



**Anyango v Ochieng & 9 others (Constitutional Petition E108 of 2021)**  
**[2023] KEHC 17967 (KLR) (Constitutional and Human Rights) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17967 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CONSTITUTIONAL AND HUMAN RIGHTS**  
**CONSTITUTIONAL PETITION E108 OF 2021**

**AC MRIMA, J**

**MAY 30, 2023**

**BETWEEN**

**WILLIAM OKONGO ANYANGO ..... PETITIONER**

**AND**

**BERNARD OSALO OCHIENG ..... 1<sup>ST</sup> RESPONDENT**  
**GEORGE OTIENO ..... 2<sup>ND</sup> RESPONDENT**  
**LILIAN AKIRA AKOTH ..... 3<sup>RD</sup> RESPONDENT**  
**DANIEL O. ODULA ..... 4<sup>TH</sup> RESPONDENT**  
**JOHN OLUKHANDA ..... 5<sup>TH</sup> RESPONDENT**  
**RICHARD WAKHU LIVINGSTONE ..... 6<sup>TH</sup> RESPONDENT**  
**O.C.P.D KILIMANI POLICE STATION ..... 7<sup>TH</sup> RESPONDENT**  
**INSPECTOR GENERAL OF POLICE ..... 8<sup>TH</sup> RESPONDENT**  
**DIRECTOR OF PUBLIC PROSECUTION ..... 9<sup>TH</sup> RESPONDENT**  
**DIRECTOR OF CRIMINAL INVESTIGATION ..... 10<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction and Background:**

1. The Petitioner herein, William Okongo Anyango, instituted the instant proceedings with a view to compel the Police and the Director of Public Prosecutions to undertake criminal charges against the 1<sup>st</sup> to 6<sup>th</sup> Respondents herein.



2. The dispute before this Court stems from contested ownership and possession of Land Reference L.R No. Nairobi Block 62/288 (hereinafter the ‘Suit property) between William Okongo Onyango, the Petitioner herein and Bernard Osalo Ochieng, George Otieno Lilian Akira Akoth, Daniel O. Odula, John Olukhanda, Richard Wakhu Livingstone, the 1<sup>st</sup> to 6<sup>th</sup> Respondents herein, and the alleged failure of the OCPD Kilimani Police Station, The Inspector General of Police, The Director of Public Prosecutions and the Director of Criminal Investigations, 6<sup>th</sup> to 10<sup>th</sup> Respondents herein, to take action against the 1<sup>st</sup> to 6<sup>th</sup> Respondents.
3. The Petitioner claim to reside with his family at a place called Olympic in Kibera within Nairobi City County.
4. It is his case that he is in the jua-kali industry of welding.
5. The Petitioner asserts that, through a sale agreement dated 27<sup>th</sup> July 2015, he purchased the Suit property from one James Kibichi Kangogo (hereinafter referred to as ‘The Vendor’) at the price of KShs, 1,800,000/-.
6. To that end, it is the Petitioner’s case that upon carrying out the necessary due diligence, the vendor effected transfer of the suit property to him on 16<sup>th</sup> August 2016
7. However, the suit property was not vacant at the time of purchase as there were illegal trespassers.
8. The Petitioner claimed that the vendor, as part of the agreement, was to deliver vacant possession of the property. It is his case that that he (the vendor) did institute Civil Case No. 2189 in a bid to restrain the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent and their agents from trespassing or in any manner dealing with the suit property.
9. The Petitioner contends that since he purchased the property on 27<sup>th</sup> July 2015, he has not been able to take possession due to presence of squatters who are agents of the 1<sup>st</sup> to 6<sup>th</sup> Respondents.
10. On 19<sup>th</sup> January 2021, at a place called fort jesus in Kibera, the Petitioner claimed that the 1<sup>st</sup> to 6<sup>th</sup> Respondents and their agents, in the presence of 14 police officers, made utterances to the effect that his family will be physically eliminated and his movable property destroyed.
11. He further claimed that on the same day at about 9.30pm, he received a phone call from the 1<sup>st</sup> Respondent on his phone number 0739393060 to threatened him about the land to the following effect;
 

“Wewe William enda mwenye alikuuzia shamba akurudishie pesa yako wacha sisi tupambane na yeye wewe ukiingilia utajilaumu. Wewe unapesa mingi minilikua nayo ikaiisha. Wewe mtu mmoja huwezi kuna watu wengi.”
12. It is the foregoing events and the contended failure by the 7<sup>th</sup> to 10<sup>th</sup> Respondents to take action against the 1<sup>st</sup> to 6<sup>th</sup> Respondents that led to institution of the instant Petition.
13. The Respondents opposed the Petition was.

