



REPUBLIC OF KENYA



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**Evans Kundu v Director of Public Prosecutions (Petition 1 of 2023) [2024] KEHC 7917 (KLR)
(Anti-Corruption and Economic Crimes) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES**

PETITION 1 OF 2023

F GIKONYO, J

JUNE 24, 2024

**IN THE MATTER OF ARTICLES 1, 2, 10, 22, 23, 24, 28, 29, 50,
157 (11) & 236 OF THE CONSTITUTION OF KENYA, 2010.**

AND

IN THE MATTER OF ARTICLE 50 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF LEGALITY AND PROPRIETY OF PROSECUTION
OF EVANS KUNDU IN MILIMANI CHIEF MAGISTRATE'S COURT ACC
NOS. 8, 10, AND 11 OF 2018, REPUBLIC VS LILIAN OMOLLO & OTHERS.**

BETWEEN

EVANS KUNDU PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

Separate trials

1. The Petitioner, an officer at the National Youth Service in charge of the Mechanical and Transport Branch, is charged with different offences under the *Anti-Corruption and Economic Crimes Act* with allegations that on diverse dates between January 2016 and May 2018, the Petitioner with other persons, committed various offences under the *Anti-Corruption and Economic Crimes Act* to wit: Conspiracy under Section 47(A) (3) read together with Section 48; Abuse of office contrary to section 46 as read together with section 48; and Fraudulent making of payments under section 45(2)(a) (ii) as read together with section 48.



2. The Petitioner's role, as alleged, is that he unlawfully authorized payments to various persons alleged to be beneficiaries of the said unlawful enterprise. The purported beneficiaries as disclosed were:
 - a. Catherine Wanjiku T/A Kunjiwa Enterprises;
 - b. Firstling Supplies Limited;
 - c. James Thuita Trading as Firstling Suppliers;
 - d. Yvonne Wanjiku Ngugi;
 - e. Lucy Wambui Ngirita T/A Ngiwaco Enterprises;
 - f. Annwaw Investment;
 - g. Jeremiah Gichini Ngirita T/A Jerrycathy Enterprises;
 - h. Phyllis Njeri Ngirita T/A Njewanga Enterprises;
 - i. Arkroad Holdings Limited;
 - j. Andriane Grace Nyambura Mbare T/A Kalabash Food Supplies;
 - k. Catherine Njeri Kamuyu t/a Erstaz Enterprises; and
 - l. Sahah Murugu T/A Erstaz Enterprises.
3. The Petitioner was arrested and arraigned before Hon Ogoti on the 29th Day of May 2018 alongside other government officers as well as the purported beneficiaries of his alleged crimes and pleaded to the various charges preferred against him by the ODPP.
4. On the 29th May 2018, the same day he was arraigned before Hon. Ogoti, the various charges were framed in different cases Milimani ACC Case No's 8 of 2018; 9 of 2018; 10 of 2018; 11 of 2018; and 12 of 2018. When the trial commenced, the said cases were consolidated and disaggregated into 3 cases namely, ACC No.8, ACC No.10, and ACC No.11 of 2018.
5. For the purpose of hearing of the cases, the three cases were administratively distributed as follows:
 - a. ACC No. 8 of 2018, before Hon. Onyina;
 - b. ACC No. 11 of 2018, before Hon. Ooko; and
 - c. ACC No. 10 of 2018, before Hon. Nyutu.
6. The petitioner seeks to challenge how the hearings are conducted in the three cases.

The petition

7. Before this court for determination is the petition dated 17/01/2023.
8. The petitioner has sought the following reliefs;
 - i. A declaration that prosecution of the Petitioner in coinciding and corresponding trials using similar category of evidence via Anti-Corruption Chief Magistrate at Milimani ACC Nos. 8, 10 and 11, Republic v Lillian Omollo & Others amounts to unfair trials and violates Article 50 (1) and (2) as read with 157 (11) of *the Constitution*.



