Walingo v Directorate of Criminal Investigation & 4 others; Seno & another (Interested Parties) (Constitutional Petition E028 of 2022) [2024] KEHC 2889 (KLR) (21 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2889 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CONSTITUTIONAL PETITION E028 OF 2022

HK CHEMITEI, J

MARCH 21, 2024

BETWEEN

MARY KHAKONI WALINGO ..... PETITIONER

AND

DIRECTORATE OF CRIMINAL INVESTIGATION ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

MAASAI MARA UNIVERSITY ..... 3RD RESPONDENT

OFFICE OF THE AUDITOR GENERAL ..... 4TH RESPONDENT

CHIEF MAGISTRATE COURT NAKURU ..... 5TH RESPONDENT

AND

SIMON KASAINE OLE SENO ..... INTERESTED PARTY

ANACLET BIKETI OKUMU ..... INTERESTED PARTY

JUDGMENT

1. This judgment relates to the application and petition dated 22nd December, 2022 filed by the Petitioner, Professor Mary Khakoni Walingo.
2. The application seeks for Orders that:
   (a) Spent.
   (b) Spent.

(c) Pending the hearing of this Application inter partes, a conservatory order be and is hereby issued staying the proceedings in Nakuru Anti – Corruption Case No. E002 of 2020 (Republic – Vs- Professor Mary Khakoni Walingo & 4 others).

(d) Pending the hearing and determination of the Application, a conservatory order be and is hereby issued staying the proceedings in Nakuru Anti – Corruption Case No. E002 of 2020 (Republic – Vs- Professor Mary Khakoni Walingo & 4 others).

(e) Pending the hearing and determination of the Applicant's Petition, a conservatory order be and is hereby issued staying the proceedings in Nakuru Anti – Corruption Case No. E002 of 2020 (Republic – Vs- Professor Mary Khakoni Walingo & 4 others).

(f) In the alternative, both this application and the Applicant's Petition be heard contemporaneously together and in an urgent and expedited manner that do not further jeopardize the rights of the Applicant/ Petitioner.

3. The petition seeks for Orders that:

I. A declaration be and is hereby issued that the investigations, recommendations to the DPP and the subsequent charging the Petitioner in Nakuru Anti – Corruption Case Number E002 of 2020 - Republic v Professor Mary Khakoni Walingo & 4 others violates the Petitioner's constitutional rights, is an abuse of the process of the court and therefore unlawful, null and void ab initio.

II. An order of certiorari be and is hereby issued removing into this court and quashing the entire charges and charge sheet dated 26th August, 2020 and Proceedings against the Petitioner in Nakuru Anti – Corruption Case Number E002 OF 2020 – Republic v Professor Mary Khakoni Walingo & 4 others.

III. A declaration be and is hereby issued that the fundamental rights and freedoms of the Petitioners under Article 27, 28, 35, 47 and 50 of *the Constitution* have been violated by the Respondents.

IV. A declaration that the Petitioner was illegally, wrongfully and unlawfully charged.

V. An order of prohibition do and is hereby issued restraining the Respondents from conducting any further investigations on the Petitioner.

VI. An order of prohibition be and is hereby issued against the 1st, 2nd & 3rd Respondents from investigating, recommending the prosecutions or commencing any prosecution of the petitioner in respect of which Nakuru Anti – Corruption case number E002 of 2020 – Republic v Professor Mary Khakoni Walingo & 4others was instituted.

VII. The costs of this petition be provided for.**

4. The petition is supported by affidavit sworn by Professor Mary Khakoni Walingo on 22nd December, 2022.

5. The application dated 22nd December, 2022 is opposed vide replying affidavit sworn by Mercyleene Njoroge (Head of Legal department Maasai Mara University – 3rd Respondent) on 18th April, 2023.

6. The 3rd Respondent, Maasai Mara University has filed application dated 10th March, 2023 which is supported by affidavit sworn by Dr. Kennedy Ole Kerei on the same date. The application seeks for Orders that:

a. This Honourable Court be pleased to set aside/ vary the ex parte conservatory orders issued to the petitioner on 28th December, 2022 by Honourable Justice Hon. C. Kariuki.

