THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. E002 OF 2020

IN THE MATTER OF: **ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: **VIOLATION AND THREATENED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10 (c), 20 (3)(b), 22 (1), 23 (1), 25 (c), 27(1) (2) (4) (5) (6) (7) (8), 28, 29 (a), 40, 47(1), 50, 157 AND 245, 259 (1) (a) (b) (c) (d) 28 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: **THE VIOLATION OF SECTIONS 4 AND 6 OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT**

AND

IN THE MATTER OF: SECTIONS 10 (a) (b) (c) (d) (f) (g) (k) (l) (m) (p) (q) (r) (s) (t) (u), (2), (3) ,(4), 24 AND 61 OF THE NATIONAL POLICE SERVICE ACT

AND

IN THE MATTER OF: **SECTION 4 AND 6 OF THE FAIR ADMINISTRATIVE ACTION ACT**

AND

IN THE MATTER OF: **MALINDI HIGH COURT HCRC NO. 006 OF 2020 REPUBLIC-VS-EZEKIEL A. OMOLLO**

BETWEEN

EZEKIEL A. OMOLLO ..... PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION ..... 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

INDEPENDENT POLICING OVERSIGHT

AUTHORITY ..... 3RD RESPONDENT

Coram: **Hon. Justice Reuben Nyakundi**

John Swaka Advocate for the Petitioner

Mr. Alenga for the DPP

Festus Kinoti Advocate for the 3rd Respondent

JUDGEMENT

Ezekiel Omollo, the petitioner herein is a police officer currently a training instructor at the Kiganjo Police training institute. He filed a petition dated 5th October 2020 contemporaneously with a Notice of Motion and an affidavit sworn by himself on the same date at the High Court in Nairobi. Following directions issued by **Mrima J** on 8th October 2020, the matter was transferred to the jurisdiction of this Court for hearing and determination.

In his petition, the reliefs sought are that:

a. ***That an Order of certiorari hereby issued removing into this court and quashing the entire proceedings against the Petitioner before the Malindi Court HCRC In Nos. 006 Of 2020 Republic -Vs- Ezekiel A. Omollo;***
b. ***A declaration that investigations on the petitioner by Respondents and the institution of criminal proceedings against the Petitioner before the Malindi Court HCRC In Nos. 006 Of 2020 Republic -Vs- Ezekiel A. Omollo violates his constitutional rights, is an abuse of the process of the court and therefore unlawful, null and void ab initio;***
c. ***An order of certiorari be and is hereby issued to quash the summons dated the 25th September 2020 and the resultant entire charge sheet and proceedings against the Petitioner before the Malindi Court HCRC In Nos. 006 Of 2020 Republic -Vs- Ezekiel A. Omollo;***

d. ***An order of prohibition be and is hereby issued prohibiting the respondents from proceeding with the prosecution before the Malindi Court HCRC In Nos. 006 Of 2020 Republic -Vs- Ezekiel A. Omollo;***
e. ***That an order for exemplary and punitive damages be and is hereby issued against the Respondents jointly and severally, in their individual personal and official capacities, on account of their gross violation of the Petitioner's fundamental freedoms and rights as enumerated in the Petition;***
f. ***Any further orders, writs, directions as the court may deem appropriate;***
g. ***Costs of the suit plus interest.***

The 1st and 2nd respondents did not prosecute the matter which was instead prosecuted by the Independent Policing Oversight Authority (IPOA), the 3rd respondent herein. On 14th October 2020, IPOA filed grounds of opposition together with an affidavit sworn by **Evans Okeyo,** both dated 12th October 2020.

When the matter came up before the Court on 14th October 2020, the Court certified it urgent, directing that service be effected to all parties and that parties file submissions to canvass the Notice of Motion application which sought conservatory orders in the nature of a stay on plea taking in **Malindi HCRC E006 of 2020**. Subsequently, the petitioner filed submissions dated 23rd October 2020 while the 3rd respondent filed theirs dated 26th October 2020.

However, on 25th November, by consent of all Counsel, it was directed that the ruling on the application be arrested and that parties instead

focus on the main petition. To this end, on 10th December 2020, the Petitioner filed submissions dated 4th November 2020 addressing the main petition. In response, the 3rd respondent filed submissions dated 15th December 2020 on that day. This judgment therefore relates to the main petition dated 5th October 2020.

The Petitioner's Case

For the petitioner, it is contended that he is a decorated Police Officer, having risen through the ranks, with his current position being a training instructor at the Kiganjo Police training Institute. He lives with his family in Nairobi and at the compound of the Kenya National Police College.

The petitioner avers that he was appointed as the Officer in charge at the Malindi Police Station pursuant to the directives that had been issued to him in tandem with appointment of officers to various Police stations.

As his case goes, on the 23rd March 2015 at around 9.00 am, the petitioner was made aware of protests within Malindi carried out by traders who were soon after joined by members of the public, who were all protesting the imposition of taxes on their trade wares by the County Government. That as the Officer Commanding Malindi Police Station, he immediately too initiative by informing the Town manager **Mr. Chome** of the ongoing demonstrations. He avers that the protesters eventually arrived at the Kilifi County Offices, which were situated within Malindi Town whereupon in accordance with

regulations, the Petitioner approached the group and requested that their representatives engage in dialogue with the officers concerned with the imposition of the taxes.

It is contended that this calmed down the crowd for a while but no sooner had the selected representatives begun approaching the main gate entrances that the group became rowdy chanting *that "Governor Kingi Must Go".*

The petitioner avers that on instinct and guided by years of experience, he made a proclamation declaring that the crowd should disperse. Instead of dispersing, the members of the public and the traders begun hurling crude weapons to the few officers that were manning the gate to the County offices.