- ii. A declaration that the trial of the Petitioner outside the outside (sic) the 24 months provided for by section 62 of the [Anti-Corruption and Economic Crimes Act](#) violates the principle of the rule of law and is unlawful.
 - iii. A judicial review order of certiorari quashing Chief Magistrate Court at Milimani ACC Nos. 8, 10, and 11 of 2018, Republic v Lillian Omollo & Others.
 - iv. General damages for exposure of the Petitioner to unfair trials via Milimani ACC Nos. 8, 10, and 11 of 2018, Republic v Lillian Omollo & Others.
 - v. Any other or further relief that this court will deem appropriate to grant.
 - vi. Costs of this suit.
9. The petition is supported by an affidavit of Evans Kundu sworn on 17/01/2023.
10. The Petitioner's position is that in the three trials, the same category of evidence is used before the three different courts, and the prosecutions in the different courts are based on the same witnesses and witness statements. Therefore, in the event a particular witness is cross-examined in one trial, they always have an opportunity to rework their responses in the trial of the other cases coming subsequently, and that cross-examination opportunity is lost in the other trial. According to the petitioner, this is portrayed in material departure from the testimonies of the witnesses every time they appear before a different Magistrate.
11. The petitioner is charged in the Chief Magistrate Court in Milimani ACC Nos. 8, 10, and 11 of 2019, Republic vs Lillian Omollo & others which criminal case the petitioner seeks to have quashed.

The responses

12. The respondent opposed the petition vide replying affidavit of CPL Benard Gikandi on 27/05/2024.
13. The respondent also opposed the petition vide grounds of opposition dated 21/05/2024 on the grounds;
- 1. That the petitioner has not demonstrated to this court the prejudices he will suffer in the ongoing prosecution in Anti-Corruption Case Number E8, 10 & 11 of 2018 Republic vs Lillian Omollo & others. The Petitioner must demonstrate that substantial injustice would otherwise result if the declarations sought are not granted. The trial court is an impartial arbiter and should be given an opportunity to determine the impugned lower court matter on merit.
 - 2. That the prayers of the petitioners are an afterthought in that since they were charged on the 1st day of February 2019, he has never raised the issue of the unconstitutionality of the criminal proceedings before the trial court.
 - 3. That the respondent made a decision to charge in accordance with Article 157 (6), thereby upholding the provisions of the same Article 157 (10) & (11) of [the constitution](#) of Kenya, 2010. Therefore, Anti-Corruption Cases Number 8, 10, and 11 of 2019 are Constitutional and properly instituted.
 - 4. That the respondent made a decision to charge the petitioner based on overwhelming evidence on the prosecution file. Therefore, the trial court should be left alone to put the prosecution evidence on the scales of justice for the guilt to be convicted and punished and the innocent, if any, to be acquitted.



5. That it is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.
6. That the Director of Public Prosecutions made decision to charge while having regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process as per Article 157 (11) of *the Constitution* of Kenya, 2010.
7. That in ACC 8 of 2018, the petitioner faces six (6) counts namely Count 1, 16, 17, 18, 19, and 20.
8. That in ACC 10 of 2018, the petitioner faces two (2) counts namely Count 1&29.
9. That in ACC 11 of 2018, the petitioner faces one (1) count namely Count 1 only.
10. That it is trite law that Two or more accused may be joined in one indictment either as a result of being named together in one or more counts on the indictment or as a result of being named individually in separate counts, albeit that there is no single count against them all.
11. That the orders sought are therefore not tenable against the Respondent as the Petitioner has not shown how the criminal proceedings in Anti-Corruption Case Numbers 8, 10, and 11 of 2018 are unconstitutional and how the Respondent will infringe on the Petitioner's constitutional rights if the orders sought are not granted.
12. That the petition is without merit and should be dismissed with costs to the Respondent.

Directions of the court

14. Directions on the hearing of the petition were given by the court (Prof. Sifuna J) on 7.2.2024 and 3.4.2024. The petition and application were canvassed by way of written submissions. The petitioner's submissions are dated 6/03/2024. 1st and 2nd interested party's relied on the petitioner's submissions on the petition. Submissions for the respondent against the petition are dated 22/05/2024.

Analysis And Determination

Issues for determination

15. This court has considered the petition, supporting affidavit, replying affidavit, grounds of opposition, and the respective parties' submissions. And arising thereto are two issues for determination, namely: -
 - i. Whether the trials in the three cases violate the Petitioner's Right to Fair Trial under Article 50 (1) and (2) as read together with Article 157(11) of *the Constitution* of Kenya, 2010. Section 62 of ACECA will also be discussed here.
 - ii. Whether the Petitioner is entitled to the reliefs sought in the petition.

I. Whether the coinciding and corresponding trials violate the Petitioner's Right to Fair Trial under Article 50 (1) and (2) as read together with Article 157(11) of *the Constitution* of Kenya, 2010.