7. The 3rd Respondent, Maasai Mara University, has filed submissions dated 19th April, 2023 in support of the application dated 10th March, 2023.

8. The petitioner has filed a supplementary affidavit sworn on 6th June, 2023, in response to the 1st, 2nd, 3rd and 4th Respondents' replying affidavits.

9. The petitioner has filed submissions dated 5th June, 2023 in support of the application dated 22nd December, 2022.

10. The 1st Interested party, Prof. Simon Kasaine Ole Seno, filed a replying affidavit sworn on 5th June, 2023 in support of the petition.

11. The 2nd Interested party, Anaclet Biket Okumu, has filed a replying affidavit sworn on 7th June, 2023 in support of the petition.

12. He has filed submissions dated 6th June, 2023 in response to the petition dated 22nd December, 2022.

13. The 1st and 2nd Respondents, Directorate of Criminal Investigations and Director of Public Prosecutions, filed a preliminary objection dated 21st March, 2023. It was opposed by the interested party, Prof. Kasaine Ole Seno vide replying affidavit sworn on 5th October, 2023 and the petitioner's submissions dated 18th September, 2023.

14. The 1st and 2nd Respondents abandoned the PO on 19th October, 2023 before Hon. H. M. Nyaga in court.

Background

15. In a nutshell, the Parties cases are as follows:

Prof. Mary Khakoni Walingo, the Petitioner.

16. She is the Vice Chancellor of Maasai Mara University and the appointed Accounting officer of the university as per Section 39 (2) of the *Universities Act* and Sections 66, 67 and 68 of the *Public Finance Management Act*, 2012 tasked with the overall responsibility and management of the university.

17. She was arrested and taken to Nakuru Chief Magistrate Courts where- she and 4 others took plea and have since been in court for a period of 27 months which according to her was contrary to the law.

18. Prior to her arrest, she was first subjected to unlawful intermittent compulsory leave for a cumulative period of over 20 months without any benefits and subsequently issued with a suspension letter. An adverse opinion on Maasai Mara's financial statements was thereafter issued by the Office of the Auditor General despite the fact that they had issued a previous report giving the green light on the university's reports.

19. She has been charged with the following offences:

(a) Conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 3 of the Anti – Corruption and Economic Crimes Act to wit misappropriation of Kshs. 177, 0007, 754. 00 between 24th January, 2016 and 19th July, 2019.

(b) Abuse of office contrary to Section 101 (1) as read with Section 102A of the Penal Code to wit she directed unlawful expenditure of Kshs. 176, 157. 954. 00.

(c) Willful failure to comply with the law relating to management of public funds contrary to Section 45 (2) as read with Section 48 of the Anti – Corruption and Economic Crimes Act to wit unlawfully authorizing expenditure of Kshs. 176, 157, 954. 00, Kshs. 70, 567, 007. 00, Kshs. 22, 813, 554. 00 and Kshs. 81, 962. 00.

(d) Stealing by persons employed in Public Service contrary to Section 268 as read with Section 280 of the Penal Code to wit stealing Kshs. 176, 157, 954. 00 by virtue of her employment.

20. The charges preferred according to her in Nakuru Anti – Corruption case No. E002 of 2020 (Republic vs Professor Mary Khakoni Walingo & 4 others) are fictitious and trumped up because Maasai Mara University has not lodged any formal complaint on any loss or mismanagement of its funds.

21. That The Directorate of Criminal Investigations and Director of Public Prosecutions usurped the powers of the Ethics and Anti – Corruption Commission in commencing investigations on the alleged offences against the petitioner yet it has no powers to institute criminal proceedings in relation to the alleged economic crimes.

22. She went on to state that the charge sheet is defective because it is signed by Officer Commanding Station – Nakuru Police Station and not signed and approved by officers of the Director of Public Prosecutions and it has defective and duplex charges.

23. That the Office of the Auditor General's reports from 2016 – 2020 confirmed that Maasai Mara University funds were not misappropriated and had been lawfully and efficiently applied which is inconsistent with the particulars of the charge sheet.