In the heat of the chaotic situation that had ensued, the petitioner avers that as he was outnumbered and fearful of what would ensue, he shot his weapon in the air in a bid to disperse the crowd. After the shot was made, he charges, the protestors begun to disperse according him an opportunity to call for reinforcements from the nearest AP Camp.

It is contended that at 2.00pm, the petitioner was called back to the Police station and was informed that **Hon. Dan Kazungu** and his personal assistant **Mr. Nzai** were waiting for a status update. On arrival they informed the petitioner that a lady had been shot and injured. The petitioner aver that he informed the officials that he would follow up the matter through the appropriate channels. That he was able to ascertain that the lady had been indeed injured, and

was at the Malindi Hospital. The petitioner further avers to making a report to the relevant police authorities, who initiated an investigation. He contends that the DCI officers at the Malindi sub county Police Headquarters station also initiated their investigations as well as the 3rd respondent who in January 2016 launched their own investigations. According to the petitioner, he was later in the year 2016 transferred to Kaloleni Police station reporting as an officer in charge of station.

It is the petitioner's case that he was never made aware of any conclusion of the investigations, was never called to record and statement, nor made privy to any kind of inquest or investigation that ensued in the matter. That further he was also not made privy nor were any officers who were reporting under him at the time invited for any investigations in the matter. He consequently charges that it was not until the 1st of October 2020 that he was served with summons to make an appearance before the High Court at Malindi, to take plea on the charge of murder on the 15th October 2020.

According to the petitioner, he is a husband and father and sole provider of his family and that he has been pointed out and his name dragged through the mud for reasons that are only known to the defendants. He avers that if the respondents carry out their sinister motive, it will have a negative impact on the Petitioner's stellar character, subjecting him to ridicule and caricature.

On this basis, the petitioner sought the intervention of the Court to protect his fundamental rights from continued by the respondents.

In particular, he contends that the respondents are in contravention of the national Values and Principles as enshrined in Article 10 (2) (b). His contention is that the respondents failed to meet the constitutional standard of equality, integrity, transparency, rule of law and accountability by the State officers as provided by the Constitution by enforcing the 2nd respondent's ill motivated agenda against the petitioner.

It is the petitioner's averment that the 1st respondent is in total contravention of the petitioner's rights as enshrined in Article 25(e), by enabling the 2nd respondent's futile criminal proceedings aimed at the petitioner, without any regard and adherence to procedure.

Further, it is averred, that by failing to adhere to the provisions under Article 27(1) of the Constitution, the 1st respondent grossly infringed and violated the right of the petitioner by failing to acknowledge that the petitioner was not awarded the benefit for fair administrative action.

Additionally, the petitioner makes the case that the 1st respondent has grossly and gravely violated the provisions of Article 73 by enabling the misuse of the constitutionally mandated office by entertaining the prosecution of the petitioner while the matter has already been settled by the appropriate court. That the 1st respondent has surpassed its mandate as per Article 157 (10); and that the aforementioned actions by the respondent have affected the petitioner physically, psychologically, morally and mentally, with the petitioner being subject to physical harm that resulted to injuries.

In closing, it is averred that this Court has jurisdiction to enforce the provisions of Article 23 of the Constitution for purposes of safe guarding the rights and freedom of the petitioner.

The Case by the 3rd Respondent

In opposing the petition, the grounds advanced by IPOA were that: the facts relied on were matters of evidence which would form the basis of the petitioner's defence in the criminal trial; the petition sought to curtail the statutory obligations of the 3rd respondent; the petition failed to disclose any breach of constitutional rights of the petitioner by the respondents; the petition failed to meet the threshold for grant of orders sought; and was an abuse of the due process of the courts and should be dismissed with costs.

The case as advanced in the affidavit of **Evans Okeyo** was that he is the Investigating Officer in respect of High Court Malindi Criminal case no. **E006 of 2020 R vs Ezekiel Omollo**. That the 3rd respondent vide letter dated 22nd June 2015 received from the 1st respondent a complaint regarding the death of **Kasichana Dzitso Ngala**, a middle-aged lady who died on 23rd March 2015 during a demonstration in Malindi town organized by traders. It was alleged to have been caused by police officers.

It is averred that the 3rd respondent in accordance with its mandate under the Independent Policing Oversight Authority Act, 2011 commenced investigations into the circumstances leading to the death of the deceased. In the course of its investigations, the 3rd

respondent interviewed witnesses to the incident who pointed to the petitioner as the shooter. The 3rd respondent also interviewed the petitioner who confirmed being present at the scene of the incident and having expended ammunition.

According to the 3rd respondent, contrary to averments by the petitioner, he was well aware of the investigations into this matter and was accorded an opportunity to give his version of events as evidenced by his statement recorded with the 3rd respondent. Further, it is averred that the 3rd respondent collected and collated expert evidence including ballistics evidence that matched the petitioner's issued firearm with the bullet retrieved from the body of the deceased.

Upon conclusion of its investigations the 3rd respondent forwarded the file, findings and recommendations to the 1st respondent for perusal and advice in accordance with the law. The 1st respondent upon independent review of the file and evidence concurred with the 3rd respondent's recommendations and directed that the petitioner be charged with the offence of murder. This precipitated the filing of Criminal case no. **E006 of 2020 R vs Ezekiel Omollo on 21st September 2020** at the High Court in Malindi.

Once the case had been registered it is averred that summons were issued by the court for the petitioner to attend court and take plea on 15th October 2020. The summons was served to the Petitioner through the Deputy Inspector General Kenya Police Service.

It is contended that the investigations by the 3rd respondent were complete and all that remained was for the petitioner to take plea for the trial process to commence in accordance with the law. It is further asserted that the petition raises matters of evidence that properly belong at the trial court, and in raising them through this petition the petitioner was asking this court to usurp the role of the trial court in abuse of the court process. That contrary to averments by the petitioner, plea taking is part of the due process of the law, and the petitioner's rights to fair trial are guaranteed during the trial process.