16. The petitioner submitted that the coinciding and corresponding trials violate the Petitioner's Right to Fair Trial under Article 50 (1) and (2) as read together with Article 157(11) of *the Constitution* of Kenya, 2010.
17. The Petitioner avers that by being exposed to three competing trials, the principle of Non bis in idem as well as the principle of double jeopardy in the expanded meaning is violated. The principle of Non



bis in idem connotes that a person cannot be punished and be subject to several procedures twice for the same facts. The principle pursues to avoid double prosecutions and double punishments.

18. The petitioner submitted that the Petitioner is being subjected to three concurrent, corresponding, and interrelated trials, more or less arising from the same transaction. That no different category of evidence is used before the different courts, and the prosecutions in the different courts are based on the same witnesses and witness statements. Therefore, any opportunity that arise during the cross-examination in the matter that is ahead is lost in the subsequent trials. The petitioner relied on *Mary Ngechi v Ethics & Anti-Corruption Commission & another* [2019] eKLR.
19. According to the petitioner, it is a well-established principle that where charges are preferred against an accused, offences that occur out of the same criminal episode, there should be a limitation on piecemeal prosecution by compelling the State to prosecute at one trial all offences. In exercising its prosecutorial powers, the ODP is enjoined by Article 157(11) to have regard to the administration of justice and the need to prevent and avoid abuse of the legal process.
20. The petitioner takes the view that, an abuse of prosecutorial powers contra Article 157(11) would infringe on an accused person's non-derogable right to a fair trial. The same is oppressive as against an accused. He called upon the court to exercise both its constitutional and inherent powers to intervene through issuance of prerogative orders. The petitioner relied on *Stanley Munga Githunguri v Republic* [1985] eKLR quoting Lord Salmon in *DPP v Humphreys* [1976] 2 All ER 497, *Hamisi Mungale Burehe v Republic* [2015] eKLR, *Commissioner of Police & The Director of Criminal Investigations Department v Kenya Commercial Bank Limited & 4 others* [2013]eKLR and *Amir Lodges Ltd & another v Mohammed Omar Sheriff* [2022] eKLR.
21. The petitioner contends that the court may put the prosecution to its election of counts to pursue so as to protect the legal process. The petitioner relied on the Court of Appeal in *Peter Ochieng v Republic* [1985] eKLR.
22. On the test for fundamental unfairness the petitioner relied on the English House of Lords holding in *Connelley v D.P.P.* [1964] 2 All E.R. (the Connelley Principle), *Republic v Jonah Orao Anguka* [1992] eKLR, and *Nicholas Kipsigei Ngetich & 6 others v Republic* [2016]eKLR.
23. The Petitioner further contends that the prosecution gets the opportunity to restructure how their witnesses respond to questions already asked in the matter that is ahead. The petitioner relied on *R v Tumaini Karisa & Another* [2019] eKLR, and *James Bari Munyoro V Republic* [2010] eKLR
24. It is the Petitioner's case that the multiple trials have given rise to a complexity that sees him spend most of his time in the courts without any substantial progress given that there are also many accused persons in each case. Ultimately, owing to the complexity, the Petitioner is embarrassed in his defence in all trials; a dilution to his right to a fair trial. The petitioner relied on *FS S v Director of Public Prosecutions & 2 others* [2015] eKLR.
25. According to the petitioner, there is a likelihood that the determination in the matter that is concluded first, may improperly influence the trajectory in which the remaining two cases will take which further mounts onto the constitutional infringement pleaded by the Petitioner.
26. Based on the above the Petitioner decries fundamental unfairness bordering on infringement of Article 157(11) of *the Constitution* which further perpetuates an infringement of the Petitioner's non-derogable right to fair trial.



27. The respondent submitted that the petitioner is properly and legally charged within the parameters of *the constitution* of Kenya, 2010 and it is not an unfair trial that violates Article 50 (1) & (2) as read with Article 157 (11) of *the Constitution* of Kenya, 2010.
28. The respondent argued that, in exercising the powers conferred by the above-mentioned Article, the Director of Public Prosecutions had regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process as per Article 157(11) of *the Constitution* of Kenya, 2010. The respondent relied on the case of Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another [2018] eKLR.
29. The respondent contends that it commenced and preferred the above-mentioned criminal proceedings against the petitioner before the Chief Magistrate's Court in the exercise of its constitutional mandate under Article 157 (6).
30. The respondent submitted that the charges as drafted are not similar and the evidence is not the same. Therefore, the charges do not prejudice the petitioner since he is able to understand the cases against him. The respondent relied on Eliphaz Riungu v Republic [1997] eKLR, and Blackstone's Criminal Practice) 1992 on the issue of joinder of counts and indictment at paragraph D8.29 at p.1119.