### **The Petition.**

14. Through the Petition dated 17<sup>th</sup> March 2021, supported by the Affidavit and supplementary Affidavit William Okongo Onyango deposed to on 17<sup>th</sup> March 2021 and 27<sup>th</sup> January 2022 respectively, the Petitioner sought to assert abdication of constitutional mandate by the Respondents.



15. Contemporaneously filed with the Petition was the Notice of Motion Application (hereinafter 'The Application') supported by the Affidavit of the Petitioner deposed to similar dated as the Petition.
16. The Application, which was subsumed in the Petition, sought interim reliefs in the following way;
  1. Spent.
  2. That pending hearing and determination of this Application an Order of Injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> Respondents from in any manner whatsoever harassing, intimidating, causing apprehension of the Applicant or causing any further threat to the Applicant either by themselves or their agent.
  3. That pending the hearing and determination of this Application the 7<sup>th</sup> Respondent be compelled to investigate and prefer charges against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents for the death threat issued to the Petitioner and his family contrary to section 223(1) of the Penal Code and for Forceful detainer contrary to section 91 of the Penal Code.
  4. Any other relief that this Honourable Court may deem fit and just to grant in the interest of justice.
17. In the main Petition the Petitioner pleaded that under section 10(4)(b) of the National Police Service Act, the Inspector General of Police has the requisite powers to uphold the national values and principles and objects set out in Article 10, 232 and 244 of the Constitution.
18. He averred that the Director of Public Prosecutions had abandoned its duties among them undertaking investigations, maintaining law and order apprehending offenders mandated under section 35 of the National Police Service Act.
19. The Petitioner posited that the 1<sup>st</sup> to 6<sup>th</sup> Respondent were in violation of section 35 of the Penal Code, which provides that any person who is in actual possession of land without any colour of right holds possession of it, in a manner likely to cause breach of peace or reasonable apprehension of a breach of peace against a person entitled by law to the possession, is guilty of the misdemeanour of forcible detainer.
20. He further averred that the 1<sup>st</sup> to the 6<sup>th</sup> Respondents were caught up by provision of section 223(1) of the Penal Code which provides that any person who without lawful excuse, utters, or directly or indirectly causes any person to receive a threat is guilty of a felony ad us liable to imprisonment for ten years.
21. Based on the foregoing, the Petitioner, while referring to the Court of Appeal decision in Misc. Application No. 68 of 2011, Michael Monari & Another -vs- Commissioner of Police & 3 Others, averred that the 7<sup>th</sup> Respondent has a duty to arrest and investigate the 1<sup>st</sup> to 6<sup>th</sup> Respondents.
22. It was his case that under Article 157(6)(a)(b) and (c) of the Constitution, the Director of Public Prosecutions had an obligation to institute criminal proceedings against the 1<sup>st</sup> to 6<sup>th</sup> Respondents for breach of peace.
23. It was further the Petitioner's case that according to section 58 of the National Police Service Act, subject to Article 49 of the Constitution, the 1<sup>st</sup> to 6<sup>th</sup> Respondents ought to have been arrested without warrant for obstructing police officers from performing their lawful duty of enforcing eviction and for causing disturbance during the eviction.