According to the 3rd respondent, having a stellar career or otherwise in the National Police Service does not immunize one from the criminal justice process. That the petitioner's apprehensions regarding possible interdiction or termination is an administrative issue between the petitioner and his employer separate from commencement of the trial process which the petitioner seeks to halt.

The 3rd respondent denied the existence of any sinister motive or mala fides in the investigations and intended prosecution, charging that it simply carried out its mandate as is required by law. That contrary to averments by the petitioner, there were no orders to arrest him or hold him incognito, and the same are simply bare assertions born of fertile imagination.

The 3rd respondent averred that the period of time taken in the investigations was not due mala fides, but simply due to the complexity of the investigations into police use of force during demonstrations that involved a large number of civilians and police

officers. It was additionally contended that there is no period of limitation with regard to investigation and prosecution of the offence of murder.

According to the 3rd respondent, the petitioner had not demonstrated infringements of any of his rights neither had he demonstrated any grounds at all for the grant of the reliefs sought in the petition. That the petition was simply meant to forestall the rights of the victim's family to access justice.

It was averred that it is only fair, just and in tandem with both the petitioner's rights to fair trial and the victim's family rights to access justice, that the trial process should be allowed to proceed whereupon the petitioner will have the opportunity to challenge all the evidence presented against him and present his defence while enjoying the constitutional safeguards of fair trial rights.

In view of the foregoing, it was contended that the petition should be dismissed with costs to the 3rd Respondent.

The Petitioner's Submissions

Mr Swaka Advocate in conduct of the petition on behalf of the Petitioner drew the Court's attention to three issues for resolution:

a. ***Should the intended prosecution against the petitioner be halted?***
b. ***Whether the respondents acted ultra vires to their mandate and whether there were proper investigations to institute a charge?***
c. ***Whether the Court can intervene where the DPP, IPOA and National Police Service act ultra vires to their mandate?***

On whether the intended prosecution against the petitioner ought to be halted, **Mr. Swaka** submitted that the intended prosecution against the petitioner was malicious and only meant to halt the progress that the petitioner has made through the ranks. The petitioner only recorded his statement once. He was never called for a follow up, neither was he notified of ongoing investigations into this matter. Procedurally, any investigations would have resulted in the petitioner being reprimanded in the event he was not summarily dismissed. It was further submitted that in investigations such as those where there was loss of life, a thorough investigation should have been done, with the petitioner being the main focus. It was submitted that in the instant case, the petitioner as an officer was still permitted to rise within the hierarchy, to carry a fire arm and even head an entire unit.

It was further submitted that investigations in the incidence had taken close five years, with no further communication to the petitioner. That such delayed responsibility on the part of the officers of the 2nd respondent can only hint to malice, an afterthought and a complete disregard of the petitioner's rights as to fair administrative action, complete disregard to the rules of natural justice and further meant to shame and degrade the petitioner. The witnesses to the unfortunate incidence were at the scene and could very well have come forward and recorded their statement the same day or a few days after the fact. The post mortem report should have been carried out immediately after the death. Counsel posed the question as to

why prefer charges after five years, if indeed there was any wrong doing on part of the petitioner. He also questioned the delay in charging the Petitioner when witnesses could have forgotten what transpired, some even relocated, other passed on and others in no way to orate the incidence. Relying on **Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others [2019] eKLR**, it was submitted that the charges against the petitioner hold no water. There had not been any conclusive investigation carried out five years after the fact. The charges are malicious and an afterthought.

Mr. Swaka proceeded to outline the grounds upon which prosecution may be prohibited citing the case of **Director of Public Prosecutions V Martin Maina & 4 Others [2017] eKLR**, where the Court cited, with approval, the decision by the Supreme Court of India in **State Of Maharastra & Others V Arun Gulab Gawali & Others, Criminal Appeal No. 590 of 2007**. These grounds were firstly 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; secondly, where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding; third, 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; and finally where the allegations constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fails to prove the charge.

It was hence submitted that neither the petitioner nor those in his command at the time were informed that ongoing investigations had resulted in any kind of formal report. He was not subjected to any further inquiry, other that the report he made at the first instance. As such, it was Counsel's submission that the process was tainted in malice, non-disclosure and contravened the rues of natural justice and collections of evidence. The Court's attention was drawn to **Joram Mwenda Guantai vs The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170; Kuria & 3 Others vs, Attorney General [2002] 2 KLR 69; Republic vs. Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703; and R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**.

The submission was made that in the course of the investigations, not once was the petitioner referred to Internal Affairs Unit as envisaged by **Section 87 of the National Police service act**. The cases cited in support of this were: **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR and Republic vs Director of Public Prosecutions & Another Exparte Chamanlal Vraijlal Kamani & 2 Others [2015 eKLR**

Counsel submitted that the court had in the past halted prosecutions which were only geared to delay of justice, or subject a party to unwarranted viciousness that comes with the institution of criminal proceedings. It was urged that the petitioner's case was such like and the Court ought to apply its discretion and halt the intended criminal proceedings. It was submitted that since the occurrence of the

incidenct, there had not been a single incidence where the Petitioner was held in any form of disciplinary action.