Separate or joint trial

31. 'Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character' (s. 135(1) of the Criminal Procedure Code).
32. Nevertheless, the DPP may institute separate or joint charges against one or more persons. Except, however, the decision should pass the outer constitutional threshold in article 157(11) to wit: -

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.

1. Propriety or otherwise of separate or joint trials is gauged on the basis of whether they will result into a fundamental unfairness (Conneley vs. D.P.P [1964] 2 All ER), or prejudice or embarrassment to the accused in his defence (Peter Ochieng vs. R [1985] eKLR), or oppression, or embarrassment, or was deployed as a result of abuse of process or power to prosecute (R vs. Jonah Orao Anguka [1992] eKLR).
2. The petitioner should therefore, prove that the separate trials results into a fundamental unfairness, or will occasion prejudice or embarrassment to the trial, or it is oppressive and only deployed as an abuse of process.
3. The DPP has stated that the offences in question were instituted in accordance with article 157(6) of *the Constitution*. And, therefore, lawful and constitutional.
4. The DPP argued further that, in instituting the charges in the three cases, acted in public interest, administration of justice and in a manner to prevent abuse of process.
5. To the DPP, the charges in the cases are distinct, draw upon different evidence and were preferred in accordance with the law and *the Constitution*, and thus, do not constitute double jeopardy or abuse of process or infringement of right.
6. The petitioner, on the other hand, stated that, the offences are similar or of similar character, draw upon same evidence and witnesses. He also argued that, witnesses are provided with an



opportunity to make up their cases which had been demolished in the earlier trial, thus, his right to cross-examination is lost. He considers these incidents to be a violation of the principle of non bis in idem as well as the principle of double jeopardy in its expanded meaning, which cumulatively is an affront to fair trial; a non-derogable right under article 25 of *the Constitution*.

7. It bears repeating that, a person may be lawfully charged in separate trials as long as the trials do not offend the right to fair trial.
8. The petitioner bears the onus of proof. He claims that the offences are similar or of similar character, or draw from same witnesses and evidence. One of the important considerations in this petition, is, whether the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character and ought to be charged in one case.
9. The petitioner needed to establish this fact in a pointed manner.
10. But, he merely made a generalized statement that, the offences in the three files are similar or of similar character, or draw from same witnesses and evidence.
11. A perusal of the papers presented and the submission by the DPP, show that, the offences are distinct and relate to different periods of time and activities for which criminal culpability is sought to be established by the prosecution.
12. On that basis, the mere fact that witnesses are the same does not necessarily mean they are speaking to the same issues or activities or events or episodes which constitute the charges subject of the different cases. The petitioner seems to suggest a prohibition on institution of separate charges or cases simply because the same witnesses will be called, but, to speak to the different and distinct incidents or events or transactions constituting the charges. This would be a dangerous proposition. Distinct corruption and economic crimes occurring within a government institution, may be copious, distinct and committed at different times by the same individual with different actors for a long period of time. The state witness may also draw substantially from employees of the institution in all the copious but distinct transactions or events or episodes. Therefore, mere pendency of three cases on corruption and economic crimes does not ipso facto mean an infringement of right to fair trial or principle of double jeopardy.
13. The large number of the accused persons, the copious alleged incidents of corruption and economic crimes which occurred at different times, and the varied roles allegedly played by each accused alone or with one or more of the co-accused persons, make these cases uniquely peculiar, presenting quite a complexity in charging. Nevertheless, the DPP should be careful to prefer appropriate charges and avoid the temptation of prefer too many charges which may be prejudicial to the accused as well as the prosecution of the case.
14. This court is acutely aware that, corruption and economic crimes are also uniquely attended to by the possibility or need of forfeiture of proceeds of crime which may require quite targeted evidence in respect of any proceeds of crime derived from the various offences committed. Nations are encouraged to approach the fight against these offences in the context of sustainable development, and recover all stolen assets or benefits derived from crime as a way of disgorgement. This element is also relevant when preferring charges of corruption and economic crimes.
15. The DPP was careful to provide succinct details that; in ACC 8 of 2018, the petitioner faces six (6) counts namely Count 1, 16, 17, 18, 19, and 20; in ACC 10 of 2018, the petitioner faces two



(2) counts namely Count 1&29; and in ACC 11 of 2018, the petitioner faces one (1) count namely Count 1 only.

