



**Cherop & 4 others v Director of Public Prosecutions & 6 others; Attorney General
& another (Interested Parties) (Constitutional Petition 35 & E019 of 2021
(Consolidated)) [2022] KEHC 10224 (KLR) (3 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 35 & E019 OF 2021 (CONSOLIDATED)**

JO NYARANGI, J

JUNE 3, 2022

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF ARTICLES 2(4), 10, 19, 20(1), & (2), 22(1), 23, 25,
27, 28, 47 (1), 48, 49 (1), 50(1) & (2), 157 (11), 165(3) (B), 169, 172 (C), 201
(D), 227 (1), 232 (1), 236 (A) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF VIOLATION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER THE CONSTITUTION**

AND

**IN THE MATTER OF CONTRAVENTION OF
ARTICLE 201, 227 AND 232 OF THE CONSTITUTION**

AND

**IN THE MATTER OF CONSTITUTIONALITY AND STANDING OF SECTION
82 OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015**

AND

**IN THE MATTER OF THE CONSTITUTIONALITY AND STANDING OF THE SPECIAL
MAGISTRATES AND THE COURT OF THE SPECIAL MAGISTRATES UNDER SECTIONS
3, 4 AND 5 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003**

AND

**IN THE MATTER OF CONTRAVENTION OF ARTICLE 10 OF THE
CONSTITUTION, 2010 AS READ WITH ARTICLE 157(B) OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF CHAPTER
SIX OF THE CONSTITUTION (LEADERSHIP AND INTEGRITY)**



AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
THE PUBLIC PROCUREMENT & ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE
TRANSITIONAL PROVISIONS UNDER PARAGRAPH 1 OF THE THIRD
SCHEDULE OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF CONTRAVENTION OF THE LEADERSHIP AND
INTEGRITY AUTHORITY ACT, 2012; THE PUBLIC OFFICER ETHICS ACT,
2009 AND KENYA MARITIME ACT, 2006; FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

COSMAS KIPLAGAT CHEROP PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

ANTI-CORRUPTION COURT 3RD RESPONDENT

NANCY KARIGITHU, PRINCIPAL SECRETARY OF THE STATE

DEPARTMENT FOR SHIPPING & MARITIME AFFAIRS 4TH RESPONDENT

BOARD OF DIRECTORS OF KENYA MARITIME AUTHORITY 5TH
RESPONDENT

AND

ATTORNEY GENERAL INTERESTED PARTY

PARTY INSPECTOR GENERAL OF STATE CORPORATIONS INTERESTED
PARTY

AS CONSOLIDATED WITH
CONSTITUTIONAL PETITION E019 OF 2021

BETWEEN

ROBINSON MWANGI KARIGUH 1ST PETITIONER

PETER KIMANI KINYANJUI 2ND PETITIONER

JARED BIWOTT 3RD PETITIONER



DENIS KIPKORIR NGENO 4TH PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

ANTI CORRUPTION COURT AT MOMBASA 3RD RESPONDENT

JUDGMENT

Background

1. Mr. Cosmas Kiplagat Cherop vide Petition dated December 10, 2020 accompanied by a Notice of Motion of even date, approached this Court seeking, *inter alia*; orders to quash the charges preferred against him by the 1st Respondent and conservatory orders staying further the proceedings in Criminal Case No. 3 of 2020 *Republic v Joel Kiprono Bii & 11 others*, Mombasa Chief Magistrate Anti-Corruption Court.
2. Upon considering the application dated 10th December, 2020, the same was compromised for the hearing of the Petition. However, conservatory orders staying further the proceedings in Criminal Case No. 3 of 2020 *Republic v Joel Kiprono Bii & 11 others*, Mombasa Chief Magistrate Anti-Corruption Court were granted pending hearing and determination of the Petition.

a. Introduction

3. This judgment disposes two consolidated Petitions, namely; Petition No. 35 of 2021 originally filed at Nairobi Milimani high court as Petition number E026 of 2021 before it was transferred to Mombasa high court on 10th February 2021 where it was given its current number (hereinafter referred to as the first Petition) and Petition No. E019 of 2021 also referred from Nairobi and later consolidated as stated (herein after referred to as the second Petition).
4. The first Petition was instituted by Cosmas Kiplagat Cherop the first Petitioner, who is the 11th accused person charged in the Anticorruption Court, Mombasa in the Criminal Case No. 3 of 2020.
5. The second Petition was instituted by Robinson Mwangi Kariguh, Peter Kimani Kinyanjui, Jared Biwott and Denis Kikorir Ngeno who are the 5th, 8th, 9th and 10th accused persons respectively charged in the Anticorruption Court, Mombasa in the Criminal Case No. 3 of 2020.
6. In respect of both petitions, the first Respondent is the Director of Public Prosecutions established under article 157 of the [Constitution](#) with Constitutional mandate to *inter alia* institute and undertake criminal proceedings against any person before any Court (other than a Court martial) in respect of any offence alleged to have been committed.
7. The 2nd Respondent is the Ethics and Anti-Corruption Commission, a Constitutional Commission established pursuant to article 79 of the [Constitution](#), with the status and powers of a commission under Chapter 15 of the [Constitution](#), for purposes of ensuring compliance with, and enforcement of, the provisions of Chapter 6 of the [Constitution](#).
8. The third Respondent is the Honourable Attorney General, the Principal government legal adviser and representative pursuant to article 156 of the [Constitution](#). He represents the national government



in Court or in any legal proceedings to which the national government is a party, other than criminal proceedings.

9. In respect to the first petition, the fourth Respondent is the Principal Secretary of the State Department for shipping & Maritime affairs, the complainant who communicated to the 2nd Respondent to ask for investigations into the allegations of malpractices at KMA.
10. The fifth Respondent is the Board of directors of the Kenya Maritime Authority a corporate organization in which during the material time to these proceedings the petitioner was the Acting Managing Director.
11. The 1st Interested Party is the inspector general of state corporations and the 2nd interested party is again the Attorney General whose role have already alluded to.
12. The point of convergence between the two Petitions is that they both challenge the Charges preferred against both Petitioners before the Anticorruption Court, Mombasa in Criminal Case No. 3 of 2020 in relation to a project initiated by the Kenya Maritime Authority for the construction of an ultra-modern building to serve as its headquarters on Plot LR Number MSA/BlockXLVIII/128. The Petitions herein revolve around the constitutionality of the pending criminal proceedings and the relevant and applicable public procurement provisions (*Act*) during the questioned procurement process the subject of the said criminal case hence the interpretation of the *Constitution* which is a preserve of the High Court.

The First Petition

13. The first Petition is the amended Petition filed on 6th April, 2021. It questions the Constitutionality of the charges which he alleges violates his fundamental rights to a fair trial guaranteed under articles 49 (a) (1) (a) & (c), 50(1) and 50(2), (b) (e) (n) of the *Constitution* to the extent that the said charges are not recognized in any law in Kenya nor international law. That the charges were maliciously instituted without proper investigation and at the 4th respondent's instigation.
14. For ease of reference, the petitioner was on 15th October together with 11 others arraigned before Mombasa chief magistrate's court facing various corruption related charges. Those charged under A/C case number 3 of 2020 were Joel kiprono Bii(A-1), Oluoch Seth Arende(A-2), Bakari Omar Bakuyu(A-3),Juma Ahmed Ali(A-4), Robinson Mwangi Kariguh(A-5), Jemimah Mkaluma Musinga(A-6), Francis Okello Oluoch(A-7),Peter Kimani Kinyanjui(A-8), Jared Biwott(A-9), Denis Kipkorir Ngeno(10), Cosmas Kiplagat Cherop(A-11) and Edwin Mong'are Momanyi(A-12).
15. In respect to count VII, he is charged with wilful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the *Anti-Corruption and Economic Crimes Act* of 2003. Particulars provides that; on 11th January 2017, at Kenya Maritime Authority, Mombasa County, in the republic of Kenya, being a person employed in the public service, to wit Acting Director General Kenya Maritime Authority, wilfully failed to comply with Section 44(2)(g) of the *Public Procurement and Asset Disposal Act*(2015) by failing to ensure procurement procedures were followed by approving award of tender in respect of tender number KMA/RFP/001/Office Block 2016/2017, at adjusted tender sums which had been adjusted by the evaluation committee contrary to section 82 of the *Public Procurement and Asset Disposal Act* 2015.
16. As to count VIII, again the charge is similar to that in respect of count VII save for change in particulars which states that; on 19th January 2017, at Kenya Maritime Authority, Mombasa County, in the republic of Kenya, being a person employed in the public service, to wit Acting Director General Kenya Maritime Authority, wilfully failed to comply with Section44(2)(g) of the *Public Procurement*