24. It was his case that the 1<sup>st</sup> and 6<sup>th</sup> Respondents stay in the property in s contrary to section 58(c) and (d) of the National Police Service Act.
25. In the supplementary Affidavit, the Petitioner deposed that he did raise a complaint under OB/54/30/10/21 against Alvine Odhiambo, willis Otieno, Vincent Ogara and Sospeter Okinda whereupon they were charged for forcible detainer in Criminal Case No. E1176 of 2021, Republic - vs- Alvine Odhiambo Abdalla and 3 Others.
26. The Petitioner denied the allegation by the 5<sup>th</sup> and 6<sup>th</sup> Respondent that the suit property is public land and referred to the statement of George Otieno, the Investigating Officer, who requested the trespassers to move out of the suit property.
27. He deposed further that and the licensed land surveyor, Bibiano Rabuku, who was instructed to visit the area on 19<sup>th</sup> January 2021 with the aim of identifying the beacons of the suit property faced hostility from the 1<sup>st</sup> to 6<sup>th</sup> Respondents.
28. It was his case that the Respondent's act of erecting structures on the property were aimed at threatening him from claiming ownership.
29. The Petitioner deposed that this Court had the jurisdiction to protect his right to property.
30. On the foregoing factual and legal backdrop, the Petitioner prayed for the following reliefs;
  - a. An Order of Mandamus do issue against the 7<sup>th</sup> Respondent to investigate and prefer charges against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, & 6<sup>th</sup> Respondent for offences under section 223(1) of the Penal Code.
  - b. That an Order of mandamus do issue to the 8<sup>th</sup> Respondent Inspector General of Police directing him to carry out their constitutional and statutory function of investigation of crime under Article 245, and to direct the 9th Respondent, Director of Public Prosecutions thereafter to consider the results of the investigation and to prosecute persons found culpable for the offence of death threat contrary to section 223(1) of the Penal Code and Forceful detainer contrary to section 91 of the National Police Service.
  - c. Any other further order or relief that the Honourable Court deems fit and just and expedient to uphold the Rule of Law and protect the Rights and Freedoms of the Petitioner under the Constitution.
  - d. An order that the Petitioner is deserving of damages to be assessed by the Court.
  - e. Costs.

### **The Submissions**

31. In further support of its case, the Petitioner filed written submissions dated 27<sup>th</sup> January 2021 where he identified the issues for determination being; whether the sale agreement is valid; where there was violation of his rights and whether the suit is time barred.
32. On the first issue, the Petitioner submitted that the was in place a sale agreement in consonance with section 3(3) of Contract Act which makes it a requirement that disposition of interests in land to be in writing.



33. On violation of his constitutional rights, the Petitioner submitted that he had the constitutional right to property under Article 40, to found a family and have it protected Article 45 and to have his family children protected from abuse, neglect as provided for under Article 53 of *the Constitution*.
34. As regards the challenge on limitation of time, the Petitioner submitted that he bought the suit property on 6<sup>th</sup> August 2016 upon following all necessary procedure. It was his case that despite not in occupation, the period to bring this matter to court has not lapsed.
35. It was urged that the Petition be heard for ensure the Petitioner does not suffer harm from the illegal acts of the Respondents.

#### **The 1st, 4th Respondents' Case**

36. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not file any response to the Petition.

#### **The 5th and 6th Respondents' Case**

37. John Olukhanda and Richard Wakhu Livingstone opposed the Petition and the Application through joint Grounds of Opposition dated 3<sup>rd</sup> June 2021. They also filed separate Replying Affidavits both deposed to on 3<sup>rd</sup> June 2021.
38. In the Grounds of Opposition, the 5<sup>th</sup> and 6<sup>th</sup> Respondents stated that the Application was bad in law and abuse of Court process since it involved a matter where the police had been involved and visited the property and no charges were preferred against them.
39. It was therefore their case that the Petition does not disclose any known cause of action against them.
40. It was their case further that the Petitioner had come to Court with unclean hands by purporting use the Court process to stifle public dissent on actions of the Petitioner or his agents to grab public land contrary to Articles 40, 60, 62 and 62 of *the Constitution*.
41. In his Replying Affidavit, the 5<sup>th</sup> Respondent deposed that the 6<sup>th</sup> Respondent is his biological father and associated himself with the description of the property he occupies and the surrounding since he has been in occupation for over 50 years.
42. It was his deposition that he neither knew the Petitioner, his family nor the fact that he owned the suit property.
43. He deposed that since his childhood, he has known the suit property as a vacant public recreational facility where children play.
44. He denied ever being reported to the Police and making any death threats to the Petitioner.
45. In his Replying Affidavit, the 6<sup>th</sup> Respondent deposed that apart from making bare allegations, the Petitioner did not provide any evidence to substantiate its claims.
46. He denied there being evidence of police report, in respect the allegation that it had been evicted. It was his case that there was no eviction order.
47. It was his deposition that he had occupied Plot No. LR 2010309740 Bloc 62/26 and has never occupied any property in Fort Jesus belonging to the Petitioner.
48. The 6<sup>th</sup> Respondent deposed that he had never issued any threats and to the Petitioner. He deposed that the allegations are aimed at silencing him and other residents about the land grabbing at Fort Jesus.