In answer to whether the Court can intervene where the DPP, IPOA and National Police Service act ultra vires to their mandate reference was made to the case of **Paul Ng'ang'a Nyaga v Attorney General & others (2013) eKLR** for the submission that the court had powers to restrict the decisions and actions of the 1st respondent where they act ultra vires to their powers and mandate. Further reliance was placed on the case of **Republic vs Director Public Prosecutions & another Exparte Justus Ongera [2019] eKLR.**

Counsel went on to cite **Diamond Hasham Lalji and another vs Attorney General and 4 others [2018] KLR** for the applicable law and circumstances under which the court could interfere with the exercise of prosecutorial discretion by the DPP. It was subsequently submitted that the 1st respondent had violated the provisions of Article 73 by enabling the misuse of the constitutionally mandated office by entertaining the prosecution of the petitioner while there was no proper if any investigation carried out for such a charge to be instituted. It was submitted that the 1st respondent had surpassed its mandate as per Article 157 (10) of the Constitution.

It was further submitted that if the respondents' were allowed to taint the petitioner's image at this stage, it would gravely undermine and contravene the constitutional provision on the presumption of innocence until the contrary is proved. That the respondents had failed to demonstrate that the petitioner had acted in breach of police

service rules or any other laws during the incident subject of the intended criminal prosecution. Counsel referred to **R vs. Attorney General ex parte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001; Kuria& 3 Others vs. Attorney General [2002] 2 KLR 69; and Kinyanjui vs. Kinyanjui [1995-98] 1 EA 146.**

Concluding, **Mr. Swaka** Advocate submitted that while the circumstances that led to that lead to the death of the individual were quite unfortunate and there was a great loss that was felt by her family and those around her, the institution of charges, where the investigations carried out with so much delay as in this matter, cannot be the basis of instituting legal proceedings.

3rd Respondent's Submissions

In the view of **Mr. Kinoti**, who appeared for the 3rd respondent, the sole issue for determination was whether the petitioner had demonstrated any ground to warrant this court to stop his intended prosecution

For the grounds upon which the court can interfere with intended prosecution, Counsel cited **Soy Developers Limited & 5 others vs Cyrus Shakhalaga Khwa Jirongo & 7 others; Soy Developers Limited & 4 others (Interested Parties) [2019] eKLR**.

For the submission that the court would only interfere with the prosecutorial discretion of the DPP in the rarest of rare cases, the Court was referred to **Director of Public Prosecutions vs Martin Maina & 4 Others (2017] eKLR.** It was further submitted that stopping a

prosecution was a radical relief that upends societal expectations that a criminal complaint, especially a charge as serious as the one levelled against the petitioner, should be ventilated through a public criminal trial. Counsel quoted from **Malindi Criminal Case No. 28 of 2011 - Republic vs PC Okello and PC Fondo** to submit that the petitioner bore the heavy burden to demonstrate through cogent evidence that there was sufficient ground to warrant the court to stop the intended prosecution. In his view, the petitioner's case had not met the threshold for the grant of such a radical remedy of stopping an intended prosecution.

Mr. Kinoti submitted that the petitioner had failed to show how the 1st and 3rd respondents acted outside their mandate in this matter. He outlined their mandate under Section 6 of the Independent Policing Oversight Authority Act, 2011 stating that the 3rd respondent was mandated to conduct investigations into complaints alleging criminal conduct by police officers, the complaint therefore fell squarely within its investigative mandate. Reliance was placed on **Fredrick Masaghwe vs Director of Public Prosecutions & 3 Others (2019) eKLR.**

The submission by Counsel was that the petitioner had failed to show how his constitutional right to fair administrative action had been infringed by the respondents. To this end, **Mr. Kinoti** submitted while the petitioner at in his petition denied recording a statement, he admitted to the same in the application that accompanied it. That per the sworn affidavit of the investigating officer and the annexures

thereto, the petitioner did indeed record a statement where he gave his version of events and was further cautioned and informed that evidence he gave would be used court law for prosecution and he indicated that he had nothing further to state. That there was no legal requirement that the petitioner be called for a follow up on investigations into him and neither was there one that a suspect must informed before the DPP makes decision on the recommendations since the DPP is not bound by the recommendations made. Counsel cited **Alfred Nyandieka vs Director of Public Prosecution & 3 Others (2019) eKLR** and **Martin Maina & 4 Others case (supra**)

It was also submitted that the fact that the petitioner rose through the ranks in the National Police service, while under investigations by the 3rd respondent had no bearing whatsoever to investigations conducted independently by the 3rd respondent which is neither his employer nor responsible for his promotion. Neither can this even remotely point to any malice or sinister motive on the part of the 1st or 3rd respondents.

Consequently, it was submitted that the petitioner does not in any way disclose how his rights to fair administrative action or any other constitutional rights were infringed in this manner.

Moving forward, it was submitted that the petitioner had failed to show how the period taken to conduct investigations has prejudiced the intended trial. According to **Mr. Kinoti**, simply citing a long period of investigations without showing anything more cannot evidence

bad faith or malice. This was especially in view of the fact that there is no statutory limitation with regard to investigating and prosecution of the offence of murder. Additionally, it was submitted that the petitioner had not pleaded anywhere in the entire petition that witnesses are unavailable or any documentary evidence is not available due to lapse time so as to prejudice the trial. On the contrary, charged Counsel, according the affidavit of the investigating officer, all evidence is available and the petitioner will have all opportunity to challenge all evidence presented against him at trial. It was further submitted that the investigating officer had given a reasonable explanation for the delay. He has deponed that length of time was attributable to the complexity of the investigations into the alleged use of force by the police during demonstrations that involved a large number of civilians and police officers. This point was buttressed by the judicial authorities of: **Republic vs PC George Okello & another [2012] eKLR; Republic v Attorney General & 4 others Ex Parte Kenneth Kariuki Githii (2014) eKLR and Soy Developers Limited case (supra).**

According to the advocate for the 3rd defendant, the decision of the Court of Appeal in **Diamond Hasham Lalji and another Vs Attorney General and 4 others 2018 (KLR)** cited by the petitioner was entirely distinguishable from the present case, since in that case the court found that necessary evidence had been lost due to the lapse of time of 20 years. One crucial witness **Mr. Ismael** was dead, and relevant documentary evidence had been lost. Therefore, the petitioners would be prejudiced in the ensuing trial. However, in the present case, all

necessary evidence is available, and consequently there is no prejudice whatsoever occasioned on the petitioner due to lapse of time.