- and Asset Disposal Act* (2015) by failing to ensure procurement procedures were followed by approving award of tender in respect of tender number KMA/RFP/003/Electrical/2016/2017 and KMA/RFP/005/Plumbing/2016/2017, at adjusted tender sums which had been adjusted by the evaluation committee contrary to section 82 of the *Public Procurement and Asset Disposal Act* 2015.
17. According to the petitioner, Kenya Maritime Authority (hereafter KMA) commenced procurement process for the construction of its modern headquarters by placing advertisements of tender No. KMA/06/ONT/EOI/2014-15 in the Daily Nation newspaper on 1st May, 2015 pursuant to the *Public Procurement and Asset Disposal Act* 2005 (repealed) (Hereinafter “the repealed act”) and *Public Procurement Regulations*, 2006 (now revoked). That this was before the enactment of the new procurement laws popularly known as the 2015 *PP & AD Act*, which came to effect on 7th January, 2016.
 18. He went further to state that the *new Act* did provide a saving and transitional clause under Section 183 which allowed application of the *former Act* (repealed) only in respect of the procurement proceedings commenced before the new law. That pursuant to that provision, the PS treasury issued a circular No. 2/2016 of 1st April 2016 advising all procurement entities on the significance and applicability of Section 183 of the *PP&AD Act* 2015
 19. That the subject procurement proceedings having commenced by way of advertisement on 1st May 2015 and in obedience to Section 183 of the *PP & ADA 2015* and the PS treasury circular aforesaid, the applicable law was the *PP&AD ACT* 2005 and the attendant regulations of the year 2006.
 20. That the petitioner having been appointed as the Acting MD on 23rd May 2015 oversaw the exercise of procurement to completion. He went further to state that, prior to the commencement of the tender for construction, the KMA had contracted M/S LIN Consult on 27th April 2016 to provide consultancy services in ; conceptualizing the designs of the KMA office building; provide detailed architectural design and engineering construction drawings of the KMA office complex; to prepare the required tender specifications and the tender documents for the selection of a suitable contractor; to provide technical assistance during bidding, bid evaluation and contract negotiations; to supervise and manage the construction to ensure completion within the budget and the required building standards.
 21. Having been fully constituted, the evaluation tender committee commenced the process. That in the course of evaluation, the evaluation committee noticed some arithmetic errors of the submitted bids hence decided to correct the same allegedly under the powers conferred by Section 63 of the *PP&ADA* 2005. Among the corrections made were;
 - a. Tender Number KMA/RFP/001/Office Block/2016-2017 where; EPCO builders Limited’s bid read out during opening was KShs 1,728,179,418, Parbat Siyani Construction limited kshs 1,828,119,427; China Zhongxing construction Co. LTD kshs 1,920,134,408 and Dinesh Construction LTD 1,966,986, 687.35 which after correction respectively were altered to read Kshs 1,825,239,939.24, Kshs 1,854,518,481.24, Kshs 1,944,226,387.5 and Kshs 1,966,986,687.35 hence EPCO was awarded the contract using the altered amount which was higher than the quoted and corrected amount
 - b. Tender KMA/003/Electricals/2016-2017 subcontract for provision of electrical works tendered at the opening tender sum of; Master Power Systems LTD Kshs 115,976,976, Mehta Electricals LTD Kshs 279,463,907; Tudor Engineering LTD kshs 228,908,852 which sums after the stated arithmetic correction respectively read; Kshs 224,292,876.11, kshs 279,746,749.95 and 319,604,316.20 hence the award of the contract to Master Power Systems Ltd



the lowest bidder at the adjusted/corrected amount which was higher than the quoted tender opening sum.

- c. Tender No. KMA/005/Plumbing,2016-2017 subcontract for procurement of plumbing, drainage and fireworks the opening tender sum was; Volcanic Plumbing Works Kshs 86,500,000;Plumbing Systems Limited Kshs 80,625,000 and Anthopi Mechanical Engineering Works LTD Kshs95,399,847 which after the stated arithmetic correction respectively read; kshs 86,500,000, kshs 79,841,217, and 96,242,636.55 hence the award of the contract was made in favour of plumbing Systems the lowest bidder at the adjusted/corrected figure of kshs 79,841,217 hence a lower figure than the quoted price at the opening point.
22. The Petitioner stated that Section 44(2) (g) and 82 of the [Public Procurement and Assets Disposal Act](#) 2015 (Hereinafter “the Act”) did not apply to the evaluation of the tenders. Therefore, the evaluation committee was not obligated to comply with the said provisions of the Act and instead in correcting the said arithmetic errors, Section 63 of the [repealed Act](#) and Regulation 50 and 51 of the [Public Procurement and Disposal Regulations](#), 2006 (revoked) applied.
23. In the petitioner’s view, it would be erroneous to apply Section 82 of the [PP&ADA](#) 2015 which out-laws correction of arithmetic errors retrospectively while the contract was under the old regime ([PP&ADA](#) 2005) which allowed such correction under section 63 which in this case saved the procuring entity a good amount of money in the subcontract for plumbing works. That the action by the evaluation committee to correct arithmetic errors was intended to effectuate and enhance fairness, accountability, transparency and competitiveness by putting bidders in an even ground in compliance with Article 201 and 227 of the [Constitution](#).
24. That signing and sending the award letters to the respective successful bidders did not amount to an illegality nor a criminal offence. He further stated that Section 79(1) of the 2015 [Act](#) contemplates correction of errors contrary to Section 82 which does not promote transparency, accountability and competitiveness envisaged under Article 227 of the [constitution](#) hence void abnatio for contravening the constitution.
25. It is the Petitioner’s case that he has not been allowed reasonable access to the evidence in the possession of the 1st Respondent, and to date, he is yet to be provided with all the evidence the prosecution intends to rely on. That as a consequence of the foregoing he has incurred travel and accommodation expenses for himself and his counsel since he lives in Eldoret and has to travel all the way to Mombasa.
26. The Petitioner averred that he was arrested at about 9:30am on 9th June, 2020, but he was never informed of the reasons for the arrest, his mobile phone was confiscated and he was denied an opportunity to communicate with an advocate, his family or anyone who could be of help to him. Further, the Petitioner avers that the 2nd Respondent kept him in custody at Central Police Station Mombasa and that both the 1st and 2nd Respondent never conducted a mandatory cautionary statement on him.
27. It is the Petitioner’s further case that the charges against him contravene Articles 50(1), 50(2) (b) and 157(11) of the [Constitution](#) to the extent that, the said charges are grounded on a terminated contract and two amended contracts, and prosecuting the said charges do not serve the interest of justice hence an abuse of the Court process.
28. The Petitioner stated that the special magistrate trying him in criminal case no. 3 of 2020 at Mombasa Anti-Corruption Court is in violation of his right to a fair hearing under Article 50(2) (d) of the [Constitution](#) as the Court is not established under the [Constitution](#). That the [Constitution](#) does not grant the Chief Justice any power to appoint any judicial officer. Further, the Petitioner averred that



- under Section 3(1) of the [Anti-Corruption and Economic Crimes Act](#), 2003, the Chief Justice has been purportedly conferred unconstitutional and illegal powers to appoint “special Magistrates”, yet it is the Judicial Service Commission that is the only organ mandated under Article 172(1) (c) of the [Constitution](#) to appoint magistrates.
29. It is the Petitioner’s case that Article 161 of the [Constitution](#) specifies officers who serve in the judiciary and Article 172 (1) (c) of the [Constitution](#) grants the Judicial Service Commission the power to appoint magistrates to serve in subordinate Courts established under Article 169. Therefore, pursuant to Article 2(4) of the [Constitution](#), Section 3 of the [Anti-corruption and Economic Crimes Act](#) is void to the extent that it is inconsistent with Article 161(1) and 172(1) (c) of the [Constitution](#). That in the same, Section 5 of the [Anti-corruption and Economic Crimes Act](#) is void to the extent that it is inconsistent with Article 169 of the [Constitution](#).
 30. The petitioner further claimed that before he was charged, he was forced to go on compulsory leave by the 5th Respondent to undergo vetting on suitability test to continue serving contrary to Circular Ref. No. OP/CAB39/1A issued by the Head of Public Service on the 4th June, 2018 requiring and affecting only Heads of Procurement Units and Accounting Unit officers to go on compulsory leave which circular was not applicable to him as he was none of those. In his view, the 5th respondent’s act amounted to a violation of his constitutional rights as well as breach of the [Fair Administrative Action Act](#).
 31. The Petitioner averred that he was never recalled from compulsory leave, since the 5th Respondent ignored the judgment delivered on 20th July, 2018 in [Okiya Omtatah Okiiti v Joseph Kinyua, Public Service Commission & Attorney General](#) that declared the impugned compulsory leave to be unconstitutional. However, on 24th January, 2020, the 5th Respondent deployed him to Lamu to take up a task designated for a junior officer 3 levels below him thus usurping the powers of the Director general on supervision of staff.
 32. Pertaining the 4th Respondent’s hatred against him, the Petitioner stated that the 4th Respondent harbours a vicious vendetta against him which can be traced from her acrimonious departure from KMA as the Director General. That when the 4th Respondent was appointed the Principal Secretary in charge of KMA, she used her new found state power and privilege of her office to victimize, discriminate, disrespect and harass the Petitioner in violation of the Petitioner’s rights guaranteed under Article 27, 41 and 47 of the [Constitution](#) hence the criminal charges herein is a perpetuation of the said differences.
 33. In conclusion, the Petitioner prayed for the following reliefs: -
 - a. A Declaration that the applicable law for the procurement process for the Kenya Maritime Authority building project on Plot LR Number MSA/Block Xlviii/128 Was The [Public Procurement And Asset Disposal Act](#) of 2005 (repealed) and the [Public Procurement And Asset Disposal Regulations](#), 2006.
 - b. A Declaration that the charges violate or threaten to violate the Petitioner's right to fair trial under Articles 50(1); 50(2) (n); 50(2)(e) ,(j); 50(2)(b); 50(2)(d).
 - c. A Declaration that Section 82 of the [Public Procurement and Asset Disposal Act](#), 2015, is void to the extent that it is inconsistent with Article 201 (d), 227 (1), and 232 (2) of the Constitution.
 - d. A Declaration that the Judicial Service Commission, as per Article 172 (1) (c) of the Constitution, is the only organ with the Constitutional mandate to appoint judicial officers, such as the so-called "special Magistrates".