24. The evidence produced by the prosecution in the form of books of accounts, receipts and bank statements were not accompanied by corresponding RTGS forms confirming that the monies were spent and/ or received by the petitioner. No probative evidence therefore has been tendered to sustain the charges to establish a case that can lead to a conviction.

25. The funds alleged to have been stolen and misappropriated cannot be confirmed by the Office of the Auditor General as Maasai Mara university has not attached any supporting documents and not verified by an independent auditor.

26. She said that she had been denied access to minutes, financial statements and internal audit reports thus breaching her right to information.

27. The DCI has admitted to have initiated the investigations after the" Mara heist" sensationalized expose after which she was arrested 1 year later, and that the investigations were conducted on the basis of a 10 page published complaint titled "The Ghosts of Corruption "by Spencer Ololchuke Sankale. She said that she became aware of this report after it was filed in court.

28. She went on to state that the investigations conducted are prejudiced. She has been condemned without due process of the law, the charges have no factual or legal foundation and the prosecution was instituted maliciously and unlawfully.

29. Further that Maasai Mara University admits not to have filed any complaint and that it has not confirmed or denied that it has lost any funds or misappropriation thereof.

30. She deponed that the DPP realized serious discrepancies, gaps and deficiencies in the investigation to warrant sustenance of the charges and a team of prosecutors was constituted to get the evidence, in conjunction with DCI on the gaps in the investigations, thus, breaching the separation of powers of investigation and prosecution between DCI and DPP.

31. She concluded that she has been condemned without due process of the law, as the charges have no factual or legal foundation and the prosecution was instituted maliciously and unlawfully.

Maasai Mara University (3rd respondents) response.

32. The university through its head of legal department stated that the application dated 22nd December, 2022 has not met the tests/ criteria for stay of criminal proceedings to wit the grounds for staying a prosecution are when the continuation of the proceedings would constitute an abuse of the process, when the resultant trial would be unfair to the accused and when the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

33. That the petitioner has failed to show how the Director of Public Prosecutions has abused its prosecutorial powers under Article 157 (11) of *the Constitution* and how the Directorate of Criminal Investigations has abused its investigative powers by initiating and conducting criminal investigations against her conduct as a public officer in violation of Article 245 of *the Constitution*.

34. She went on to state that The Statute of Limitations Act does not apply to criminal matters as criminal cases can be instituted at any point so long as there is sufficient evidence to sustain a prosecution and ultimate conviction of an accused person. That the petitioner has not demonstrated how the commencement of the prosecution one year after the airing of the 'Mara Heist' amounted to an abuse of the prosecutorial powers of the DPP or the investigative powers of the DCI.

35. That Maasai Mara university is a public institution run and managed using tax payers' monies. As such, any question as to alleged misappropriation of funds can be investigated and raised by any person and the failure to have a separate complaint when there is another already being prosecuted against the petitioner is not a reason to stay a substantive criminal trial that has been in court for over a year.

36. She stated that in addition to the provisions of Section 214 of the Criminal Procedure Code, a mere technical defect in a charge sheet which is not fundamental and does not cause a failure of justice is curable and therefore not a ground for staying an ongoing criminal prosecution. Thus, the charge sheet should be amended and not the proceedings stayed.

37. The Audit reports from 2019 – 2021 for Maasai Mara University reflect serious audit queries as to loss of millions of shillings by different departments of Maasai Mara University under the petitioner's leadership as vice chancellor as enumerated under paragraphs 26, 27, 28 and 29 thereof.

38. The petitioner is obligated to account for the discrepancies raised in the audit reports by virtue of her position as vice chancellor and accounting officer of the university and she must be answerable to the law.

Professor Kasaine Ole Seno (1st interested party)

39. He deponed that the charge sheet was defective because the Kshs. 177, 007, 754. 00 stated in it does not correspond to the figures in the cheques (same cheques reproduced in several copies to arrive at the figure in the charge sheet) produced as evidence. Proven amount whose cheques he signed and have been produced in court amount to Kshs. 66, 577, 512. 00.

40. That no investigations were conducted prior to the charges being preferred against him and 4 others and as such, they were charged with no evidence thus being an abuse of power.