16. In these circumstances, the claim of embarrassment in defence by the petitioner is over-rated.
17. The DPP sought consolidation of the initial 5 cases and were segregated into the three cases now subject of challenge in these proceedings.
18. From the submissions by the DPP, the action to consolidate the cases depicts diligence to avoid prejudice to the petitioner and the co-accused in multiple cases, yet, ensuring apt exercise of DPP's public mandate to prosecute offenders on behalf of the public.
19. There is also no proof that the witnesses will rework their evidence in the other trials which relate to distinct offences and episodes that are alleged to have taken place at different times. In any event, there are sufficient safeguards in law to deal with situations where a witness contradicts or departs from the written statement supplied to the defence pursuant to article 50(2)(j) of *the Constitution*.
20. The petitioner stated that, the separate trials may embarrass the accused who has been subjected to hopping from one court to the other due to the separate trials. There is also a claim of embarrassment in his defence.
21. In the Petitioner's case, he acknowledges that, the complexity that sees him spend most of his time in the courts without any substantial progress is majorly due to the many accused persons and witnesses in the cases.
22. The record shows that two of the three cases are before one trial court. He does not have to hop from court to court. By this fact also, the perceived embarrassment of the court is over-rated. The charges are also distinct and proper to be tried separately without causing an embarrassment in his defence.
23. It is worth noting that, under section 135(3) of the CPC a separate trial may be ordered where a person may be embarrassed in his defence because he has been charged with more than one offence in a case.
24. This court's view, is that, it is in the public interest and interest of justice that, the accused should not be prejudiced and embarrassed in his defence by the numerous counts he has to face in the same case, or numerous cases prosecuted against him simultaneously. However, in the circumstances of this case, it is desirable that, the cases are tried separately. The court is aware that the trial court may put the DPP to election where the charge sheet is overloaded to avoid prejudice. The DPP also has the discretion to make the election in appropriate cases. These options are in-built in the trial process and are available at any time of the trial.

Abuse of process and power

33. The petitioner argued that the three cases are parallel proceedings as same evidence will be adduced. He stated also that, in the circumstances, the cases are but an abuse of process of the court and state power of prosecution.
34. This court is content to cite the case of Amir Lodges (*supra*) that separate proceedings will only be stopped if the defendant proves that, 'either; the government was acting in bad faith and using the malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process violation'.



Trial outside 24 months

35. The petition also seeks for a declaration that the trial of the petitioner outside the 24 months' period provided in section 62 of the [Anti-corruption and Economic Crimes Act](#) (ACECA) is a violation of the principle of rule of law and is unlawful.
36. This point was not seriously argued in the submissions by the petitioner leaving it a skeleton without flesh or life.
37. Nevertheless, the respondent submitted that section 62 of the [Anti-Corruption and Economic Crimes Act](#) deals with the suspension of public officer charged with corruption or economic crime but not institution of the charges. To them, the petitioner has misdirected himself to a wrong provision of law.
38. This court is ware of judicial pronouncements that section 62 of ACECA relate to suspension of a public officer who is charged with corruption or economic crime rather that the trial. Thus, no premium may draw upon the said section in the manner proposed by the petitioner.
39. Consequently, the trials herein are not unconstitutional on the basis of section 62 of ACECA.