- e. A Declaration that the Chief Justice does not have the Constitutional power to appoint judicial officers known as "special Magistrates". Therefore, his act of appointing special Magistrates is void to the extent that it is inconsistent with Article 172 (1) (c) of the Constitution.
- f. A Declaration that pursuant to declarations "d" and "e", the Court trying the Petitioner lacks jurisdiction.
- g. A Declaration that the 4th Respondent violated the Petitioner's rights under Articles 41(1) and 47(1) of the Constitution.
- h. A Declaration that the 4th Respondent contravened Articles 10(2); Article 73(1) (a)(i), (ii), and (iii) and 2(b); 75(1)(a) and (b); Article 210(1)-, Article 232(1)(a), (c), and (e).
- i. A Declaration that the 4th Respondent contravened Sections 7, 8, 9, 10, 11, 13, and 16 of the Leadership and Integrity Act, 2012; Sections 9, 10, and 12 of the Public Officer Ethics Act, 2003; Sections 4 and 6 of the Fair Administrative Action Act, 2015.
- j. A Declaration that the 5th Respondent violated the Petitioner's fundamental rights under Articles 41(1) and 47(1) of the Constitution.
- k. A Declaration that pursuant to declaration "g" above, the 4th Respondent should be personally liable for any damages that may accrue because of the same.
- l. A Declaration that the Director General of Kenya Maritime Authority has the sole power of control over personnel, including deployment of staff, as per Section 11(2) of Kenya Maritime Authority Act, 2006. Hence, the 5th Respondent usurped the powers of the Director General when it sent him on compulsory leave and deployed him to Lamu to serve in a junior position.
- m. A Declaration that the Petitioner is entitled to general and exemplary damages against the Respondents herein jointly and severally for the breach of the Petitioner's rights as enumerated above.
- n. An Order of Mandamus to be issued compelling the 1st, 2nd and 3rd Respondents to terminate the investigations, prosecution, and trial of the Petitioner in Criminal Case No. 3 of 2020 in the Special Magistrate Anti-Corruption Court at Mombasa And Court proceedings therein be set aside with finality.
- o. The Costs of this Petition and interest thereon.
- p. A Declaration that if this Honourable Court finds favour in any of the prayers "g" "h" "i" and "l" above then it be found prudent to declare the 4th Respondent unfit to hold any public office.
- q. A Declaration that pursuant to declarations "j" above, the 5th Respondent should be liable for any damages that may accrue because of the same.

Second Petition

34. The second Petition (original Petition no E019 of 2021) was filed on the 24th March, 2021 by the four Petitioners. The affidavit in support of the Petition is sworn by the 1st Petitioner on behalf of the other Petitioners. He is an expert who was sourced by the KMA as an attendee of the evaluation committee. He is charged with wilful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with Section 48 of the Ant-corruption and economic crimes Act 2003 (See count II).



35. Particulars are that between 15th December 2016 and 1st January 2017 at Mombasa County in the republic of Kenya being a person sourced by Kenya Maritime Authority to be an expert and an attendee of the evaluation committee for tender number KMA/RFP/001/ Block 2016-2017 wilfully failed to comply with Section 82 of the Act by adjusting the tender sums on the bid documents relating to the said tender for three companies namely; Master Power Systems limited, Mehta Electrical Limited, and Tudor Engineering Limited contrary Section 45(2)(b) as read with section 48 of the Anti-corruption and economic crimes Act 2003.
36. On the other hand, the 2nd 3rd & 4th Petitioners were charged with wilful failure to comply with Section 82 of the Act by adjusting the tender sums on the bid documents relating to the said tender for three companies namely; EPCO Builders Ltd, Prabat Siyami Construction and China Zhongxing Construction Company Ltd contrary to Section 45(2) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act 2003.
37. It is the Petitioners' case that they; were merely hired and sourced consultants; are not government employees; did not have control as to the administration, custody, management receipt, or use of any part of the public revenue or public property, and therefore, the charges preferred against them are unknown in law. That the charges against them are fatally defective, and no amendment can cure importation of the terms "responsibility of the Petitioners" if any.
38. It is also the Petitioners' case that the charges preferred against them by the 1st Respondent violates Article 157 of the Constitution requiring the 1st Respondent to consider the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Further, the preferred charges prejudice the Petitioners' rights guaranteed under Article 47 of the Constitution, since they do not have or include any essential ingredients of the charge under the law and that it imports an unknown ingredient into Section 45(2) (b) of the Anti-corruption and Economic Crimes Act 2003 'expert and attendees' who have no association to the charge preferred.
39. In the end, the four Petitioners prayed for the following reliefs: -
- a. A Declaration be and is hereby issued that the charges against the Petitioners violate their rights under Article 47 of the Constitution of Kenya.
 - b. A Declaration be and is hereby issued that the charges violate or threaten the Petitioners' rights under Article 50 (2) (b) of the Constitution of Kenya.
 - c. A Declaration be and is hereby issued that the charges against the Petitioners are unknown in law, therefore fatally defective.
 - d. An Order of Mandamus to be issued compelling the 1st and 3rd Respondents to terminate the Court proceeding against the Petitioners in Criminal Case number 3 of 2020 *Republic v Joel Kiprono Bii and 11 others*.
 - e. An Order of Prohibition be and is hereby issued restricting the 1st Respondent from charging or recharging the Petitioners with the same charges as in Criminal Case Anti-Corruption Case 3 of 2020.
 - f. The Petitioners be awarded the Costs of the Petition and interest.

The Cross Petition and Reply to the First Petition

40. In response to the 1st Petition, the 4th Respondent Ms. Nancy Karingithu filed a reply to the amended petition and a Cross Petition dated 13th April, 2021. Her case is that Section 22 as read with Section



- 12 of the [National Government Coordination Act](#) protects her from personal liability for any action, claim or demand in connection with any acts done for the purpose of executing the functions of her office. That in any event, the 1st and 2nd respondents are independent office bearers who do not work under instruction when preferring criminal charges against anybody.
41. She denied instigating or even influencing the investigation and or prosecution of the petitioner in the first petition. She further denied involvement in any of the petitioner's misfortunes at his place of work and that she has not in any way used her position as principal secretary to frustrate the petitioner's career progression and attainment of greater opportunities at his place of work. In a nutshell, she put the petitioner to strict proof and urged the court to allow the trial court to substantively hear the case and determine the same on merit including the question of correction of arithmetic errors.
 42. With regard to the cross petition, she stated that she is an accomplished maritime law expert who has received and achieved various awards and recognitions, inter alia; presidential Award of the Order of the Moran of the Burning Spear (MBS) in 2007 and the first principal secretary to be appointed for the newly created state department for Shipping and Maritime Affairs within the Ministry of Transport, Infrastructure & Urban Development the year 2015.
 43. It is her case that the Petitioner caused to be published an Article in an online publication "kahawatungu.com", on the link <https://www.kahawatungu.com/ps-nancy-karingithu-corrupt-dealings-kenya-maritime-authority> under the heading "PS Nancy Karingithu On Spot Over Corrupt Dealings, Rot In Kenya Maritime Authority (herein after" the September 2020 Article").
 44. That by virtue of Article 28 of the [Constitution](#), she has a Constitutional right to inherent dignity which should be respected and protected as envisaged in the bill of rights. That Article 29(d) of the [Constitution](#) guarantees her the right and freedom and security of person, which includes the right not to be subjected to torture in any manner, whether physical or Psychological.
 45. She claimed that the Article in an online publication "[kahawatungu.com](#)" was shared on Facebook, Twitter, Pinterest, WhatsApp and on Flipboard. According to her, the published words were understood to mean that; she had manipulated the proper functioning of a Government Institution; was not a team player; corrupt; antisocial; deadwood; useless; quarrelsome; angry; influenced the removal of the Petitioner and that she was responsible for corruption and the deteriorating standards at the Kenya Maritime Authority.
 46. It is also the 4th Respondent's case that on or about 7th April 2021, the Petitioner caused to be published an Article in an online publication "[kahawatungu.com](#)", on the link <https://www.kahawatungu.com/ps-nancy-karingithu-sued-by-kma-senior-manager-corruption-colluding-shippers-evade-sh3-billion-taxes/under> the heading "PS Nancy Karingithu Sued By KMA Senior Manager Over Corruption and Colluding With Shippers To Evade Sh 3 Billion in Taxes".
 47. She further claimed that the published words were understood to mean that she was a fraudster for overseeing the fraudulent purchase of plot LR Number MSA/BlockXLVIII/128 in which the government astoundingly paid Kshs. 195,000,000.00 to buy land it already owned through the Kenya Railways Corporation (KRC) and that she was unfit to hold public office since she lacked in Integrity and leadership.
 48. It was her position that the 8th April 2021 and the September 2020 Articles are malicious, untrue, grossly offensive and affect her. That the said Articles amount to gross violation of her Constitutional right to inherent dignity, the right to have that dignity respected and protected and the right to be subjected to psychological torture. Consequently, the 4th Respondent prayed for compensatory and exemplary damages against the Petitioner.



49. She sought the following reliefs: -

- a. Compensatory damages for violation of the Constitutional right to inherent dignity, and the right to have that dignity respected and protected, as guaranteed in Article 28 of the Constitution;
- b. Further compensatory damages for violation of the Constitutional right to freedom and security of the person, which includes the right not to be subjected to psychological torture in any manner, as guaranteed in Article 29(d) of the Constitution;
- c. In addition to (a) and (b), damages in tort for defamation;
- d. Exemplary damages;
- e. A permanent mandatory injunction compelling the Petitioner to stop the continued circulation of the offensive Articles and their removal from all platforms on which they have been posted;
- f. A further order of injunction restraining the Petitioner from causing the publication of Articles, messages and any other form of communication in any print or electronic media, and in particular in social media;
- g. Costs of the Cross-Petition;
- h. Interest on damages and costs at Court rates until payment in full; and
- i. Such further or other relief as this Honourable Court may deem fit to grant.

The 1st Respondent' Response.

50. The 1st Respondent opposed the first Petition vide Grounds of Opposition dated 22nd March, 2021. The second Petition was opposed vide Replying Affidavit sworn on 11th June, 2021 by Marinda Berryl prosecution counsel ODDP'S office. The grounds in Opposition have been reproduced verbatim as follows:

- a. The Prayers sought by the Petition are unconstitutional as they seek to prevent the 1st Respondent from exercising its mandate. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.
- b. The Petitioner has not adduced reasonable evidence to show that criminal proceedings are mounted for an ulterior purpose and have not demonstrated how the 1st Respondent has acted without or in excess of powers conferred upon them by law.
- c. The Petitioner must demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed.
- d. The facts raised by the Petitioner can be raised at the trial Court as the accuracy and correctness of the facts or evidence gathered by the Respondents can only be assessed and tested by the trial Court, which is best equipped to deal with the quality and sufficiency of evidence gathered in support of the charges.
- e. Article 157 of the Constitution is to the effect that the 1st Respondent shall institute criminal proceedings only where a criminal offence has been committed.