Next, Counsel contended that the petitioner was undeserving of the reliefs sought as he had failed to show there is a predominant ulterior motive underlying the intended prosecution. The petitioner had merely alleged in his petition that the respondents had failed to meet standards of equality, transparency et al by enforcing the 2nd respondent's ill motivated agenda against the petitioner. However, no particulars whatsoever are given as to what that ill motivated agenda of the 2nd respondent is, and no further details had been provided as to how the respondents in particular the 1st and 3rd respondents who are independent of the National Police Service, were enforcing that ill motivated agenda of the Inspector General as against the petitioner. It was charged that the burden lay on the petitioner to show by way of clear evidence that the intended prosecution is actuated by an ulterior malicious motive and the petitioner had failed to discharge this burden. Again, reference was made to **Soy Developers Limited case (supra) and Kenneth Kariuki Githii case (supra).**

On this point it was submitted that the cases cited by the petitioner in support of his case were clearly distinguishable. The case of **Diamond Hasham Lalji (supra)** was distinguishable since in that case the court found that the predominant purpose of the intended prosecution was to compel the petitioners to settle a Family dispute which was the subject of civil litigation. Similarly, the case of **Alfred**

Nyandieka (supra) was also distinguishable since in that case the count found that there was unchallenged evidence of bribery and extortion by the investigating police officers and therefore found that the predominant purpose underlying the intended prosecution was malicious. **The case of Reuben Njuguna Gachukia and another vs IG and 4 others 2019 (eKLR)** was also distinguishable since in that case the court found that the investigations were predicated on arbitrary raid and search by goons, who were not law enforcement officers and therefore had no mandate to conduct investigations.

In Counsel's mind therefore, none of the circumstances pertaining in those cases were relevant to the case at hand. In the instant case Counsel submitted, there was a factual basis for the intended prosecution, and the mandate of the investigating and prosecuting agencies is unimpeachable. Further, the petitioner had failed to show in his pleadings that there was any predominant ulterior motive underlying investigations.

In the fifth prong to the 3rd respondent's submissions, it was contended that the petitioner sought to present his defence before this court, and to have the court step into the shoes of the trial court and determine matters of evidence with regard to the criminal charge in abuse of the court process. It was submitted therefore that it was not the duty of the court in this instance to go into the merits or veracity of the evidence to be tendered against an accused person. The Court only had to consider the process, rather than the merits or demerits of the intended prosecution. Counsel quoted with

approval the authorities of **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR, Patrick Ngunjiri Maina v Director of Public Prosecutions & 2 others [2019] eKLR, Martin Maina & 4 Others (supra), Fredrick Masaghwe Mukasa v Director of Public Prosecutions & 3 others [2016] eKLR and Meixner & Another vs. Attorney General [2005] 2 KLR 189.**

Thence it was submitted, the bulk of the petition related to matters of evidence with regard to the criminal charge that this court could not delve into as they are best left for the trial court.

Finally, it was submitted that the petitioner sought to curtail the right to access to justice for the family of the late of **Kasichana Dzitso Ngala** contrary to Article 48 of the Constitution which guaranteed the right to Access to Justice that the state had a duty to ensure. Further, pursuant to Article 50 every person has the right to have a dispute that can be resolved by the application of law decided in a fair and public hearing before court or, if appropriate, another independent and impartial tribunal or body. These rights accrue to the family of the victim herein the late **Kasichana Dzisto Ngala** and were further amplified in the Victims Protection Act, 2014 at section 4.

On the basis of these arguments, it was submitted that the petitioner had failed to demonstrate any ground to warrant the court to halt the intended prosecution. It was thus submitted that the petition should be dismissed with costs to the 3rd respondent.

Analysis and Determination

With utmost regard to the pleadings filed in this matter and having punctiliously considered the arguments advanced by both Counsels **Mr. Swaka** and **Mr. Kinoti**, my summation of what is required of me is to answer whether the petitioner's gravamen is in tandem with the circumstances in which the court would be entitled to prohibit, bring to a halt or quash the intended criminal proceedings against him.

In achieving this objective, the court intends to in the first instance, question whether the respondents acted within their respective mandates in their investigation and subsequent institution of a criminal charge against the petitioner. Concomitant with this issue would be to answer whether the petitioner's rights have been violated in the manner that he claims and finally, to ponder whether, on analysis of the preceding questions, he is deserving of the reliefs sought.

When faced with a petition seeking to arrest a criminal prosecution, the factors which a court ought to account for are well settled. For a start, the court ought to be extremely cautious in making its determination so as to avoid prejudicing the intended or pending criminal proceedings. The court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions and neither should it curtail with the investigatory mandate accorded to IPOA. However, the court may intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a

criminal offence. In **George Joshua Okungu & Another V The Chief Magistrates Court, Nairobi & Another [2014] eKLR** it was held:

> ***"50. The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The 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. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good***

administration. See R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763 and Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).”

Similarly, in **Republic v Grace Wangari Bunyi (Sued as the Administrator of the Estate of the Late Obadiah Kuira Bunyi) & 7 others Exparte Moses Kirruti & 28 others [2018] eKLR**

“It is important to note that the discretion given to the Director of Public Prosecutions to undertake investigation and prosecute criminal offences is not to be taken for granted or lightly interfered with and must be properly exercised. In the same respect, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions. The mere fact that their high chance of success as regards the intended or ongoing criminal proceedings does not count, it not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned merits of the case but to address defects in decision making process by a decision making body. However, the court may only intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence and the justice system such as with a view to forcing a party to submit to a concession of a civil dispute, the court will not hesitate to bring such proceedings to a court.”