41. He questioned the exhibits listed at paragraph 10 and 11 relating to transactions authorized and signed as at March, 2019 yet he left the university in October, 2018 when he stopped signing cheques as deputy vice chancellor – finance and administration. These documents form the substance of the charge sheet.

Further that the exhibits on education and partnership accounts for the year 2016 had nothing to do with the position he held at the university and his duties.

42. In regard to Kshs. 5, 586. 19 and Kshs. 48, 600. 00 stated at Charge No. 2 of the charge sheet he said that they were statutory deductions whose cheques that he signed show as such.

Anaclet Biket Okumu (2nd interested party)

43. While in support of the application and petition stated that the DCI and DPP have not presented any substantial evidence to establish the veracity of the charges and the entire suit in Nakuru Anti – Corruption Case No. E002 of 2020 (Republic -vs- Professor Mary Khakoni & 4 others) is a deliberate strategy driven by malicious intent, aiming to harm him and the other accused persons since they were selectively targeted and relentlessly pursued.

44. The figures presented by the investigating officers in the form of 272 cheques have discrepancies and cite different figures (Kshs. 176, 305, 238. 00)which contradict the Kshs. 177, 007, 754. 00 at Count 1 of the charge sheet.

45. That the cheques listed at paragraph 10 are categorized as unsupported cheques when there are payment vouchers proving that the cheques are supported. Cheques worth Kshs. 17, 095, 613. 00 have discrepancies in terms of dates on the cheques presented versus those on the investigation report.

46. The charges against him run from 24th January, 2016 yet he was employed and made a signatory to Maasai Mara University's accounts on 15th November, 2017. Kshs. 65, 410, 072. 00 is credited to the period 24th January, 2016 to 15th November, 2017 when he was not an employee and accounts signatory.

47. He went on by disputing the Kshs. 218, 069, 224. 00 for the financial year ending 30th June, 2020 alleged to have been stolen and/ or misappropriated and attributes it to creative accounting tactics and Maasai Mara University's failure to explain the existence and the amounts held in the suspense account. This figure changed to Kshs. 215, 175, 241. 00 as at the financial year 30th June, 2021 without an explanation as to where the difference in funds was debited.

48. That Maasai Mara University's ERP accounting system had several weaknesses in areas such as student finance and inventory as per the audit report for the year ending 30th June, 2019 yet the system administrators have never been questioned.

49. As regards Kshs. 81, 962, 308. 00 quoted at Count VI of the charge sheet the same contradict the Kshs. 54, 411, 128. 00 which is the proven amount in this regard from the cheques produced as evidence.

Submissions filed by the parties:

50. The petitioner has filed submissions in support of the petition dated 14th December, 2022; dated 5th June, 2023. She relied on Article 229 of *the Constitution* of Kenya, 2010 and Section 35 of the *Public Audit Act*, 2015 to assert the position that the Auditor General has an obligation to audit and report the accounts of any entity that is funded from public funds and further that the Auditor General had given a clean bill of health on Maasai Mara University's accounts for the financial year 2018 – 2020. She made reference to the auditor general's report marked "MKW-1" to "MKW-2" annexed to her supporting affidavit dated 22nd December, 2022.

51. She submitted that the first adverse report by the auditor general for the year ended 30th June, 2020 and marked as "MKW-6" in the aforementioned supporting affidavit reveals inaccuracies and variances in the financial statements presented for audit, presence of unsupported and/ or unvouched

for expenses, double payment of salaries, irregular payment of salaries, overpayment of allowances and non – remittance of statutory deductions among others. She emphasizes that she was not in office during this period as she had gone on leave on 10th September, 2019 and subsequently terminated from her employment. Further, that in her absence during this period, Maasai Mara University appointed Professor J. S. Chacha as acting Vice Chancellor and that it is during his tenure that the said irregularities happened.

52. She relied among others on Article 157(11) of *the Constitution* which provides that in exercising its prosecutorial powers donated by law, the DPP is enjoined to have regard to the public interest, the interest of the administration of justice and avoid abuse of the legal process.