- f. Article 24 (1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.
- g. The Petitioner has merely stated his rights and has failed to meet the specificity Rule as espoused in the case of Anarita Karimi Njeru v Republic(1979) and therefore the Petition commends only one order and that is striking out on the grounds that having failed to meet the specificity Rule it remains scandalous, speculative and does not meet the doctrine of ripeness since a defect in the charges can in any event be remedied under Section 214 of the Criminal Procedure Code. Failed to demonstrate how each of his specific rights stated in his application have been or will be infringed, violated and or threatened by the 1st Respondent if the criminal proceedings proceed.
- h. That the Public Procurement and Asset Disposal Act (PPDA) 2015 ought to be read and interpreted in a wholesome manner as the purported interpretation of Section 63 ought to be in line with Section 82 of the same Act which is specific on the tender sum and states that the same ought to be absolute and final and not to be the subject of correction, adjustment or amendment in any way. Section 82 of the PPDA was in operation by 12th August 2016 when the advertisement for the subject tender was published and thereafter processed and finalized.
- i. That the question of jurisdiction of the trial Court is a matter that should be determined in limine by the trial Court and not the High Court since to do so the High Court will be unconstitutionally usurping the power of the trial Court.
- j. That Section 5(2)(c) of the Judicial Service Act, 2011 as read with Section 3 of the Anti-Corruption and Economics Crimes Act, 2003 gives the Chief Justice powers to appoint special magistrates to preside over corruption and economic crimes and any related offences and we confirm that the Honourable the trial Court has jurisdiction.
- k. Section 79 and Section 82 of the PPDA do not in any way contradict each other, as the said provisions are completely different in substance.
- l. That on the issue of Constitutionality of Section 82 of the PPDA, we invite the Court to apply the Rule of presumption of Constitutionality of statutes in interpreting that Section which dictates that a statute is Constitutional until the same is declared unconstitutional.
- m. That objections raised by the Petitioner to the charges ought to be raised sua sponte before the trial magistrate and cannot in any event form a basis of a Constitutional challenge since the Petitioner faces a multiplicity of counts that only the trial Court upon hearing evidence would be in a position to determine the suitability of the charges or otherwise.
- n. It is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.
- o. The Petition is misconceived, frivolous, vexatious, as the Petitioners have not demonstrated how the 1st Respondent acted illegally, unreasonable, *ultra vires* and or contrary to natural justice.
- p. The Petition is without merit, an abuse of Court process and should therefore be dismissed with costs to the Respondents.



51. In the Replying affidavit, it is the 1st Respondent's case that the Petition dated 23rd March, 2021 is an abuse of the Court process as it is abstract, vague, generic hypothetical and academic as it does not raise any real or ripe issues/controversies to warrant the intervention of this Constitutional Court.
52. The deponent avers that the writs of prohibition and mandamus sought in the application and Petition violate the provisions of Article 27, 47, 50, 79, 157, 159 and 259 of the Constitution, Section 1, 2,3,4,5, 6,23 and 26 of the ODPP Act as it seeks to curtail the Constitutional powers of the 1st Respondent in exercise of their lawful mandate of prosecution which is detrimental to public interest and Rule of law.
53. It is also deponed that whether the Petitioners bear responsibility as hired consultants are matters of evidence, and that their veracity and correctness can only be tested by the trial court upon prosecution being given a chance to present their case and the petitioners to cross examine.
54. In closing, the deponent averred that the public interest in this matter outweighs the interests of the Petitioners and as such, the balance of convenience tilts in favour of the 1st Respondent and it is in public interest and justice that the orders sought herein be declined.

Second Respondent's Response

55. The 2nd Respondent opposed the first and second Petition vide Replying affidavit sworn on 1st April, 2021 by Mohamednoor Issack, an investigator with the 2nd Respondent. He averred that as an investigator the commission has the powers, privileges, and immunities of a police officer, and that the 2nd Respondent is established as an Independent Constitutional Commission under Section 3 of the Ethics and Anti-Corruption Commission Act (EACC Act) pursuant to Article 79 of the Constitution. It was deponed that pursuant to Article 252(1) (a) of the Constitution as read with Section 13(2) (c) of the EACC Act, the 2nd Respondent has the power to independently and free from influence to conduct investigations on its own initiative or on a complaint made by any person. Further, pursuant to Section 25 of the Anti-Corruption and Economic Crimes Act, the 2nd Respondent is under a legal obligation and duty bound to investigate all complaints it receives, and to inform a complainant in writing should it decline to investigate or discontinue any investigation before it is concluded.
56. On the issue of access to the evidence in the custody of the 2nd Respondent, the deponent averred that the commission is under a duty to protect its informers in accordance with Section 65 of the Anti-Corruption and Economic Crimes Act. Consequently, some information has been concealed from furnished evidence to be produced or inspected in connection with the proceedings.
57. With regard to the instant case, the deponent avers that the 2nd Respondent commenced its investigations on suspected malpractice in the tender for the construction of an office block by the Kenya Maritime Authority vide Tender No. KMA/RFP/001/Office Block/2016/17-Proposed development of office block on Plot No. Block XLVIII/128 in Mombasa (Herein after" the office block tender"). Preliminary investigations into the alleged malpractice revealed that the office block tender was initiated through a pre-qualification process as supported by Procurement Professional Opinion dated 16th September, 2016, Arising from the approval by the Petitioner on 16th September, 2016, a list of Pre-Qualified Suppliers was prepared by KMA.
58. After invitation of bids from prequalified suppliers, the deponent states that it was established that bids were received from four firms namely; EPCO Builders Ltd, Dinesh Construction Limited, Parbat Siyani Construction Ltd, and China Zhongxing Construction Co. Ltd. Eventually, EPCO Builders Ltd, was awarded the office block tender at a corrected sum of Kshs. 1,825,239,939.34 as opposed to the sum of Kshs. 1,728,176.418 read out during the tender opening resulting to a possible loss of Kshs. 97,063,521.34.



59. The 2nd Respondent also discovered that similar adjustments were also reportedly done for the contracts relating to Electrical works and Plumbing, Drainage & Firefighting Works, where the contracts were awarded at corrected tender sums of Kshs. 224,292,876.11 and Kshs. 79,841,217.50 respectively as opposed to the tender sums of Kshs 115,976,976 and Kshs. 80,625,000 read out during the tender opening.
60. That It was also established that the Bill of Quantities in respect of the office block tender were reportedly subjected to arithmetic error corrections, in contravention of Section 82 of the PPADA which provides that the tender sum read out during the tender opening shall be absolute and final and shall not be subject of correction, adjustment or amendment in any way by any person or entity.
61. It is the 2nd Respondent's case that it recommended to the 1st Respondent the prosecution of the Petitioners herein after discovering a conspiracy between the directors of EPCO Builders Ltd and Master Power Systems with the evaluation committee to underquote for the works and later adjust the tender sum by way of arithmetic error correction.
62. The deponent also averred that the allegations by the Petitioner that the procurement for the construction of the KMA office block commenced on 1st May, 2015 is false and a diversionary tactic employed to confuse the court, since investigations have revealed that the tender notice advertisement of 1st May, 2015 was for the provision of consultancy services with regard to design of the office complex, and was referenced tender No. KMA/06/ONT/EOI/2014-15. Subsequently, the advertisement by KMA for the tender for prequalified contractors for the construction of the proposed development of multi-storey office block, which is the subject matter of investigations and currently before the trial Court was placed in the daily newspapers of 12th August, 2016 within which time, the provisions of the Public Procurement and Asset Disposal Act, 2015 were in force.
63. The deponent averred that Section 82 of the PPADA exists for the very reason of protecting the public from inflation of tender sums by providing that the tender sums ought to be absolute and final. The deponent further averred that parliament taking into account that errors and minor oversights ought to be corrected, enacted Section 79 of the PPADA. However, the said Section does not contemplate correction of errors so much as to deviate from the requirement set out in the tender document or to alter the tender sum.
64. It is also the 2nd Respondent's case that the instant Petition is tantamount to asking the Court to usurp the functions of the trial Court. Therefore, all the issues raised by the Petitioner ought to be raised as his defence before the trial Court, which is a Court of competent jurisdiction.
65. In response to the issue of the Constitutionality of "Special Magistrates", it is the 2nd Respondent case that in recognition of the role of the Chief Justice, Parliament amended Section 3 of the Anti-Corruption and Economic Crimes Act vide statute Miscellaneous amendment No.7 of 2007 to provide for the Chief Justice as the appointer of "special magistrates" which magistrates are already duly appointed by the Judicial Service Commission, and that the special magistrates operate within the framework of the normal subordinate Court structures as provided for in Article 169 of the Constitution.
66. In response to the allegations by the Petitioner that his rights while under arrest were violated, the deponent averred that the said allegations are false, misleading, and a poor attempt at seeking sympathy from the Court, since the Petitioner was informed of the reason of his arrest in Lamu and he was granted the right to communicate with persons who could offer him assistance among them his son.



67. The deponent averred that the 2nd Respondent's arresting officers were humane toward the Petitioner since; he was allowed to pick personal effects from his residence during his arrest; bought for lunch after they had exited Lamu Island on their way to Mombasa; was again informed of the reasons for his arrest and the right to remain silent; the consequences of not remaining silent and that he never spent any time in the police station since police bond was availed to him. In closing, the deponent averred that the Petitioner and all the other accused persons have so far been subjected to a fair trial process, which has not been occasioned by any unreasonable delay.
68. Besides, the second respondent also relied on the replying affidavit of Robert Mutegi Njue an employee of KMA sworn filed on 13th July 2021 thus expressing same the same position as mohamed Noor Issack.

