relied on a decision rendered by the Supreme Court of India, namely *RP Kapur v State of Punjab* AIR 1960 SC 866 in which the applicable factors to be considered by the court in similar circumstances were discussed. Hence, it was held that the Court can intervene:
- (a) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or
 - (b) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or
 - (c) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or
 - (d) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.
32. Although the petitioner alleged that the decision to prosecute him amounts to abuse of the process of the court, the fact of the matter is that he is yet to be charged or arraigned before court. In fact, no action has been taken so far in furtherance of the decision to prosecute; and therefore it is impossible to tell at this point in time whether or not there is sufficient evidence to back up that decision. Indeed, authorities abound to show that the best forum for testing the validity of a charge including the sufficiency of evidence is the trial court itself. For instance, in *Erick Kibiwott & 2 Others v Director of Public Prosecution & 2 Others* [2014] eKLR it was held that:
- “...In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. In dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the *Constitution*. There mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings...”
33. Additionally, and more importantly, Article 50(1) of the *Constitution* provides that:
- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
34. Needless to mention that the essence of Article 50(1) of the *Constitution* is the concept of a fair hearing; and that it envisages the context of the fair hearing to be a public hearing before “...a court or, if appropriate, another independent and impartial tribunal or body...” in which the accused is afforded all the safeguards set out in Article 50(2) of the Constitution. It is for the foregoing reasons that it is always preferable that disputes about facts, such as those raised herein by the petitioner, be ventilated before the trial court, which is itself a creature of the *Constitution* pursuant to Article 162 and 169 of the Constitution.



35. In the premises, I would follow *Michael Sistu Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others [2016] eKLR*, wherein a three-judge bench held that:

“The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... ”

36. It is also significant to mention that the petitioner asked for a review of the decision to prosecute him on the 6th September 2021, which request is yet to be responded to. the 1st respondent acknowledged the request for review and averred that the prosecution was yet to be commenced, thus there is room for them to provide a decision on the request for review.

37. Indeed, under Article 159 (2) (c), the courts are mandated to promote and embrace alternative forms of dispute resolution. Further, Article 47 of the Constitution guarantees that every person is entitled to fair administrative action, that allows for the review of a decision made by an administrative body. Section 5(4)(e) of the *Office of the Director of Public Prosecutions Act* No. 2 of 2013, provides that the Director of Public Prosecutions has the power to review a decision to prosecute, or not to prosecute, any criminal offence.

38. It is my view that, since the 1st respondent is yet to take a decision on the petitioner’s review application, the instant Petition is premature. Section 9(4) of the *Fair Administrative Actions Act* provides that an aggrieved party must exhaust the relevant internal remedies before approaching a court unless they have been exempted from that procedure.

39. It is also significant that the decision of the respondents to charge and prosecute was not a final decision and cannot by itself amount to a violation of the *Constitution*. In *Halsbury’s Laws of England Fourth Edition* Vol. 1 page 90 para 74 the opinion is expressed, which I find apt, to the effect that:

“The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or



where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available.”

40. For the foregoing reasons, it is my considered view that the Petition dated 23rd September 2021 is premature and is accordingly struck out on that account and the interim orders discharged. Each Party to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF FEBRUARY 2024

OLGA SEWE

JUDGE