53. She also relied on Section 5 (1) (c) of the Office of the Director of Public Prosecution Act No. 2 of 2013 which gave the ODPP mandate to formulate the ODPP Guidelines on the Decision to Charge to wit, "The decision to prosecute as a concept envisages two basic components namely; that the evidence available is admissible and sufficient and that public interest requires a prosecution to be conducted."

54. She also referred to the case of Diamond Hasham Lalji and Another vs Attorney General and 4 others [2018] eKLR where the court, at paragraph 45, stated that;

> "In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which the DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage, the courts should not hold a fully – fledged inquiry to find if evidence would end in a conviction or acquittal. That is the function of the trial court. However, proper scrutiny of the facts and circumstances of the case are absolutely imperative."

55. The sum total of the numerous authorities she cited are that the criminal proceedings at the trial court were a sham, malicious and calculated to achieve ulterior motive and hence the petition ought to be allowed.

56. Prof. Simon Kasaine Ole Seno, the 1st Interested Party, has filed submissions and relied on Republic v Director of Public Prosecutions & another ex parte Patrick Kang'ethe Njuguna & 4others [2017] eKLR 75 where the court stated, ;

> "It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the public authorities the court may interfere/ intervene in the following situations:
>
> i. Where there is an absolute discretion.
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> ii. Where the decision maker exercises discretion for an improper purpose.
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> iii. Where the decision maker is in breach of the duty to act fairly.
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> iv. Where the decision maker has failed to exercise statutory discretion reasonable.
>
> v. Where the decision maker acts in a manner to frustrate the purpose of the Act donating the power.
>
> vi. Where the decision maker fetters the discretion given.
>
> vii. Where the decision maker fails to exercise discretion.
>
> viii. Where the decision maker is irrational and unreasonable."

57. He also relied on Article 157 (11) of *the Constitution* of Kenya, 2010 which provides that 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.

58. He also prayed for the petition to be allowed as prayed.

59. Anaclet Biket Okumu, the 2nd Interested Party, has filed submissions and relied among others on Section 21 of the Penal Code which defines conspire to mean;

> "Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

60. He also cited Ann Wangechi Mugo & 6 others v Republic [2022] eKLR quoted Gichanga v Republic [1993] KLR 143 where the court held,

> "With respect to the offences of conspiracy, the crucial issue is whether the appellant and his fellow conspirators acted in concert with the intention that the Board be induced to part with its money."

61. Further he relied on Rule 107 of the Public Finance Management (National Government) regulations, 2015 on Clearance and Suspense Accounts states that:

> (1) All the transactions relating to clearance and suspense accounts shall be supported by authentic and verifiable source documents, clearly indicating the approved allocation.
>
> (2) Where it is necessary to account for revenue and expenditure transactions in a clearing or suspense account, the Accounting Officer shall ensure that: -
>
> (a) Amounts included in clearing or suspense accounts are cleared and correctly allocated to the relevant cost centers on a monthly basis;
>
> (b) Monthly reconciliations are performed to confirm the balance of each account; and
>
> (c) Reports on uncleared items are prepared on a monthly basis and submitted to the National treasury.
>
> (3) The National Treasury shall prescribe in the financial manual procedures to be used for management of balances in suspense or clearing accounts."

62. He also cited Yongo v Republic [1983] KLR, 319 where the court stated;

> "In our opinion a charge is defective under Section 214 (1) of the Criminal Procedure Code where:
>
> (a) It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b) It does not, for such reasons, accord with the evidence given at the trial; or

(c) It gives a misdescription of the alleged offence in its particulars."

63. Therefore just like his colleagues above he prayed that the petition as well as the application be allowed as prayed.

Analysis and Determination:

64. I have carefully considered the application, petition, responses as well as the written submissions filed by the parties. I think it is reasonable to deal with the main petition whose outcome in any event will impact on the application.