Response by the Attorney General

69. The 3rd Respondent herein the Attorney General on behalf of the 5th Respondent, the interested party and himself, opposed the Second Petition vide Replying Affidavit sworn on 13th July, 2021 by Robert Mutegi Njue who is the Director General of Kenya Maritime Authority. He averred that the Petitioners in the second Petition were members of the tender committee that was sourced by the Kenya Maritime Authority for tender evaluation. He further averred that the 1st Petitioner was an attendee for evaluation of the tender number KMA/RFP/001/Office Block 2016/17, while the 2nd, 3rd and 4th Petitioners were attendees for evaluation of the tender number KMA/RFP/003/Electrical/2016/17.
70. He deposed that the 1st Petitioner was contracted as an expert from Lins Consult, a firm that entered into an agreement with KMA for the provision of design and supervision of development of KMA Office Block Headquarters in Mombasa. That 1st Petitioner participated in a series of meetings of the evaluation committee, and as a member of the evaluation committee, he was to be guided by the provisions of Section 46 of the *PPADA*, and was therefore expected to abide by the provisions of Article 10 of the *Constitution*, which provide for national values and principles of good governance. Further, as a member of the evaluation committee, the 1st Petitioner was also bound by the provisions of Article 73(2) of the *Constitution* which provide for the guiding principles of Leadership and Integrity.
71. In response to the allegation that the Petitioners were just mere attendees, the deponent avers that under Section 45 of the *Anti-corruption and Economic Crimes Act* 2003, once nominated as a committee member of the Tender Evaluation Committee, a person becomes accountable for the resources used and the property involved. As such, the Petitioners are accountable for the public property including finances committed to them during the tender evaluation exercise.
72. On the allegation of the charges against the Petitioners being defective, the deponent deposed that the charges levelled against the Petitioners are clearly spelt out in the *Anti-corruption and Economic Crimes Act* 2003 as financial crimes.

Rejoinder.

73. The Petitioner in the first amended Petition in response to the Replying affidavit by the 2nd Respondent filed a further affidavit sworn on 26th April, 2021. He averred that even though the 2nd Respondent has the mandate to conduct investigations, the investigations must bear fidelity to the *Constitution*; the 2nd Respondent herein has weaponized its powers to investigate, summon and handed the loaded weapon to the 4th Respondent. The Petitioner alleged that the 2nd Respondent's powers to investigate the 4th Respondent have been abused to defeat the national values; the 2nd Respondent is unwilling to continue with the investigations against the 4th Respondent despite numerous complaints of corruption and abuse of office against her.



74. The Petitioner further claimed that he was not responsible for the procedures/processes of the tender evaluation under which correction of arithmetic errors was conducted. The Petitioner further avers that he only approved the award of the impugned tender based on the views of the Procurement Manager contained in his Professional Opinion as made mandatory under Section 84(3) of the PPADA 2015. That the 2nd Respondent's malice in the charges preferred is revealed when the particulars in the charges against him do not specify the procurement procedure the Petitioner breached or failed to comply with under Section 44 of the PPADA.
75. The Petitioner in the first amended Petition in response to the 4th Respondent's Cross-Petition, filed an affidavit in Reply to the Cross-Petition sworn on 26th April, 2021. The Petitioner in response to paragraph 32 of the 4th Respondent's affidavit dated 13th April, 2021 averred that the affidavit sworn on 18th March, 2021 being referred to by the 4th Respondent was never served upon him or his counsel on record and as such, his averments are without the benefit of the said affidavit. Nevertheless, the Petitioner averred that his counsel on record has advised him that on 25th March, 2021 the Court expunged from its record the said affidavit dated 18th March, 2021 due to a conflict in representation of Nancy Wakarima Karigithu.
76. On the issue of the protection afforded to the 4th Respondent pursuant to Section 12 and 22 of the National Government Coordination Act, 2013, the Petitioner averred that the provisions of Section 22 of the National Government Coordination Act, 2013 only applies to officers appointed under the said Act. However, the 4th Respondent was appointed under Article 155 of the Constitution, and not under the National Government Coordination Act, 2013. Therefore, the 4th Respondent cannot claim protection due to public officers appointed under the National Government Coordination Act, 2013, having been appointed under Article 155 of the Constitution and having taken oath prescribed under Article 74 of the Constitution.
77. The Petitioner further deponed that the 4th Respondent is subject to the Constitutional provisions pertaining to the conduct of a state officer specified in the Constitution under Article 10, chapter six, Article 232, and that the 4th Respondent must exercise executive authority in accordance with the Constitution. Therefore, Nancy Karigithu is rightly sued before the Court, which shall determine whether on the balance of evidence, her actions and omissions as a public officer were in good faith, or whether her conduct lacked good faith and amounted to an abuse of office, in contravention of the Constitution and in breach of written law.
78. In response to the 4th Respondent's Cross-Petition, the Petitioner deponed that the Cross Petition does not state that Cosmas Kiplagat or name him as a party to the Cross-Petition to wit the Respondent. In fact, the Cross-Petition does not name any Respondent. Furthermore, the purported Cross-Petition was filed on 15th April, 2021, way after the expiry of the time ordered by the Court on 25th March, 2021. Despite the Court having expanded time to accommodate a Cross-Petition from the 4th Respondent, there was delay on the part of the 4th Respondent.
79. It is the Petitioner's case that the purported Cross-Petition dated 13th April, 2021 failed to disclose the parties contrary to Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and "Form A" in the schedule thereto. In the alternative, he averred, such glaring omission contravenes the Civil Procedure Rules, Order 1 Rule 1(3) and order 4 Rule 1(1). Therefore, it is legally and factually impossible for the Court to grant the prayers sought in the purported Cross-Petition against unnamed Respondent, since a Petition without parties is a nullity *ab initio* and dead on arrival and in capable of resuscitation by way of amendment.



80. It is the Petitioner's case that the Cross-Petition was filed contrary to the mandatory requirements under Rule 4(1) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013.
81. The deponent further avers that the purported Cross-Petition seeks to wrongly invoke the jurisdiction of the Court by bringing an extraneous civil claim disguised as a Constitutional infringement, when she should seek recourse for her tortious claims in the ordinary civil Courts.
82. The Petitioner in closing averred that the purported Cross-Petition does not disclose any reasonable cause of action in the [Constitution](#), and in law as to invoke the intervention of the Court. Therefore, the Cross-Petition is with no doubt an abuse of the Court process and this Court ought to strike the same out or dismiss the Cross-Petition with costs.
83. The Petitioners in the second Petition in response to the 1st Respondent's affidavit sworn by Marindah Berryl, filed a further affidavit sworn on 13th July, 2021 by the 1st Petitioner (Robinson Mwangi Kariguh). He deponed that the 1st Respondent ought not to institute criminal proceedings simply to appease the public but anchor it in the rule of law.
84. The deponent further averred that there was no property or revenue to be managed by the Petitioners and that the Petitioner's roles were limited to providing technical advice as stipulated under Section 46(7) of the [PPADA](#). Further, it is the Petitioners' case that it is the legal responsibility of the accounting officer of the KMA under Section 68 of the [Public Finance Management Act](#) 2012 to ensure that resources of the said public entity are used in a way that is lawful and authorised, effective, efficient, economical and transparent.

Submissions.

85. Counsel for the Petitioner in the first amended Petition filed his submissions on 6th May, 2021; counsel for the Petitioners in the second Petition filed their submissions on 19th May, 2021; counsel for the 1st Respondent filed submissions on 27th April, 2021; counsel for the 2nd Respondent filed submissions on 18th May, 2021, while the Attorney General filed submissions on behalf of the 4th, 5th Respondent, the Interested party and itself on 13th May, 2021.
86. Mr. Chemwok learned counsel for the Petitioner in respect of the first amended Petition principally restated the content contained in the affidavit and further affidavits in support of the petition. He faulted the retrospective application of the [Public Procurement and Asset Disposal Act](#) (PPADA) 2015 in framing the particulars of the charges preferred against the petitioner. Learned counsel submitted that the tender evaluation committee evaluated Tender No. KMA/RFP/001/Office Block/2016/17, Tender No. KMA/003/Electrical/2016-17 and Tender No. KMA/005/Plumbing/2016-17 as per the 2006 Procurement Regulations and corrected arithmetic errors as prescribed under Regulation 50.
87. Counsel further submitted that the Standard Tender Document KMA issued to the tenderers was a statutory document issued by the Public Procurement Regulatory Authority in January, 2007 under Regulation 33 of the 2006 [procurement Regulations](#). Further, that the clause of the said document in respect to the subject tenders prescribed the criteria for correction of arithmetic errors under clause 5.7 on page 14. Therefore, the correction of arithmetic errors by the evaluation committee should be construed to have been an act under Section 63 of the [repealed Act](#) by dint of Section 33 of the [Interpretation and General Provision Act](#) (Cap 2).
88. Counsel cited the finding in [SDV Transami Kenya Limited and 19 Others v Attorney General & 2 Others & another](#) [2016] eKLR, where the Court held that with respect, it is accepted pursuant to



Section 33 of chapter 2 that anything done under the Regulations is deemed as having been done under the Act for purposes of the criminal sanction under the Act.