A familiar position was also taken in **Eunice Khalwali Miima v Director Public of Prosecutions & 2 others [2017] eKLR** where the Court stated:

“The circumstances under which the Court will grant stay of a criminal process in these kinds of proceedings is now well settled.

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. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings."

The investigatory powers of IPOA are established under the **Independent Policing Oversight Authority Act, 2011** which in its Section 7 empowers IPOA to investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution. Highlighting this stance of the law, the Court in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** held:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges.

The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

The prosecutorial powers of DPP are constitutionally and statutorily provided for under **Article 157 (10) of the Constitution and Section 4 of the Office of the Director of Public Prosecution Act No. 2 of 2013**, which provides that the DPP does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his/her powers and functions, shall not be under the direction or control of any person or authority. The exercise of that power is however subject to Subsection (11) of Article 157 and Section 4 of the DPP Act, which provides that in exercise of the said power, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process. Only in circumstances where it is manifest that the DPP acted unlawfully by failing to exercise their own independent discretion; acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual will the High Court intervene.

In the case of **Diamond Hasham Lalji & Another v A.G. & 4 others [2018] eKLR** which this Court was referred to by both Counsel, the Court of Appeal stated:-

> ***"[34] It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2)(d)(ii) of the Constitution ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.***
>
> ***The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. (Matululu and Anor v. DPP [2003] 4 LRC 712). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction."***

I further seek to associate myself with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** the Court held that:

> ***"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".

With the litany of judicial pronouncements on the threshold for interfering with the discretion of the investigative and prosecutorial agencies in mind, I now turn to the petitioner's gravamen. According to the petitioner, the manner in which IPOA conducted itself in its investigations into the circumstances surrounding the death of **Kasichana Dzitso Ngala**, which occurred on 23rd March 2015 under the watch of the petitioner when he had to contend with protests by traders and the general public in Malindi town as the Office Commanding Station, left a lot to be desired. He charges that these investigations were actuated by extraneous considerations and imputes ill motive on the part of the investigating agency. For him, the investigations only served to single him out and ruin his reputation as a decorated police officer with a stellar and unblemished record. He draws this inference from the fact that since the time the incident occurred, neither he nor his junior officers who were present on the material day had been further contacted as regards the progress of investigations into the incident. That since then, he has gone on to earn accords and rise in position at his job without any adverse comments on his conduct. That the ill motive was clearly demonstrable in the five year delay it took from the time the incident occurred in March 2015 to the time summons against him were issued and a case filed at the Malindi High Court with a

murder charge. His take therefore is that the 3rd respondent exercised its mandate improperly by taking so long to institute charges against him and failing to inform him of the progress of investigations. This was tantamount to a violation of his right to fair administrative action. Extending this argument to the conduct of the DPP, he also charges that they too failed to exercise their powers within the precincts of the law by founding a charge on sinister motives.

In contrast to the petitioner's case, the 3rd respondent maintains that it acted well within its mandate of investigating complaints made against police officers in the Service. It charged that investigations into the circumstances surrounding the death of the deceased were well within its purview. On the contention that the petitioner was not kept abreast of the progress of investigations, the case was made that this was incorrect as the Petitioner had been accorded an opportunity to record a statement on his own version of events on the material day. Regarding the delay in bringing the charge against the Petitioner, it was averred that the investigations were of a complex nature and thus took time to be completed. In any case, it was argued, there was no limitation with regard to investigations and prosecutions for the offence of murder, which is what the petitioner was faced with in the impending prosecution.

The principle that a decision-maker should not fetter his discretion was explained by **Lord Browne-Wilkinson in R v Secretary of State for the Home Department, ex p Venables {1998}** as follows:

> ***"When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future .... By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise. These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases ..... But the position is different if the policy adopted is such as to preclude the person.... from departing from the policy adopted is account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful."***

As far as the ill motive on the part of the respondents, it was argued that such imputation could not hold water as not only had the petitioner failed to demonstrate the same, but also that the actions of the respondents were strictly in line with the powers accorded to them under the law.

In my analysis, the petitioner claims to be aggrieved by the improper conduct of investigations against his actions. However, as I see it, not a scintilla of evidence has been provided to show how prejudicial to the petitioner such investigations were. IPOA had the mandate to

conduct the investigations as conferred upon it by Section 7 of the IPOA Act, 2011.

In my view the 2nd and 3rd respondent in directing the prosecution of the petitioner has not violated any rights of the petitioner or violated the provisions of the constitution. In the case of **Davi Ndolo Ngiali & 2 others v Directorate of Criminal Investigations & 4 others** {**2015**} **eKLR** and **Erick Kibiwott & 2 others v DPP & 2 others Judicial Review Civil Application No. 89 of 2010** where the Honourable Judge observed that:

> ***"The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial Court ..... as long as the prosecution and those charged with the responsibility of making decisions to change act in a reasonable manner, the High Court would be reluctant to intervene."***

In the conduct of these investigations, the petitioner was accorded an opportunity to record a statement. He could not now turn around and say he was not aware of the investigations. The petitioner further charges that he was not kept abreast of the progress of the investigations. The 3rd respondent did not owe him this duty. Under Section 27 of the IPOA Act, upon conclusion of an investigation into a complaint where the inquiry, in the Authority's opinion, discloses a criminal act by a member of the Service, recommend the prosecution of that member to the Director of Public Prosecutions. This is exactly what happened in the instant case.