49. It was his deposition that since 1970 when he took occupation of the land next to the suit property, the suit property was used a public recreational facility.
50. As a result of the foregoing, it was his case the alleged ownership by the Petitioner is illegal.
51. In reference to the letter dated 10<sup>th</sup> February 2021, he deposed that the residents of Jamhuri East Neighbourhood Welfare Association, which he is a member wrote to the Ethics and Anti-Corruption Commission, Cabinet Secretary for Interior and National Security and the Directorate of Criminal Investigations complaining of public land grabbing.
52. It was his case that he had never been in occupation of the suit property since he was in Kibera.
53. The 6<sup>th</sup> Respondent denied knowledge of Civil Suit No 2189 of 2017.
54. The 6<sup>th</sup> Respondent denied any altercation with the police when they came with the Petitioner to identify the beacons of the suit property.
55. He deposed that subsequent upon the police visiting the suit property, and in response to the Petitioner's complaint, he was summoned at the Directorate of Criminal Investigations, Kilimani, where he recorded a statement under OB/No. 28/06/02/2021 regarding the plot adjacent to his.
56. To that end, he deposed that the Police never preferred any charges against him.
57. In the end, he maintained that the Petitioner is an illegal occupant of the suit property and the instant Application and Petition were meant to censor and intimidate and the other Respondents. He urged Court to dismiss the Petition and the Application with costs.

#### **The Submissions**

58. In their written submissions dated 22<sup>nd</sup> November 2021, the 5<sup>th</sup> and 6<sup>th</sup> Respondents largely reiterated the depositions in their Affidavits.
59. They however added that that the Petitioner might have been duped into buying public land and access way.
60. They maintained that they were strangers to the outcome of Civil Suit No. 2189 of 2017 and denied there ever being eviction orders therein.
61. It was further their case that the Petitioner moved this Court but has continuously violated court orders towards prosecuting this matter and instead chose to file new suits in other courts and using police officers to intimidate them.
62. On totality of the foregoing, the Petitioner submitted that the Petition had failed to meet the threshold of identifying the Constitutional violations and manner of violation as established in the famous case of Anarita Karimi Njeru -vs- Republic.
63. It was urged that the Petition and Application be dismissed with costs.

#### **The 7<sup>th</sup> to 10<sup>th</sup> Respondents' case:**

64. Despite service, the OCPD Kilimani Police Station, the Inspector General of Police, the Director of Public Prosecutions and the Director of Criminal Investigations did not participate in the hearing of the Petition.

#### **Analysis:**



65. This Court has carefully considered the Petition, the responses, the parties' submissions as well as the decisions referred to by the parties.

66. The gravamen of the Petition is whether this Court can compel the Police and the Director of Public Prosecutions to institute criminal charges against the 1<sup>st</sup> to 6<sup>th</sup> Respondents. In order to get the best way forward in this matter, it is imperative to have a look at, albeit briefly so, the role of the police and the Office of the Director of Public Prosecutions (hereinafter referred to as 'the DPP').

67. The roles of the National Police Service as well as the DPP are provided for both in *the Constitution* and statutes. As such, the Court will first look at how *the Constitution* ought to be interpreted.

68. This Court has previously dealt with this subject of constitutional interpretation. In Nairobi High Court Constitutional Petitions No. 33 and 42 of 2018 (Consolidated) Okiya Omtatah Okoiti vs. Public Service Commission & 73 Others this Court rendered itself as follows: -

54. As regards the interpretation of *the Constitution*, suffice to say that *the Constitution* itself gives guidelines on how it ought to be interpreted. That is in Articles 20(4) and 259(1).

55. Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

56. Courts have also rendered how *the Constitution* ought to be interpreted. The Supreme Court in a ruling rendered on 21<sup>st</sup> December, 2011 in *In the Matter of Interim Independent Electoral Commission [2011]* eKLR discussed the need for Courts, while interpreting *the Constitution*, to favour a purposive approach as opposed to formalism. The Court stated as under: -

(86) .... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). *The Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. *The Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

(87) In Article 259(1) *the Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and



principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

(88) ..... Article 10 states clearly the values and principles of *the Constitution*, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

(89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting *the Constitution*, is a task distinct from interpreting the ordinary law. The very style of *the Constitution* compels a broad and flexible approach to interpretation.

57. On the principle of holistic interpretation of *the Constitution*, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR affirmed the holistic interpretation principle by stating that:

This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that *the Constitution* should be interpreted in a holistic manner, within its context, and in its spirit.

58. The meaning of holistic interpretation of *the Constitution* was addressed by the Supreme Court in In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR. The Court at paragraph 26 stated as follows: -

...But what is meant by a holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

59. In a Ugandan case in Tinyefuza v Attorney General, [1997] UGCC 3 (25 April 1997) the Court was of the firm position that *the Constitution* should be read as an integrated whole. The Court observed as follows: -



.... the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.....

60. In Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

(21) .... Before the High Court embarked on the interpretation of the contentious provisions of *the Constitution*, it restated the relevant principles of interpretation of *the Constitution* as extracted from case law thus: -

- that as provided by Article 259 *the Constitution* should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.
- that the spirit and tenor of *the Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.
- that *the Constitution* must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.
- that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has



minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

69. In Advisory Opinion Application No. 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR, the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -

...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.

70. Having laid the manner in which Courts ought to interpret the Constitution, this Court will now consider the role of the Police.

71. Article 243 of the Constitution establishes the National Police Service as a national service and functions throughout the country and consists of the Kenya Police Service and the Administration Police Service. Article 244 of the Constitution provides the objects and functions of the National Police Service as follows: -

- (a) strive for the highest standards of professionalism and discipline among its members;
- (b) prevent corruption and promote and practice transparency and accountability;
- (c) comply with constitutional standards of human rights and fundamental freedoms;
- (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
- (e) foster and promote relationships with the broader society.

72. The National Police Service is under the command of the Inspector General of Police, the 8<sup>th</sup> Respondent herein. The manner in which the 8<sup>th</sup> Respondent is to carry out its mandate is provided for under Article 245(2)(b) and (4) of the Constitution as follows: -

1. The Inspector General –

- a. ....
- b. shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
- 4. The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector General with respect to—
  - (a) the investigation of any particular offence or offences;
  - (b) the enforcement of the law against any particular person or persons; or



(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

5. Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.

73. Article 157(4) of *the Constitution* provides that: -

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

74. Article 245(8) of *the Constitution* accords Parliament the duty to enact legislation to give full effect to the constitutional provision. In line with that calling, Parliament enacted the *National Police Service Act*, No. 11A of 2011 (hereinafter referred to as ‘the Police Act’) which commenced application on 30<sup>th</sup> August, 2011.

75. Sections 24 and 27 of the Police Act respectively provides for the functions of the Kenya Police Service and the Administration Police Service and as follows:

24. The Functions of the Kenya Police Service:

The functions of the Kenya Police Service shall be the—

- a. provision of assistance to the public when in need;
- b. maintenance of law and order;
- c. preservation of peace;
- d. protection of life and property;
- e. investigation of crimes;
- f. collection of criminal intelligence;
- g. prevention and detection of crime;
- h. apprehension of offenders;
- i. enforcement of all laws and regulations with which it is charged; and
- j. performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

27. The Functions of the Administration Police Service:

The functions of the Administration Police Service shall be the—

- (a) provision of assistance to the public when in need;
- (b) maintenance of law and order;
- (c) preservation of peace;



- (d) protection of life and property;
- (e) provision of border patrol and border security;
- (f) provision of specialized stock theft prevention services;
- (g) protection of Government property, vital installations and strategic points as may be directed by the Inspector-General;
- (h) rendering of support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties;
- (i) co-ordinating with complementing Government agencies in conflict management and peace building;
- (j) apprehension of offenders;
- (k) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

76. Part V of the Police Act establishes the Directorate of Criminal Investigations which is under the direction, command and control of the Inspector-General.