89. Counsel further submitted that the retrospective Application of Section 82 of the PPADA to frame charges against the Petitioner by the 1st Respondent violates the Petitioner's right to a fair trial guaranteed under Article 50(2) of the Constitution.
90. On whether the special magistrate Court possess the jurisdiction under the Constitution, counsel referred to the finding in Julius Meme v Republic & Another[2004]eKLR and submitted that the Meme case would be decided differently today since; a special magistrate is not just an ordinary magistrate, but his appointment exceeds the regular manner of appointing magistrates; the Court is not a Magistrate's Court in all respects; it is a fully fledged separate and distinct subordinate Court in form but lacks constitutional substance.
91. Counsel further submitted that the constitution does not provide for the delegation of the powers of the Judicial Service Commission to the Chief Justice and that the functions of the Chief Justice as the president of the Supreme Court and Chairperson of the Judicial Service Commission are purely administrative and managerial in nature as per Article 162(20) (a) and Section 5 of the Judicial Service Act. In counsel's view, the Chief Justice cannot confer jurisdiction upon any judicial officer, neither can he take away the jurisdiction conferred on a judicial officer.
92. On whether the charges under Count VII and Count VIII of the Charge Sheet in criminal case No. 3 of 2020 are an abuse of the legal process and do not serve the interest of the administration of justice, Counsel reiterated the content in the amended Petition and submitted that it beats logic and reason why the 2nd Respondent commenced investigation in June 2019 when KMA had rectified the alleged anomaly in 2018. That the 2nd Respondent's conduct is made worse by the reliance on a terminated sub-contract for electrical works to impute irregularity.
93. Counsel further submitted that the Petitioner is not challenging the competence of the charge or the sufficiency of the DPP's evidence, for he understands that these matters should be examined and determined by the trial court. However, counsel submitted that the court must prevent a prosecution resulting in an abuse of the process and a trial, which will result in an unfair trial.
94. On whether harassment, victimization, disrespect by the 4th Respondent violated the Petitioner's fundamental right to fair labour practices and reasonable working conditions guaranteed under Article 41 of the constitution, Counsel argued that the 4th Respondent did not enjoy the protection prescribed under the National Government Coordination Act, 2013 hence the 4th Respondent can be sued in her personal capacity
95. On whether the 5th Respondent violated the Petitioner's fundamental rights guaranteed under Article 27(4), 41(1) and 47(1) of the constitution, counsel submitted that the 5th Respondent discriminated against the Petitioner by sending him on compulsory leave even though he was not the KMA, Head of the Accounting Unit. Further, the Petitioner was not recalled from leave after the finding in Petition 51 of 2018 Employment and Labour relations court determined that the compulsory leave contemplated in Circular Ref. No. OP/CAB.39/1A dated 4th June, 2018 contravened the Constitution.
96. Counsel submitted that during the 11 months, and 18 days the petitioner was on compulsory leave, he suffered damage to his professional reputation and high standing in the society due to being deemed corrupt. That he suffered mental anguish, suspicion and experienced emotional drain due to being vetted and interrogated by a Government multi-agency team led by the National Intelligence spooks who made him take a polygraph test thrice because he excelled the first two times.



97. Counsel also submitted that the resolution by the 5th Respondent to send the Petitioner to Lamu to serve as an officer 3 grades below his grade humiliated and embarrassed the Petitioner, having served as the KMA acting Director General for three years. That the said transfer was tainted with illegality and procedural impropriety. Therefore, the Petitioner's right to inherent dignity and the right to have his dignity respected and protected as per Article 28 of the constitution were violated. Counsel also argued that the 5th Respondent did not have power over KMA personnel in accordance with the Kenya Maritime Authority Act.
98. On whether the Petitioner is entitled to the writs of mandamus compelling the 1st, 2nd and 3rd Respondent to terminate any further investigations, prosecution and trial, Counsel submitted that the orders of mandamus would compel the DPP to discontinue the criminal proceedings he instituted against the Petitioner.
99. Mr. Waudu learned counsel for the Petitioners in the second Petition submitted that the charges against the Petitioners were defective as a number of essential elements and or ingredients of the offence under Section 45(2) (b) of the *Anti-Corruption and Economic Crimes Act* are not disclosed. Counsel cited the missing elements to as; none of the Petitioners was a public officer within the meaning of Article 260 of the Constitution; the Petitioners did not receive or use any part of the public revenue or public property; the offence under Section 45(2) (b) of the *Anti-Corruption and Economic Crimes Act* can only be committed by a public officer or a person whose function concerns the administration, custody, management, receipt or use of any part of the public revenue or public property.
100. According to Mr Waudu, a charge sheet which is fundamentally defective cannot be amended. To buttress this position, the court was referred to the holding in the case of *Sigilani v Republic* (2004)2 KLR 480
101. Counsel contended that to hold the Petitioners liable for any infringement of the PPADA in their capacity as consultants would not only call for amendment of the charges but substitution with new charges. Counsel cited the finding in *Joram Mwenda Guantai v The Chief Magistrate, Nairobi* (2007) eKLR, where the Court held that the appellant not being a member of the procuring entity could not be guilty of any offence under Regulation 46(9) of the *Regulations* which provides that a member of a procuring entity who breaches the provisions of the *Regulations* commits an offence.
102. It was counsel's submission that the petitioners were not members of the KMA evaluation committee hence cannot be held liable for the omissions or commissions of the evaluation committee as their role was to give professional advice which was not binding at all hence not liable under Section 46(4) (b) of the *PP&ADA* and regulation 16 of the *PP&ADA* 2006.
103. In conclusion, counsel submitted that the applicability of Section 382 of the *Criminal Procedure Code* to amend charges to be in compliance with Section 134 of the *Criminal Procedure Code* is immaterial in the circumstances of this case.
104. Ms. Marinda learned prosecutor for the 1st Respondent submitted that the orders of mandamus sought is a wrong remedy to seek since an order of mandamus cannot quash a public duty that has already been done. In that regard counsel relied on the holding in the case of *Kenya National Examination Council and the Republic*. Nairobi Court of Appeal number 266 of 1966.
105. On the question of the constitutionality of the charges, counsel submitted that the allegation does not meet the test laid out in the case of *Anarita Karimi Njeru v The Republic* (1976-1980)KLR where the court held that allegations of constitutional violation must be pleaded with reasonable degree of precision.



106. Concerning whether the Petitioners are entitled to the reliefs sought, counsel submitted that the prosecution of the Petitioners does not amount to a breach of the Petitioners' fundamental rights. According to learned counsel, the primary test in making of a prosecutorial decision on the part of the DPP is whether or not the material gathered meets the evidential and public interest threshold. Counsel further submitted that courts have held that it is not the court's duty to decide who to be charged and with what offence. If the court were to do so, they would clearly be intermeddling in the matters that are purely within the province of the DPP rendering the DPP a constitutionally docile entity.
107. Counsel cited the finding in *AG v AG & 3 Others ex-parte Thomas Nganga Munene* (2014) Petition no. 166 of 2013 where the court found that the mere insufficiency of evidence does not justify halting of a criminal trial.
108. On the constitutionality of the special trial court, counsel relied on the finding in *Julius Meme v Republic & Another* (*supra*) and submitted that the magistrate properly holds her position under the Constitution and the law and is fully competent to try Criminal Case No. 3 of 2020.
109. Ms. Lai learned counsel for the 2nd Respondent reiterated the content contained in the replying affidavits to both petitions thus contending that the impugned procurement process was carried out under the 2015 *PP&ADA* and not the 2005 one. Counsel contended that the 2nd Respondent's investigations were independent, and within its statutory mandate derived from Article 79 and 252 of the *constitution*. That they did not act under anybody's instructions nor direction. In this regard reliance was placed on the case of *Mape Building & General Engineering v The Attorney General & 3 Others* (2016) eKLR where the Court held that the 2nd Respondent was under a constitutional obligation to investigate the alleged criminal activities and it would be important to point out that where investigations and prosecutions of suspected criminals are involved, the wider public interest that criminals are brought to book through a fair process that does not bring the criminal justice process into disrepute must always be weighed against any individual's interest and right.
110. Counsel further submitted that the Petitioner has not proved how the 2nd Respondent's independent investigations have become a witch-hunt and a violation of the Petitioner's rights under the Constitution. Consequently, counsel opined that the Petitioner has not stated with precision the Constitution violations against the 2nd Respondent in conformity with the principles laid out in *Anarita karimi Njeru v Republic* (*supra*)
111. It was also submitted that the law as set out in the *Anti-Corruption and Economic Crimes Act* anticipates that a corruption offence may take place regardless of whether or not as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss. That issues relating to merits of a case are purely within the ambit of the trial court. To support this position, the court was referred to the case of *Erick Kibwott & 2 others v Director of Public Prosecutions & 7 seven others* (2014) eKLR.
112. On the constitutionality of the trial magistrate's court, counsel submitted that the trial court is constitutional and well within the hierarchy of courts as provided under Article 169 of the constitution on subordinate courts and the role of the Chief Justice in gazetting Magistrates to special Courts under the *Anti-corruption and economic crimes Act* is clearly defined. On the aspect of issuance of Mandamus orders as a relief, counsel urged that it was not applicable as it will be tantamount to directing the second respondent on how to discharge its mandate.
113. Mr. Nguyo learned counsel for the 3rd, 4th, 5th Respondents and the Interested Party reiterated the submissions of the other Respondents on the issue of the constitutionality of the "special magistrate"



and further submitted that the court can only be stopped from trying the Petitioner if he demonstrates that the criminal charges against him are malicious and an abuse of the court process.

114. On whether the Petitioner's right to a fair hearing were violated, counsel submitted that the Petitioner has not demonstrated how the DPP in preferring charges against him violated his right to a fair hearing. Counsel submitted that the petitioner was merely apprehensive of the outcome of the investigations and is thus using all means to label the 4th Respondent as a malicious person and to paint the ODPP as the one that is subject to control by individuals. To express the position that the ODPP is an independent office not subject to control, counsel referred to the holding in the case of *Vincent Kibiego Saina v Attorney General* Misc. No.839 of 1999
115. Counsel further submitted that the Petitioner deserves a public trial, to be informed of the charge against him, to have an advocate and to adduce evidence among other rights, which he has not been denied. To advance the proposition that the duty to hear and determine the merits and demerits of a case purely lies with the trial court, counsel placed reliance on the holding in the case of *Michael Monari &ano v commissioner of police & 3 others* misc, Application No. 68 of 2011.
116. Counsel in conclusion submitted that it is not in dispute that the 4th Respondent has immunity for actions taken in exercise of her public duty and that the Petitioner has failed to demonstrate what the 4th Respondent did contrary to her oath of office. Nevertheless, it is the 1st and 2nd Respondent's duty to determine the culpability of the Petitioner and that the 4th Respondent's office is not involved in the administration of justice.
117. S.C Mr. Nderitu appearing for the 4th respondent equally associated himself with the other respondents' submissions in particular mr Nguyo's submissions. Counsel contended that the petitioners have an opportunity to prove their case before the trial court that indeed they legally corrected an arithmetic error. That the establishment of special courts to try Anti-corruption cases is legal hence nothing irregular by the CJ appointing magistrates to preside over such courts and therefore no prejudice to be suffered by the petitioners. Regarding the allegations made by Mr. Cosmas against the fourth respondent, counsel submitted that the 4th respondent is immune from litigation arising out of discharge of her duties and that the same is baseless and malicious.