Only the most compelling and cogent evidence will justify the Court's interference on issues of this nature involving halting a prosecution of a suspected offender. This is what the Court had in mind in the case of **Rhodes (R on the application of) v Police & Crime Commissioner for Lincolnshire {2013},** the Court opined:

> ***"The Court must not interfere simply because it thinks it would have made a different decision if it had been the primary decision-maker. Nothing less than Wednesbury unreasonableness will do. In other words, the Court must not interfere unless it is satisfied that the PCC's decision is 'irrational' or 'perverse'. The assessment of the PCC's decision must be made by reference to the material he had available to him. This could include not only the materials he considered but also the materials he could and should have considered."***

The threshold in which the High Court could impugn the decision maker of another constitutional organ for an improper purpose or bad faith or being irrational was placed so high that it effectively calls upon the pleader of facts to discharge that burden on the preponderance of evidence. That to me is not the case here in the instant petition.

The 1st respondent too cannot be faulted for exercising its discretion to initiate charges against the petitioner. Once it had examined the file forwarded to it by IPOA and established that there was a basis to form a criminal charge, it went ahead and instituted the petitioner's prosecution; this is well within the mandate of the office of the DPP. Despite the assertions by the petitioner, little by way of evidence was

availed to the court to demonstrate what sinister motive, if any, that the DPP had when it made the decision to prosecute. In **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** the Court held:

> ***"243. We agree that there is a real danger of courts overreaching if they were to routinely question the merit of the DPP's decisions. However, there are circumstances where the type of scrutiny set out in the majority decision of Njuguna S. Ndungu (supra) is called for. Should there be credible evidence that the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, then a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled."***

It follows that for the intended prosecution to be deemed as being unfounded, it must be so manifestly weak so as to not disclose a prosecutable case or have no prospect for conviction. This is not the case in the instant matter. The petitioner herein faces a charge of the murder of **Kasichana Dzitso Ngala**. The petitioner in his pleadings conceded to having shot in the air. The 3rd respondent on their part asserted that upon investigations, it was established that it is the Petitioner's weapon that was discharged and caused the death of the deceased. It cannot therefore be said that no prosecutable case has been disclosed. On the face of it, there does exist tangible evidence, which evidence is uncontroverted, that it was the petitioner's actions

resulted in the death of the deceased. What the petitioner belaboured, was that the respondents', by virtue of the delay in bringing forth the charges against him, were motivated by ulterior considerations. With respect, this assertion cannot fly as it is unsubstantiated by the evidence on the record.

I can do no better than align myself with the decision in the case of **Republic vs PC George Okello & another [2012] eKLR** referred to this Court by **Mr. Kinoti** for the 3rd respondent where my esteemed colleague **Meoli J** held:

> ***37. "I can find no better words to capture this conclusion than those used by the South African Constitutional court in Sanderson as regards appropriate relief:***
>
> ***Even if the evidence he has placed before the court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of delay on the outcome of the case – is far reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will be seldom warranted in the absence of significant prejudice to the accused...***
>
> ***Ordinarily and particularly where the prejudice alleged is not trial related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available***

only in a narrow range of circumstances, for example where it is established that the accused has probably suffered "irreparable prejudice as a result of delay."

The gist of the foregoing is that on the question of whether the Respondents' acted within their mandate, I find in the affirmative.

Briefly, I will address myself to whether the Petitioner's rights were violated. As a precursor, I remind myself of the sentiments of the Court with regard to the precision of claims on alleged violations of constitutional rights in **Mumo Matemu v Trusted Society of Human Rights Alliance and others[2013] eKLR** to wit:

"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous 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…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."

The Petitioner has alleged violation of Articles 10(2) (b), 25 (c), 27(1) and 73. This is in addition to the assertion that the 1st respondent acted beyond its mandate under Article 157(10) of the Constitution. However, despite these averments as to violations, the petitioner does not go into any details as to how these Articles have been violated. All what he contends is that the respondents failed to meet the constitutional standard of equality, integrity, transparency, rule of law and accountability by the State officers as provided by the Constitution by enforcing the 2nd respondent's ill motivated agenda against the petitioner.

The Kenyan criminal justice system is robust and has appropriate safeguards, entrenched in the Constitution no less, that guarantee the rights of the petitioner. The institution of investigations by the IPOA, which investigations have culminated in the charging of the petitioner before a court of law, especially where such investigations were conducted within the precincts of its mandate as has been amply demonstrated by the 3rd respondent, cannot in and of itself constitute a violation of the petitioner's rights. My position is not novel, in **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** the Court held:

"In our view, it would be within the mandate of an investigative body to receive complaints and to investigate them. Such bodies or entities cannot be faulted for acting on the complaints as in so

doing, they would be acting within their constitutional and statutory duty. It was stated in Josephat Koli Nanok & another v Ethics and Anti-Corruption Commission (2018) eKLR, that by undertaking investigations an investigating entity does not violate any constitutional rights, and that violation of rights may only occur in the manner in which the investigative mandate is executed. In that event, the Petitioner would be under an obligation to demonstrate that his or her rights have been violated by the manner of investigation and attendant processes."

In the same vein, I agree with the Court in **Kenneth Kanyarati & 2 others v Inspector General of Police Director of Criminal Investigations Department & 2 others [2015] eKLR** where it was stated:

"It is evident consequently that investigation of crime has a constitutional underpinning with proper statutory structures. It is to ensure that persons are not simply dragged to court and charged with offences only to turn out that there was no basis for the prosecution in the first place. The mere fact therefore of an investigation being undertaken by the 1st Respondent would not itself be unconstitutional and a party must prove much more than the investigation process alone. As was stated by Ngugi J in Peter Ngaki Njagi Vs. Officer Commanding Station (OCS) Kasarani Police Station, and others NBI HCCC No. 169 of 2012 [2013] eKLR

"(12).....an investigation into alleged commission of an offence does not amount to violation of a constitutional right. Indeed, neither does arrest and prosecution, for those are all part of the criminal justice system which is sanctioned by the Constitution."'