Whether the orders sought are merited Order of Certiorari

40. ...
 1. The petitioners submitted that, upon making a finding of infringement of [the constitution](#) by the Respondent a judicial review order of certiorari quashing the proceedings in Chief Magistrate Court at Milimani ACC Nos. 8, 10, and 11 of 2018, Republic v Lillian Omollo & Others ought to be issued. The petitioner relied on Stanley Munga Githunguri v Republic [1985] eKLR and [Maina & 4 others v Director of Public Prosecutions & 4 others \(Constitutional Petition E106 & 160 of 2021\)](#) (Consolidated)) [2022] KEHC 15 (KLR)(Constitutional and Human Rights) (27 January 2022) (judgment)
 2. The respondent submitted that the respondent acted within the provisions of the law and its jurisdiction to decide to institute criminal proceedings against the petitioner devoid of illegality, irrationality, and procedural impropriety. Therefore, this prayer for the order of Certiorari collapses. The respondent relied on the case of Municipal Council of Mombasa... Vs...Republic, Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR and n Justice Kasule in the Uganda case of Pastoli ...Vs..Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304.
 3. The respondent submitted that the petitioner has not established any basis for the Court to grant any of the orders sought. The petitioner is charged with different offences in each case namely ACC Case NOs. 8, 10, and 11 of 2019, Republic vs Lilian Omollo & others though most of the witnesses will testify in all of those cases adducing different evidence for each. Therefore, the petitioner has not demonstrated that substantial injustice would otherwise result if the criminal proceedings in ACC Case NOs. 8, 10, and 11 of 2019, Republic vs Lilian Omollo & others proceed as they are instituted or are not quashed.
 4. The petitioner was clear that, quashing of criminal proceedings is an inherent power that the superior courts use sparingly, and only in the clearest of cases
 5. They cited the case of [Maina & 4 others v Director of Public Prosecutions & 4 others \(Constitutional Petition E106 & 160 of 2021\)](#) (Consolidated)) [2022] KEHC 15 (KLR)



(Constitutional and Human Rights) (27 January 2022) (judgment) and endeavored to set out some of the instances where the court may quash criminal proceedings, inter alia:-

- i. Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;
 - ii. Where the quashing of the impugned proceedings would secure the ends of justice;
 - iii. The prosecution is not in the public interest;
 - iv. The prosecution is not in the interests of the administration of justice;
 - v. The prosecution is oppressive, vexatious, and an abuse of the court process;
 - vi. The prosecution amounts to a breach of rights and fundamental freedoms;
6. The court has already found that, the petitioner has not demonstrated that substantial injustice and infringement of a right and fundamental freedoms would otherwise result if the criminal proceedings in ACC Case NOs. 8, 10, and 11 of 2019, Republic vs Lilian Omollo & others, proceed.
 7. The petitioner has not also shown that, the said proceedings are an abuse of the process of the court.
 8. Separate trials do not necessarily result into embarrassment of the accused. Separate trials may be ordered to avoid embarrassment arising out of an overloaded charge sheet, or where it is desirable or in respect of distinct offences.
 9. Nothing shows that the petitioner will suffer any prejudice if the three matters proceed as scheduled. In any case, discretion to election suggested in the case of Peter Ochieng vs. Republic is still available to the trial court as well as the prosecution.
 10. There is also nothing to suggest the witnesses will give same evidence in respect of incidents which relate to charges that are distinct and different.
 11. The submission by the DPP, that, the three cases were instituted pursuant to their mandate in article 157(6) of *the Constitution*, after careful consideration of the public interest, interest of administration of justice and the need to prevent abuse of process, has not been controverted. The action by DPP portend diligence and adherence to staple criminal protections against prejudice in separate charging of the petitioner, thus, not an infringement of the rights of the petitioner.
 12. This court has found that, the charges may be instituted and tried separately. There is nothing to show the charges were instituted maliciously or as a result of abuse of the process of the court or the state power of prosecution by the DPP.
 13. The court also stated that the trial court is clothed with staple protections aimed at preventing any prejudice of the accused during trial.
 14. In sum, the order for certiorari is not merited.

Conclusions and orders

41.



16. Whereas, offences founded on the same facts, or form or are part of a series of offences of the same or a similar character, may be charged together in the same charge or information, separate trials may be ordered where it is desirable in the circumstances of the case.
17. The law protects a person from being subjected to simultaneous prosecution in multiple cases which arise out of the same or similar transactions which is a matter of the accused's right to a fair trial, which, cannot be limited (Article 25 of *the Constitution*). But, nothing shows prejudice to fair trial will arise if the separate trials proceed.
18. In the circumstances, the petitioner is not exposed to unfair trial, and a claim of damages cannot arise.
19. The petition lacks merit and is dismissed.
20. In the circumstances of this case, each party shall bear its own costs.
21. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 24TH DAY OF JUNE, 2024**

F. Gikonyo M

Judge

In the presence of: -

Adan C/A

Musyoka h/b for Dr. Okubasu for petitioner

Achochi for respondent