77. The functions of the Directorate are provided for in Section 35 of the Police Act as follows: -

35. Functions of the Directorate:

The Directorate shall –

- a. collect and provide criminal intelligence;
- b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;
- c. maintain law and order;
- d. detect and prevent crime;
- e. apprehend offenders;
- f. maintain criminal records;
- g. conduct forensic analysis;
- h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*;
- i. co-ordinate country Interpol Affairs;
- j. investigate any matter that may be referred to it by the Independent Police Oversight Authority; and;
- k. perform any other function conferred on it by any other written law.



78. From the above analysis of *the Constitution* and the law, it comes to the fore that the National Police Service is a vital national organ with defined roles. Further, the Service's independence and that of the 8<sup>th</sup> Respondent is constitutionally-insulated from any form of interference or directional command. Apart from the Director of Public Prosecutions and only to the extent so provided, no other person, body or entity has the power to give any form of directives to the 8<sup>th</sup> Respondent on how to discharge its functions.

79. The independence is further ring-fenced in that even the power donated to the Cabinet Secretary under Article 254(4) of *the Constitution* to issue any directives to the 8<sup>th</sup> Respondent is only limited to policy issues.

80. The Supreme Court In the Matter of Interim Independent Electoral Commission [2011] eKLR, discussed the meaning and extent of the independence in relation to constitutional Commissions and independent offices. The Court emphasized the need for such entities to co-ordinate for effective service delivery, but delineated the discharge of their respective mandates as follows: -

[60] While bearing in mind that the various Commissions and independent offices are required to function free of subjection to "direction or control by any person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit.

81. Having dealt with the role of the National Police Service, the Court will now deal with the role of the DPP.

82. As said above, the basis of the exercise of prosecutorial powers in Kenya is *the Constitution* and the law. Article 157 of *the Constitution* establishes the Office of the Director of Public Prosecutions as under: -

1. There is established the office of Director of Public Prosecutions.
2. The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.
3. The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.
4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
5. The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.
6. The Director of Public Prosecutions shall exercise State powers of prosecution and may--
  - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
  - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or



undertaken by another person or authority, with the permission of the person or authority; and

- c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

7 If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

9. The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

10. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

11. In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

12. Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.

83. Further to the foregoing, the Office of Director of Public Prosecutions Act No. 2 of 2013 (hereinafter referred to as 'the ODPP Act') is an Act of Parliament aimed at giving effect to Articles 157 and 158 of *the Constitution* and other relevant Articles of *the Constitution* and for connected purposes. The ODPP Act provides in Section 4 the guiding principles which must guide the DPP in prosecution of cases as follows:

- (4) In fulfilling its mandate, the Office shall be guided by *the Constitution* and the following fundamental principles—
  - (a) the diversity of the people of Kenya;
  - (b) impartiality and gender equity;
  - (c) the rules of natural justice;
  - (d) promotion of public confidence in the integrity of the Office;
  - (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
  - (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
  - (g) protection of the sovereignty of the people;



- (h) secure the observance of democratic values and principles; and
- (i) promotion of constitutionalism.

84. Suffice to say the ODPP Act and other statutes variously provide for the manner in which the DPP ought to discharge its mandate.

85. The exercise of prosecutorial powers by the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed. I have, hereinabove, endeavoured to capture several decisions which were referred to by the parties in their respective submissions. To that end, this Court is grateful to the parties for such diligence.

86. Having said so, this Court recalls that it recently discussed the exercise of prosecutorial powers by the DPP in Nairobi High Court Constitutional Petition No. E216 of 2020 Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR. Since I am still of that persuasion, I will reproduce what was stated in that case and as follows: -

#### SUBPARA 91.

Regarding the exercise of prosecutorial discretion by the Director of Public Prosecutions, the Court of Appeal in Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR stated as follows: -

#### SUBPARA (41)

] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in Mohit v Director of Public Prosecutions of Mauritius [2006] 5LRC 234:

these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...