The court in the **Kanyarati (supra) case** went on further to state:

"I am satisfied that it is not the business of the court to identify the points of investigation. Neither is it the business of this court to wander into the merits and demerits of any intended or prospective prosecution. As was stated in R Vs. Commissioner of Police and Another Ex parte Michael Monari & Another (2012) eKLR

"The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges.

I therefore remain unconvinced that the investigations and intended prosecution of the petitioner violated his constitutionally guaranteed rights and do hold as much.

All that is left to ponder at this stage is whether the petitioner is entitled to the reliefs sought. Primarily, he seeks a declaration that the investigations and institution of criminal proceedings against him were a violation of his constitutional rights and for orders of certiorari quashing the proceedings, charge sheet and summons against him as well as orders prohibiting the respondents from proceeding with the criminal prosecution. Regarding the grant of such reliefs, **Halsbury's Laws of England 4th Edn. Vol. 1(1) para 12 page 270** has this to say:

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account

the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."

In **Kuria & 3 Others vs, Attorney General [2002] 2 KLR 69** it was held:

"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution...In the instant case there is no evidence of malice, no

evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial…In the circumstances of this case it would be in the interest of

the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

Another decision relevant in this aspect is that of **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170** where the Court of Appeal held:

"It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

It light of the preceding authorities to which I am fully aligned with, it was incumbent upon the petitioner to demonstrate to the satisfaction of the court that the respondents had somehow abused, overstepped or exercised their mandate unlawfully in carrying out

the said investigations and prosecuting the petitioner in order for the reliefs sought to avail to him. It is not enough to simply state that the decision by the respondents to undertake an investigation and mounting criminal charges against the petitioner constituted an abuse of court process. The petitioner did not demonstrate any unlawful actions, excess or want of authority, evidence of malice, evidence of intimidation or even of manipulation of court process so as to seriously impede the likelihood of him getting a fair trial as provided for under Article 50 of the constitution. In the absence of such proof, this court is unable to bring the intended criminal proceedings against the Petitioner to a halt.

As I pen off, I find it necessary to note that even in the event that the Petitioner, upon acquittal of the charges levelled against him in the intended criminal prosecution, feels aggrieved by the conduct of said prosecution, he would still have a recourse in law. In such a circumstance, nothing would stop him from bringing forth an action grounded in a Constitutional Tort. A constitutional tort is used to protect fundamental rights and freedoms, especially in circumstances where a public official's conduct is fairly characterized as an abuse of power. In such an action, as a remedy, the petitioner would as a matter of right be able to apply for a declaration of a violation of his rights and claim damages too. This position is not alien, the Courts have held, as they did in **Kimunai Ole Kimeiwa & 5 others v Joseph Motari Mosigisi (The then District Commissioner, Rongai District) & 3 others Petition 38 of 2014 [2019] eKLR** that a suit characterized by abuses of power by the investigative and

prosecutorial agencies can be properly founded under the Constitution. In that case it was held:

> ***"This argument would work if this was a suit sounding only in torts. However, looking at the pleadings, the substance of the suit can only be called a Constitutional Tort. Almost always a suit for malicious prosecution involves some allegation of deprivation of liberty as guaranteed in the Bill of Rights. This, then, implicates the concept of a Constitutional Tort in cases such as this one. As Prof. Michael Well explains, the prime objective of a constitutional tort is to protect a broad range of common law interests encompassed within the Bill of Rights' liberty interests in circumstances where the official's conduct is fairly characterized as an abuse of power."***

Similarly, in **John Atelu Omilia & another v Attorney General & 4 others Petition 447 of 2015 [2017] eKLR**, faced with a case that had allegations of violations of human rights by investigative agencies, the court held:

> ***"...In cases of violation of fundamental rights, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the actions complained of. The court should examine the case in light of the provisions of the Constitution..."***

Going further, it was stated:

> ***"...Even though, the petitioners could properly have sued for malicious prosecution, to me, the above issues are justiciable controversy appropriate and ripe for judicial determination, hence, the need for this court to determine the constitutionality or otherwise of the said allegations their acquittal notwithstanding."***

The long and short of it is that the petitioner herein seeks to jump the gun at an interlocutory stage by urging the Court to interfere, prematurely in my view, with the laid-out process to be followed in the instance of a criminal prosecution. He essentially has presented what ostensibly would be his defence in the criminal proceedings against him to this Court and asked that the Court stop those proceedings from going any further. Unfortunately, this Court shall not countenance such a position, for the reasons laid bare in the foregoing discourse.

I find solace in the words of the court in **Kipoki Oreu Tasur V Inspector General Of Police & 5 Others [2014] eKLR** where it was held:-

> ***"The criminal justice system is critical pillar of our society. It is underpinned by the constitution and its proper functioning is at the core of the rule of law and good order in society, that it should be allowed to function with no interference from any quarter or restraining from the superior courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated."***

I am also guided by the finding by **Lenaola J** (as he then was) in **Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR:**

> ***"In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable"***

The petitioner will have ample opportunity to ventilate on his innocence in the more befitting arena that is the trial court. As it stands, the remedies he sought in this Petition cannot avail to him.

In the upshot, the petition dated 5th October 2020 is found to be without merit and is hereby dismissed with costs to the 3rd respondent.

It is so ordered.

Dated, Signed And Delivered At Malindi On This 8th Day Of February 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Swaka for the petitioner: johnswaka@yahoo.com
2. Mr. Kinoti for IPOA for the third respondent: festus.kinoti@ipoa.go.ke
3. Mr. Alenga for the DPP: kilifi@odpp.go.ke