Determination

118. Having considered the petitions herein, cross-petition and the responses thereof, and further having taken into consideration respective counsel's well researched submissions, the following issues do arise for determination;
 1. Whether the petitioners were properly or wrongly charged for actions committed under the *Public Procurement & Assets Disposal Act* 2015
 2. Whether the petitioners in the second petition are liable to prosecution for actions rendered as consultants to KMA and not as its employees
 3. Whether the charges preferred against the petitioners violate their right to a fair trial
 4. Whether the creation of special Anti-corruption courts and the subsequent appointment of the trial court trying the petitioners is unconstitutional
 5. Whether the 4th respondent violated the rights of the petitioner in petition number one pursuant to Article 41 and 47 of the *constitution*
 6. Whether the order of mandamus can issue against the respondents



7. Whether the prayers sought under the cross petition can issue

Whether the petitioners were properly or wrongly charged for actions committed under the PP&ADA 2015

119. At the core of the first petition is the assertion by the petitioner that procurement process the subject of these proceedings commenced on 1st may 2015 when an advertisement for notification of the public to tender for consultancy services for construction of an office block for Kenya maritime Authority(KMA) was placed. A copy of the said advert was annexed to the affidavit in support of the original petition sworn on 10th December 2020 (Annexure CKC-2) thus confirming that an advert for tender number KMA/06/ONT/E01/2014-2015 for provision of consultancy services for the construction of office block for Kenya Maritime Authority was made.
120. According to the petitioner, the procurement process for construction commenced prior to the 2015 PP&ADA Which came into force on 7th January 2016 and that the correction of arithmetic errors on the various quoted tender amounts was in compliance with section 63 of the PP&ADA 2005 and therefore section 82 of the PP&ADA 2015 which outlaws such correction cannot apply retrospectively. It is trite that unless expressly stated by the repealing law, a statute shall not operate retrospectively. See Samuel Kamau Macharia & another v Kenya commercial Bank Limited & 2 others (2011)eKLR where the court held that;
- “As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature”
121. For avoidance of doubt, Section 82 of the PP&ADA 2015 does provide as follows;
- “The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity”
122. The words used are plain and couched in mandatory terms thus leaving no ambiguity as to call for any further interpretation. In the case of Oduor & 3 others v Magistrates and judges vetting Board & another(civil Appeal 457, 458, 466 & 475(consolidated) of 2018 (2021) KECA 92 (KLR) Kiage JA had this to say;
- “It seems to me quite indisputable that where the text is clear, there is absolutely no justification for a court to resort to the policy context, no matter how salutary or tempting, in order to qualify the meaning of a provision. It can be stated, and with patent justification, that the written word is key. Even averred purposivists concede that the statutory text is the starting point and the ultimate constraint to interpretation”
123. Mr. Chemwok asserted that Section 82 is not applicable in the instant case and that even if it were applicable which is not, it is contradictory to Section 79 of the same Act which provides that; a tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents and that it shall not be affected by minor deviations or errors or oversights which can be corrected without affecting the substance of the tender. I do not find any contradiction with the two provisions as they complement one another. What constitutes errors or oversights that can be corrected without affecting the substance of the tender under Section 79 is qualified by Section 82 which is



- a latter provision by stating that the tender sum as read out during the tender opening shall not be corrected or adjusted implying that it is not a minor deviation which can be corrected without affecting the substance of a tender. Therefore, Section 82 does supersede Section 79 of the PP&ADA hence no contradiction between the two as their roles are clearly defined.
124. If the court finds that the subject procurement contracts were commenced under 2005 PP&ADA(repealed), then, Section 183 of the 2015 Act shall apply in so far it is a transitional clause which expressly allows contracts commenced under the old Act to be concluded under that Act. With that saving or transitional provision, Section 63 of the 2005 Act would then apply in case of correction of arithmetic errors. Should the court find the 2005 Act is not applicable, again Section 63 of that Act will not apply.
125. I will now address the question whether the three contracts the subject of these proceedings commenced before the 7th Jan 2016 when the 2015 Act came to force. As stated above, the Tender advertised on 1st May 2015 is KMA/06/ONT/EOI/2014-2015. At paragraph 21 of the petitioner's affidavit in support of the original petition he concedes that the said tender was awarded to M/s Lins consult who signed the contract on 27th April 2017 to render consultancy services in designing the contemplated building and provide detailed architectural design, prepare tender documents and offer technical advice. Up to that end, that specific and independent contract was concluded. The KMA could have decided to continue with the next step or simply hold and wait for any necessary action. In other words, the tender for consultancy services did not translate to an award for construction of the actual building.
126. Consequently, KMA raised another advertisement published in the Nation daily of 12th August 2016 inviting tenders for construction of a multi -storey office block for KMA in Mombasa town. Tenderers were advised to tender on main works, electrical, plumbing. Lift installation and air conditioning. According to the second respondent through the affidavit of Mohamed Noor Issack in reply to the petition, the contract the subject of the pending criminal proceedings commenced after the 2015 PP&ADA had come to force.
127. From the advertisement of 12th August 2016, tender numbers KMA/RFP/001/Office Block/2016-2017 for proposed development of office block on plot number BlockXLVIII/128 Mombasa, tender number No. KMA/003/Electrical/2016-2017 for electrical works and tender number KMA/005/Plumbing/2016-17 for plumbing services on the said plot was raised. It is clear from their titles that they are different from the tender for consultancy services advertised on 1st May 2015.
128. Obviously, and for all purposes and intents, the two tender advertisements are distinct and cannot by any stretch of imagination be construed to mean the same thing or refer to one tender. Accordingly, it is my finding that the three tenders subject of the pending criminal charges and this petition commenced from the date of advertisement which is 12th August 2016 and therefore properly conducted within the PP&ADA 2015.
129. The question whether the correction of arithmetic errors which is not denied constituted an offence is a matter of evidence to be tested on cross examination before the trial court and not for this court. See *Erick Kibwott & others v Director of public Prosecutions & others (supra)*. Whether Section 82 of PP&ADA 2015 was contravened is not a constitutional issue but a question of determination of a criminal aspect after due process. Any deficiency in the manner in which the charge is drafted is an issue capable of amendment under section 214 of the CPC before the trial court and therefore not a constitutional issue.



Whether the petitioners in the second petition are liable to prosecution for actions rendered as consultants to KMA and not as its employees

130. The 1st petitioner in petition two sat in the tender evaluation committee in respect of tender No. KMA/RFP/001/Office Block 2016/2017 as an expert attendee (see count II). The 2nd, 3rd and 4th petitioners were also consultant attendees in the evaluation committees in respect of the electrical and plumbing tenders (see count V). According to the petitioners, they were not employees of KMA hence do not qualify to be charged under section 45(2)(b) of [ACECA](#) 2003. Mr. Waudu contended that the petitioners were wrongly charged as they were not employees of KMA, were not public officers nor state officers nor were they bestowed with the responsibility of administration, custody, management, receipt or use of public revenue. That they cannot be held responsible under that [Act](#) hence the ingredients of the offence have not been proven and therefore a defective charge sheet. Counsel relied on the finding of [Guantai case\(supra\)](#) to advance this argument where the court found that Guantai could not be held liable for actions executed while acting as legal officer for the procuring entity to which he was not an employee.
131. On the other hand, the second respondent(EACC) contended that under Section 46 of the [PP&ADA](#) 2015, the petitioners were responsible for actions committed as members of the evaluation committee. Although Mr. Waudu submitted that the petitioners were not evaluation committee members, the minutes attached to the replying affidavit sworn by Robert Njue confirms the opposite. Section 46 of the [PP&ADA](#) does empower an accounting officer to appoint tender evaluation committee members from within the organization and where necessary experts from outside the organization. In this case the petitioners took part in the evaluation exercise as experts(consultants).
132. What legal sanctions are available for evaluation committee members who act in breach of procurements rules. Section 176 of the [PP&ADA](#) has a wide range of criminal law related sanctions against a wide range of offences deemed to have been committed in the course of discharging duties during procurement proceedings among them inappropriate influence in tender evaluation or signing a contract contrary to the requirements of this act or regulations thus a penalty under Section 177 of the [Act](#). One such requirement is Section 82. Unlike the era of quantai case, liability on procurement matters under the 2015 [Act](#) is not confined to public officers alone but also private persons(expert) who take part in the procurement process like it happened in this case.
133. The argument that the charge sheet is defective for lack of proof of the salient elements of the offence is not a constitutional issue but an issue for amendment of charges which is curable under section 214 of the [CPC](#). Quoting a wrong section perse is not a ground to quash charges. It is curable by amendment and no one will suffer prejudice. I believe, public interest in this case demands that the charge should not be quashed merely because of a defect of the charge sheet which defect is curable.
134. The test for a court to dismiss a charge sheet for being defective is whether the defect is so substantive so as to render the accused confused and prejudiced to the extent of not understanding the nature of the charge/s. Even if raised on appeal after conviction, the same test will apply. If found that the defect is inconsequential, the court will deal with it under section 382 of the [CPC](#). See [Bernard Ombuna v Republic](#)(2019)eKLR court of appeal Nairobi. For those reasons, the ground of a defective charge cannot stand the scrutiny of violation of a constitutional right. In this case, the petitioners do understand the nature of the breach committed under Section 82 and in what capacity. The act of preferring a wrong section can be addressed before the trial court.