In Regina v. Director of Public Prosecutions ex-parte Manning and Another [2001] QB 330, the English High Court said partly at para 23 page 344:

At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.

Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.

#### SUBPARA (42)

] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.

In Ramahngam Ravinthram v Attorney General (supra) the Court of Appeal of Singapore said at p. 10. Para 28:



however, once the offender shows on the evidence before the court, that there is a *prima facie* breach of fundamental liberty (that the prosecution has a case to answer), the prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At this stage the prosecution will not be able to rely on its discretion under Article 35(8) of *the Constitution* without more, as a justification for its prosecutorial decision.

92. The High Court in *Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others* [2019] eKLR had the following to say about the role of the Director of Public Prosecutions in prosecuting criminal offences: -

25. It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in *the Constitution* and in the aforesaid Act have not been adhered to, this Court cannot shirk its Constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, *the Constitution* itself. I associate myself with the sentiments expressed in *Nakusa vs. Tororei & 2 Others* (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that:

the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret *the Constitution* and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting *the Constitution*, the Court must uphold and give effect to the letter and spirit of *the Constitution*, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Dominic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of *the Constitution* has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of *the Constitution* as they stood at the time *the Constitution* was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any



provision of legislation found to be repugnant to constitutional right.

93. Long before the advent of *the Constitution* of Kenya, 2010 the High Court in R vs. Attorney General exp Kipngeno arap Ngeny Civil Application No. 406 of 2001 expressed itself as follows: -

.... Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognized, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognized lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some *prima facie* case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a *prima facie* case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself *inter alia* whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds....

94. It has also been well and rightly argued that, on the basis of public interest and upholding the rule of law, Courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. The Court of Appeal in *Diamond Hasham Lalji & another v Attorney General & 4 others* (supra) stated as follows: -

The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, *inter alia*, that persons reasonably 'suspected of committing a crime are prosecuted and convicted, punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by state and citizens.

92. The Court of Appeal in *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR referred to the Supreme Court of India



in State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007, where the Court stated:

The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, 227 of *the Constitution* of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as “Cr.P.C.”) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.

95. The High Court in Bernard Mwikya Mulinge case (*supra*) expressed itself as follows: -

14. As has been held time and time again the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of *the Constitution*. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon.....

97. In Meixner & Another vs. Attorney General [2005] 2 KLR 189 the Court stated as follows: -

The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of *the Constitution*. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of *the Constitution*). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in *the Constitution* particularly the right to the protection by law enshrined in section 77 of *the Constitution*....

98. Mumbi Ngugi, J (as she then was), in Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others (2014) eKLR stated that:



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

99. In Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR the Court held that:

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

100. Recently, the High Court in Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties) [2021] eKLR dealt with several instances where a Court may intervene and stop a prosecution. They include where: -

- i. There is no ostensible complainant in respect to the complaint;
- ii. The prosecution fails to avail witness statements and exhibits without any justification;
- iii. There is selective charging of suspects; or
- iv. An Advocate is unfairly targeted for rendering professional services in a matter.

101. It is, hence, a settled legal principle and position that whenever a Petitioner sufficiently demonstrates the stifling of or threats of infringement of rights, fundamental freedoms, *the Constitution* and/or the law by the investigative and prosecutorial agencies, a Court should not hesitate to intervene and stop such a prosecution. Such intervention by the Courts should, however, be in clearest of the cases.

87. I have also come across several other decisions on the subject. I will refer to only some few. In Anthony Murimi Waigwe v Attorney General & 4 others [2020] eKLR, the Court held that the Prosecutor has a duty to analyze the case before prosecuting it and it should let free those whom there is no prosecutable case against them. It expressed itself thus: -

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



49. The Petitioner in support of interest of administration of justice dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction, In other words Public Prosecutors should ask themselves• would an impartial tribunal convict on the basis of the evidence available?

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

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper ... there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.

51. In a democratic society like ours, no one should be charged without the authorities conducting proper investigation. The prosecutor on the other hand is under duty to consider both incriminating and exculpating evidence, In the case of Republic v. Director of Public Prosecutions & Another ex parte Kaman/ Nairobi Judicial Review Application Nog 78 of 2015 (supra), the court expressed itself as follows:

this court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of •justice is a hallowed lace and ought to be reserved for those mattes in which the protagonists have a conviction stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the Office of the Director of Public Prosecutions Act to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a catwalk.