65. The Petitioners issues for determination are:

i. Whether criminal proceedings can be sustained for offences under the Anti – Corruption and Economic Crimes Act where the Auditor general has issued audit reports confirming that public funds were applied lawfully and in effective way in accordance with Article 229 (6) of *the Constitution*.

ii. Whether under Article 157 (6) (a) of *the Constitution* a charge sheet in criminal proceedings can be instituted by the Kenya Police and a charge sheet signed by police officers.

iii. Whether the criminal justice system designed under Article 50 and 157 allows the role of a complainant, an investigator and a prosecutor to be undertaken by a single person or entity.

iv. Whether a stay of the criminal proceedings is warranted in light of the above submissions.

66. Masai Mara University's (3rd Respondent) issues for determination are:

i. Whether the notice of motion dated 22nd December, 2022 misrepresented the conclusion and import of the Auditor General's report on the financial accounts of Masai Mara University between the year 2016 – 2020.

ii. Whether the petitioner misled the court by claiming the charge sheet dated 26th August, 2020 is fatally defective.

iii. Whether failure of the 3rd Respondent (applicant herein) to lodge any formal complaint that its funds have been misappropriated or lost affects the validity of the criminal proceedings in Nakuru Anti – Corruption Case No. E002 of 2020 (Republic v Professor Mary Khakoni Walingo & 4 Others).

iv. Public interest.

67. Prof. Simon Kasaine Ole Seno's (Interested Party) issues for determination are:

i. Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed.

ii. Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of *the constitution*.

iii. Whether the prosecution is against public policy.

68. Anaclet Biket Okumu's (3rd Interested Party) issues for determination are:

i. Questions the investigation and resultant charges due to the existing disparities in the figures alleged to have been lost.

ii. Whether the Petitioner and the Interested Parties acted in concert with the intention to steal funds from Masai Mara University.

iii. The charge is defective, malicious and illegal for inaccuracies.

69. I think the first issue to determine which i find germane herein is the issue of the charge sheet which in this case cuts across all the parties and is at the center of the case. In approaching the same it shall be appropriate to see what the courts have said in the past.

70. In Peter Ngure Mwangi v Republic [2014] eKLR, the Court of Appeal stated as follows:

> " ...On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not. This Court considered the ingredients necessary in a charge sheet and stated as follows in the case of Isaac Omambia v Republic, [1995] eKLR:
>
> > "In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."
>
> A charge can also be defective if it is in variance with the evidence adduced in its support [Emphasis mine]. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in Yongo v R (1983) eKLR that:
>
> > "In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
> >
> > (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein [Emphasis mine]
> >
> > (ii) when for such reason it does not accord with the evidence given at the trial...."

71. A careful reading of the parties' submissions as well as the affidavit evidence on record appears to me that on the face of it there are material differences between the figures quoted on the charge sheets and those submitted by the parties. The respondents it appears did not have a direct answer on these variances.

72. In my view i think the same smug of a hurried investigations and specifically after what was termed a media expose. Probably had the respondent done a forensic analysis of the accounts, for that is what this suit stands on, the mathematics would have been different.

73. In the premises the same "does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein". (supra).

74. The next issue is whether there was an overlap of functions between the Kenya Police and The Director of Public Prosecution(DPP). The two offices are mutually distinct. On this score the courts at various levels and times have rendered themselves exhaustively.

75. Odunga, J (as he then was) for instance clearly spelt out the roles and responsibilities of each of them in Engineer Geoffrey K Sang v Director of Public Prosecutions & 4 others (2020) eKLR where in laying the basis that an entity must strictly operate within its constitutional and legislative limits stated thus:

> "In this petition, one of the challenges taken by the petitioner revolves around the prosecutorial powers. It is clear that neither the concerned the Directorate of Criminal Investigations nor the Inspector General of police has any prosecutorial powers. 123.The law is very clear that powers must be expressly conferred; they cannot be a matter of implication. In testing whether a statute has conferred jurisdiction on a person or authority, wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a statutory tribunal created statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore, where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See Chogley v The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram v Mystery Model Hair Salon (supra); Warburton v Loveland [1831] 2 DOW & CL (HL) at 489; Lall v Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General v Prince Augustus of Hanover [1957] AC 436 AT 461.124.It is therefore clear that statutory power must be conferred by the statute establishing an entity which statute must necessarily set out its powers expressly since such entities have no inherent powers. Unless its powers are expressly donated by the parent statute, the authority or person cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In Republic v Kenya Revenue Authority ex parte Aberdare Freight Services Ltd & 2 others [2004] 2 KLR 530 it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.125.Therefore, where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative or executive bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law.

Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See Re Hardial Singh and others [1979] KLR 18; [1976-80] 1 KLR 1090."

152. Further, in demarcating the limits of the National Police Service and the DPP in respect to the power to undertake prosecutions, the court stated as follows: -126.In this case in terms of prosecutorial powers, the Director of Public Prosecutions may pursuant to article 157(4) of *the Constitution*, 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. Upon receipt of such directions, pursuant to section 35(h) of the *National Police Service Act*, the Inspector General of Police may direct the Directorate of Criminal Investigations to execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to article 157(4) of *the Constitution*. Clearly therefore there is a clear chain of command set out hereinabove. When it comes to the exercise of prosecutorial powers, as between the three entities, the Director of the Public Prosecutions has the last word. In other words, no public prosecution may be undertaken by or under the authority of either the Inspector General of Police or the Director of Criminal Investigations without the consent of the Director of Public Prosecutions. 127.What the foregoing provides is that each of the three entities must of necessity stay on their respective lanes. Any attempt by any of them to trespass onto the other's lane can only end up disastrously. In simple terms an attempt by the Directorate of Criminal Investigations to charge a person with a criminal offence without the consent of the Director of Public Prosecutions is ultra vires the power and authority of the Director of Criminal Investigations and amounts to abuse of his powers. It is therefore null and void ab initio. 128.In this case it was contended which contention was not denied that there was a futile attempt by the 2nd respondent herein to levy charges against the petitioner without the consent of the 1st respondent. That action was clearly unconstitutional, unlawful, illegal, null and void. This court is under a constitutional mandate to direct the 2nd respondent back to his lane by directing him to refrain from running amok onto the 2nd respondent's lane. The 2nd respondent, the Director of Criminal Investigations, must keep to its lawful lane and must desist from the temptation to overlap even where he believes that those who are constitutionally empowered to take action are dragging their feet. Once he is done with its mandate he must hand over the button to the next "athlete" and must not continue with the race simply because he believes that the next athlete is "a slow footed runner". 129.Under article 157(4) of *the Constitution*, the Director of Public Prosecution is empowered to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General is obliged to comply with any such direction. In other words, the DPP is not bound by the actions undertaken by the police in preventing crime or bringing criminals to book. He is, however, under article 157(11) of *the Constitution*, enjoined to 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. In other words, the DPP ought not to exercise his/her constitutional mandate arbitrarily.

> In my view, the mere fact that those entrusted with the powers of investigation have conducted their own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the investigating agencies have formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our constitution, be considered in deciding whether or not to institute prosecution. See The International and Comparative Law Quarterly Vol 22 (1973). 136.In my view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP's decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of article 157(11) of *the Constitution* as read with section 4 of the Office of Public Prosecutions Act, No 2 of 2013.137.Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP.
>
> Orderliness requires that the holders of the offices of the Director of Public Prosecution, the Inspector General of Police and the Director of Criminal Investigations properly understand their powers and their limits. They must not through administrative or other craft or by innovation conjure imaginary powers which they in fact do not possess. 144.Accordingly, I must make it clear that the 2nd respondent herein, the Director of Criminal Investigations has no powers at all under our current legal frame work to present any charges before a court of law particularly where the Director of Public Prosecutions, the 1st respondent has not consented to the same."

76. I think the situation at hand is complete opposite. There was from the affidavit evidence an usurping of powers by the police. They took up the role of investigator and prosecutor. There was no evidence that there was any concurrence by the DPP. This ran contrary to the law and i think the submissions by the petitioner and the interested parties finds merit on this ground.

77. In other words, the DPP was not granted any opportunity to exercise his mandated discretion as explained in the above lengthy quotes from the eminent courts.

78. There was in my view an exercise of abuse of power by the respondents. There was for instance no evidence to show that the university ever raised any complain or at all. What prompted the respondents to act was a media expose dubbed Mara heist. Beyond that there was no any other investigations. I suspect that that was the reason there was no concurrence by the DPP.