Whether the special magistrate’s Ant-corruption court has a constitutional mandate to hear the case

135. This issue was raised by Mr. Chemwok who contended that creation of special Anti-corruption courts by the Chief Justice is unconstitutional as they are not provided in the constitution. There is no doubt that Hon. Nyaloti who was in conduct of this case was duly gazetted by the Hon. Chief Justice pursuant to Section 3 of the *ACECA*. For one to be appointed as a special magistrate, he or she must be of the rank of a chief magistrate or principal magistrate or an advocate of 10 years’ experience in practice.
136. Therefore, before one becomes “special”, he or she must have been a magistrate duly appointed by the judicial service commission not the CJ. The duty to appoint a special magistrate just like the children courts’ special magistrates must be contextualized and not interpreted casually as an ordinary appointment by way of recruitment. This is an administrative function bestowed upon the head of judiciary (CJ) to designate or redeploy a judicial officer to perform a special function without necessarily divesting from the substantive position of a judicial officer in the true sense of an officer recruited to perform functions of a magistrate in a subordinate court created under Article 169 of the *Constitution*.
137. The rationale for creation of special courts in dealing with corruption related matters was as a result of the hue and cry from society that the vice of corruption was crippling the economy and society in general just like cancer that needed to be confronted within the specified shortest time possible to tame the menace. This position has been replicated in Election petitions where the CJ appoints judges by gazetting them to perform a specific function of hearing election petitions within 6 months. The rationale is the same and has worked extremely well and therefore the direction to firmly follow. In my view, the intention for creating such courts was noble and should be encouraged to restore confidence to society that serious matters relating to corruption are special requiring special treatment. I do not find anything unconstitutional in the circumstances. In any event, the petitioner has not demonstrated the prejudice he is likely to suffer by being tried before a court that is likely to hear his case expeditiously.
138. In the case of *Julius Meme v Republic & another* (*supra*) similar question was raised and the court addressed the issue of appointment of special Magistrates courts by describing it as a means of achieving greater efficiency in the trial of corruption related cases hence a normal and practical approach to efficiently dispose cases. Accordingly, that ground is anchored on quick sand and without factual foundation.

Whether the charges preferred against the petitioners violated the petitioners’ rights to a fair trial.

139. The petitioner in the first petition raised several issues claiming that; the charges levelled against him were orchestrated by malice; the charges cannot stand the test of a criminal trial; he was arrested arbitrarily in an inhumane manner and without notice; was not cautioned nor allowed to communicate with his family nor lawyer and that the trial herein was commenced with an ulterior motive.
140. The powers to investigate corruption related offences have been donated to the EACC pursuant to Article 252 (1) of the *constitution* as read together with section 13 (2)(C) of the *EACCA*. Its duty is to independently and without any influence or direction conduct investigations based on a complaint lodged by any person. Further, upon investigation, the EACC is required to forward their report to the DPP who makes a final decision on who to charge. The ODPP is equally an independent office created under Article 157 of the *Constitution* which provides at sub article 10 that the DPP shall not require the consent of anybody or authority to commence any criminal proceedings and in exercise of his function, he shall not be under the direction or control of any person or authority.



141. The two offices are independent and the principle of separation of powers cannot allow this court to arrogate itself powers to direct them on what to do and how to do it. However, where there is abuse of power of office or exercise in excess of authority than prescribed, a court can intervene through the relevant legal mechanism of judicial review or constitutional reference. This position was succinctly held in the case of *Douglass Maina Mwangi v Kenya Revenue Authority and another* HC constitutional petition No.528/2013.
142. Concerning the question of malicious prosecution and being charged on non-existent charges based on contracts already cancelled and re-issued on the original tender sum, that is for the trial court to determine. The merits, demerits or sufficiency of evidence is not for this court to decide but the trial court. The right to be heard is already in place. Unless established with clarity and sufficiently that the trial is intended to achieve an ill motive, the court should exercise caution in halting prosecution especially where public interest is at stake. See *Total Kenya Limited & 9 others v Director of criminal Investigation Department and 3 others* (2013) eKLR
143. Similarly, The Supreme Court in *Hussein Khalid and 16 others v Attorney General & 2 others* [2019] eKLR had this to say;

“ [105] It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it will not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence (s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount.

[106] We hasten to add that even upon trial, if it is found that the accused was arrested and charged with an offence unknown in law, he/she still has recourse in the civil justice system by way of seeking damages. The remedy for an apprehension of such a ‘mis-trial’ happening, where it has not been proved is not to vitiate the trial itself. It will be pragmatic that the Appellants let the trial commence and conclude, during which trial they raise all the issues they have as against the law under which they are charged, if successful, it is only then that they will pursue their rights in civil proceedings.”

150. In *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR the court of appeal observed as follows;

“ At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal, that is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative. *State of Maharashtra & Others v Arun Gulab Gawal & Others* - Supreme Court of India – Criminal Appeal No. 590 of 2007 paragraph 18 and 24, *Meixenen & Another v Attorney General* [2005] 2 KLR 189”



144. The Supreme Court in the case of *Hussein Khalid And 16 others v Attorney General & 2 others* [2019] eKLR held thus:

“(122) Consequently, without downplaying the Appellants’ allegations of infringement, we find that they have recourse under Article 22 against the specific violations they may have undergone in the manner of their arrest, detention and arraignment. They may seek damages or other reliefs available to them. We do not think that such violations in themselves should warrant the vitiating of the trial processes. There exist constitutional safeguards that extend to the right to fair trial and the attendant mechanisms to protect the Appellants. We are persuaded by the holding in *Kuria & 3 Others v Attorney General* [2002] 2 KLR 69 where it was stated that:

“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.”

145. In *Republic v Director Public Prosecutions & another Ex parte Justus Ongera* [2019] eKLR this court had this case

“The finer details regarding the contract and who met which requirements and to what extent the applicant misled the Auditor General and the entire tender committee into awarding a contract through single sourcing instead of subjecting it to competitive bidding will be a subject of the trial court. The High court should be slow but cautious before curtailing other independent offices from executing their statutory mandate unless it is overtly clear that such action will definitely deliver a miscarriage of justice.”

146. In a nut shell, the petitioners have not with precision established the specific violations suffered or provisions of the constitution violated as stated in the case of *Anarita Karimi Njeru v The Republic (supra)*. The burden of proof on a Petitioner in a constitutional Petition was addressed by the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR as follows: -

“Although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154:

“the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a



foundation of conviction and good faith, in engaging the constitutional process of dispute settlement”.

147. In conclusion therefore, it is my finding that the petitioners’ constitutional rights are intact as due process has been followed in investigating and preferring charges before a court of law competent to try the matter hence fair hearing as contemplated under Article 50 of the *constitution*. Whether there shall be a conviction or acquittal is a matter of evidence before the trial court and not speculation.

Whether the 4th and the 5th respondents violated the petitioners’ rights guaranteed under article 41 and 47(1) of the constitution.

148. The petitioner in the first petition raised several allegations and complaints against the 4th and 5th respondent ranging from harassment at his place of work, discrimination, sending him on compulsory leave and even demoting him to a junior rank after transferring him to Lamu. In my view, issues relating to employment have a clear road map before the Labour court.

149. Employment and Labour Relations Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and coincidental to the employment and labour relations including interpretation of the Constitution within a matter before it. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR the Supreme Court held as follows”

“ 68. A court’s jurisdiction flows from either the Constitution or Legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

150. The High Court and the Employment & Labour Relations Court are creatures of the *Constitution*. Article 165 (3) arrogates it unlimited jurisdiction in criminal and civil matters and goes further in Article 165 (5) to state that the High Court will not have jurisdiction on matters reserved for the exclusive jurisdiction of the Supreme Court and those falling within the jurisdiction of the courts contemplated in Article 162 (2) which are;

Employment & Labour Relations Court and the Environment & Land Court. I do not wish to venture into labour and employment related issues.

151. Allegations relating to corruption committed by the 4th respondent and personal differences by the petitioner against the 4th respondent are personal in nature. Those allegations can best be handled by the relevant institutions and not the court to investigate through a constitutional reference. In fact, I do not see any relevance of the allegations made against the 4th respondent. By virtue of being a PS in the ministry under which KMA falls does not make the PS automatically liable for every omission or commission committed by the 5th Respondent. The claim against the 4th respondent is misplaced and an expression of anger and bitterness which is being vented out under a wrong platform as there is no proof that the 4th respondent did maliciously instigate the petitioner’s prosecution and even if she made a report which is not proven, it could not on its own go through before being investigated and approved by the EACC and ODPP respectively.

Whether the prayers in the cross-petition may be granted

152. The Cross-Petition herein is a reaction of alleged malicious defamatory remarks made by the petitioner in the 1st petition against the 4th respondent in her capacity as the PS under whose docket the 5th respondent falls and also as a former boss to the petitioner. According to the petitioner, the 4th



respondent allegedly left the organization after; frustrating the petitioner; engaging in corrupt deals while serving as MD at KMA thus making the organization buy a plot it owned at inflated price; the 4th respondent was so corrupt and that she was behind his tribulation at his place of work and eventual malicious prosecution.

153. It is the 4th respondent's claim that the allegation made against her and published in various media platforms are malicious, full of false hood and intended to damage her otherwise good, reputation, record and standing in society and her place of work as evidenced by various awards conferred upon her by his Excellency the president. From the onset, I must state that the cross petition herein is misplaced. It is raising totally a different cause of action which is civil in nature and therefore requires a separate suit all together seeking damages for defamation.
154. In *Okoiti v James R. Njenga, Steward Madzayo, Hellen Kombo, Alice Kalya, Benson Kaaria, Achiya Echakara Rhoda Abonobadha and Jeremia Kianga (Sued as the Registered Trustees of the Agricultural Society of Kenya) & 19 others* (Petition 33 of 2019) [2022] KEHC 74 (KLR) (26 January 2022) (Judgment) it was held:

“We agree that the issues set out in the cross-Petition did not afford the opportunity for the Petitioner to respond to the same effectively. Firstly, because it introduced a different cause of action from that raised in the original Petition; and secondly, because it was not framed in a manner, for which there was a known laid out procedure for an exhaustive response.”

155. In the case of *Patrick Mbau Karanja v Kenyatta University* [2012] eKLR Lenaola, J (as he then was) expressed himself as follows in regard to when the Constitutional interpretative mandate of the Court may be invoked: -

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

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



40. Lenaola, J went on to observe as follows after citing the above case: -

“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights”.

156. Having held as above, it is my holding that the petitions herein and the cross petition thereof have not met the threshold for constitutional redress to warrant grant of the respective reliefs sought and accordingly, they are dismissed. Given the nature of the suits which border on public interest litigation, each party shall bear own costs.

DATED, SIGNED DELIVERED VIRTUALLY AT MOMBASA THIS 3RD DAY OF JUNE 2022

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J. N. ONYIEGO

JUDGE