88. In Meme v Republic & Another [2004] eKLR the Court of Appeal discussed abuse of the Court process thus: -

An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.

89. In quashing a criminal prosecution on the basis of abuse of Court process, the Court in Peter George Anthony Costa v. Attorney General & Another Nairobi Petition No. 83/2010 expressed itself thus:-

The process of the Court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or of oppression in the process of litigation. It follows that where there is an abuse of the



court process there is a breach of the petitioner's fundamental rights as the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.

90. Still on abuse of Court process in using Court to settle personal scores, the Court in Rosemary Wanja Mwagiru & 2 Others V Attorney General & 2 Others, Mumbi J (as she then was) stated that: -

The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.

91. On the need for a Prosecutor to act within the law, the Court in Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others stated that: -

The discretionary power vested in the Director of Public Prosecution is not an open cheque and such discretion must be exercised within the four corners of *the Constitution*. It must be exercised reasonably within the law and to promote the policies and objects of the law which are set out in Section 4 of the Office of Director of Public Prosecution Act. These objects are as follows: the diversity of the people of Kenya; impartiality and gender equity; the rules of natural justice, promotion of public confidence in the integrity of the office; the need to discharge the functions of the office on behalf of the people of Kenya, the need to serve the cause of justice; prevent abuse of legal process and public interest, protection of the sovereignty of the people; secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.

92. In Republic v. Commissioner of Co-operatives ex parte Kirinyaga Tea Growers Cooperative Savings & Credit Society Ltd CA 39/97 119991 EALR 245 the Court of Appeal warned against the improper use of power in the following words: -

...it is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allowed anyone on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith....

93. The above position was amplified in Nairobi High Court Miscellaneous Application No. 1769 of 2003 Republic vs. Ministry of Planning and Another ex parte Professor Mwangi Kaimenyi, where It was held:

So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power, The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner.



94. The need for Courts to act with deference and accord constitutional and legal entities to discharge their mandates was revisited in *Paul Ng'ang'a Nyaga vs Attorney General & 3 Others* (2013) eKLR, where it was held that: -

.... this Court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of *the Constitution*.

95. The Court believes that it has sufficiently rendered itself on the general exercise of prosecutorial powers and for the purposes of this case. I will now look at whether the prayers sought by the Petitioner ought to issue.

96. It is simply the Petitioner's case that he lodged criminal complaints against the 1<sup>st</sup> to 6<sup>th</sup> Respondents herein and that the Police and the DPP ought to be compelled to institute criminal charges accordingly.

97. From the discussion above, the position on the way forward in the matter is well set out. Whereas the Petitioner was within his right to lodge complaints against the Respondents, the Police were under a duty to independently investigate those complaints and at the completion of the said investigations, the DPP reserved the right to decide on whether to institute any criminal charges.

98. The main prayers in the Petition seek to compel the police to investigate the complaints and the DPP to institute any criminal charges. There is no evidence that the investigations are not ongoing or that there has been inordinate and unexplained delay on the part of the Police. In fact, the Petitioner admits that the investigations are on-going. The Petitioner has, hence, failed to demonstrate the infringement of any of the provisions of *the Constitution* by any of the Respondents.

99. With such a state of affairs, there was no need of dragging any of the Respondents to this Court. The Petitioner ought to have followed up the matter with the Police and the DPP until such a time when a case against both or either would consolidate and on the basis of apparent infringement of his rights and fundamental freedoms. In the meantime, the Petition is premature and uncalled for.

100. Having said so, there is nothing meaningful that this Court may engage itself in going forward. The upshot is, therefore, that the matter ought to come to an end and the following final orders do hereby issue: -

- a. The Petition is hereby dismissed.
- b. The Petitioner shall shoulder the entire costs of the proceedings.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF MAY 2023**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**N/A Counsel for the Petitioner.**

**Mr. Lichuma Counsel for the 5<sup>th</sup> and 6<sup>th</sup> Respondents.**

**Regina/Chemutai – Court Assistants.**