79. The court obviously will not countenance this.In the case of Maina & 4 others v Director of Public Prosecutions & 4 others (Constitutional Petition E106 & 160 of 2021 (Consolidated)) [2022] KEHC

15 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment) the court stated as follows:

> " ... [83] In that regard, the Court of Appeal in the case of Commissioner of Police & another v Kenya Commercial Bank Ltd & 4 others [2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power and held that: -
>
> > Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged. By the same token and in terms of article 157(11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the inspector general undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri v Republic [1985] KLR 3090. It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua v R [2002] 1 EA 205. See also Kuria & 3 others v Attorney General [2002] 2 KLR. (emphasis supplied) [84] Furthermore, the Supreme Court of India in RP Kapur v State of Punjab AIR 1960 SC 866 laid down guidelines to be considered by the court on when the High Court may review prosecutorial powers. They are as follows:(I)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(II)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(III)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(IV)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.[85]We are persuaded that this is a good guide in the interrogation of alleged abuse of prosecutorial powers and read alongside article 157(11) of *the Constitution*, we have sufficiently expressed ourselves elsewhere in this Judgment to show that the unconstitutional continuance of the criminal

proceedings against the appellant amounts to abuse of court process and that, balancing the scales of justice, the weight would favor the appellant and not the respondents..."

Determination:

80. In light of the foregoing, this court finds that the charge sheets are defective because the amounts of money alleged to have been lost are not tallying with the evidence produced. In effect i think there was no sufficient forensic investigations done and if there was one then the same was hurriedly done perhaps to satisfy some third parties or some ulterior motive. The same did not meet the threshold for charging the petitioner and her colleagues in such a serious matter based on fraud and conspiracy.

81. The Kenya Police at the same time usurped the powers of the Director of Public Prosecutions by making the decision to charge, drafting the charge sheets and signing them. Their role should have ended at investigations and submitting their report (s) to the DPP for further action as found above. The net effect was that there was an obvious crossing of lanes, so to speak, which *the Constitution* did not envisage and which this court is mandated to correct.

82. In essence there was abuse of power by the respondents. They ought to have followed the proper protocols.

83. Neither does this court buy into the argument that Maasai Mara University ought to have filed a formal complaint for the investigations to be conducted. The complaint is to be instituted by the DPP after investigations have been conducted by the Kenya Police.

84. In the premises this court is not persuaded that the Petitioner and the interested parties conspired to steal the alleged lost funds from the Masai Mara University. The threshold to sustain this charge has not been met coupled with the fact that there are serious loop holes in the evidence provided by the prosecution vis a vis the charges.

85. If for any chance the court was to allow the prosecution to proceed then it will be condoning an abuse of court process and subjecting the petitioner and the interested parties to an unnecessary litigation. In short the respondents have not met the necessary threshold to sustain the charges against them.

86. I think i have stated so much to show that the petition is meritorious and by extension the application. The same is allowed as hereunder;

    a. A declaration is hereby issued that the investigations, recommendations to the DPP and the subsequent charging the Petitioner and the interested parties in Nakuru Anti – Corruption Case Number E002 of 2020 - Republic v Professor Mary Khakoni Walingo & 4 others violates their constitutional rights and is an abuse of the process of the court and therefore unlawful, null and void ab initio.

    b. An order of certiorari is hereby issued removing into this court and quashing the entire charges and charge sheet dated 26th August, 2020 and Proceedings against the Petitioner and the Interested Parties in Nakuru Anti – Corruption Case Number E002 OF 2020 – Republic v Professor Mary Khakoni Walingo & 4 others.

    c. An order of prohibition be and is hereby issued against the 1st, 2nd & 3rd Respondents from investigating, recommending the prosecutions or commencing any prosecution of the petitioner in respect of which Nakuru Anti – Corruption case number E002 of 2020 – Republic v Professor Mary Khakoni Walingo & 4others was instituted.

    d. Costs shall be in the cause.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 21ST DAY OF MARCH 2024.

H K CHEMITEI

JUDGE