



Olukano & 2 others v Director of Public Prosecutions & 2 others (Constitutional Petition E002 of 2023) [2024] KEHC 7828 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7828 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION E002 OF 2023**

JN KAMAU, J

JUNE 24, 2024

**IN THE MATTER OF ARTICLES 22(1), 23(1) & (3), 159(2)(A)(E),
165(3)(B),(D), 6, 7 & 258 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 3,
10(1), 10(2), 19, 20, 21(1), 25(C), 27(1) & (2), 29, 47(1), 50(1),
50(2)(A), (B), (C), (J), (L), 79, 157(11) & 249 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

**JERUSA ROSE AWINJA OLUKANO 1ST PETITIONER
PRISCILLA IMMACULATE OWESO 2ND PETITIONER
JOSIAH ROMAN AKETCH 3RD PETITIONER**

AND

**THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT**

JUDGMENT

Introduction

1. In its Petition dated 5th April 2023 and filed on 6th April 2023, the 1st, 2nd and 3rd Petitioners herein prayed for: -



- i. Declaration be issued that investigations on the Petitioners by the DCI, OCS/Incharge Serem Police Station and the DPP's institution of criminal proceedings against them in criminal case Vihiga SPM Cr Case No E222 of 2023 violates their constitutional rights, is an abuse of the process of court and therefore unlawful, null and void ab initio.
 - ii. An order of certiorari be and is hereby issued to quash the entire charge sheet dated 21st March 2023 and proceedings against the Petitioners in criminal case Vihiga SPM Cr Case No E222 of 2023.
 - iii. An order of prohibition be and is hereby issued prohibiting the respondents from proceeding with the prosecution of criminal case in Vihiga SPM Cr Case No E222 of 2023.
 - iv. An order of prohibition be and is hereby issued against the OCS/In charge Serem Police, DCI and DPP from investigating, recommending the prosecution or commencing any prosecution of the Petitioners in respect of which criminal case in Vihiga SPM Cr Case No E222 of 2023 was instituted.
2. The 3rd Respondent and the Interested Party did not file a response to the Petition.
 3. The Petitioners' Written Submissions were dated 20th November 2023 and filed on 18th December 2023. The 1st, 2nd and 3rd Respondent and the Interested Party did not file any Written Submissions despite being given ample time by court to do so. The Judgment herein is therefore based on the affidavit evidence on record and the said Petitioners' Written Submissions.

The Petitioners' Case

4. The Petitioners' swore their Affidavits in support of the Petition on 5th April 2023.
5. It was their case that on 15th May 2020, the 1st and 2nd Petitioners were selected by the County Public Service Board of Vihiga and the Interested Party herein to be part of the interviewing panel as technical persons for recruitment of Pharmaceutical Technicians who had been shortlisted. The 1st Petitioner was a Pharmacist and Pharmaceutical Technician while the 2nd Petitioner was in charge of health records. The 3rd Petitioner was a member of the Interested Party and chaired the Interviewing Panel. The 1st and 2nd Petitioners were required to scrutinise and verify all the documents as per the advert.
6. They contended that they did not appoint the successful Applicant for the position of the Pharmaceutical Technician as that was the sole mandate of the County Service Public Board (CSPB). They averred that during the interview on 15th May 2020, one of the shortlisted candidates, namely, one James Nakuti Ouya, appeared before them and they noted that he did not have the original registration and licence from the Pharmacy and Poisons Board and some of his required documents had anomalies which they indicated in their respective interview score guides.
7. The said James Nakuti Ouya was recommended for the position of Pharmaceutical Technician by the CSPB and was deployed at Likindu Health Centre. On 4th August 2020, the 1st Petitioner instructed one Dr Eric Sikuku to write a letter addressed to the Registrar, Pharmacy and Poisons Board seeking verification of enrolment status of the said James Nakuti Ouya and on 11th August 2020, the Ministry of Totality sick bold lower case Health Pharmacy and Poisons Board responded to the aforesaid letter confirming that the said James Nakuti Ouya had never enrolled with their Board.
8. On 23rd March 2023, the Petitioners were summoned by the 2nd Respondent to record statements touching on the issue so as to assist it in carrying out its investigations. They were, however, charged and arraigned in court together with the said James Nakuti Ouya on allegations they termed false, untrue



and unfounded in Case No E222 of 2023 Vihiga SPM Cr. They asserted that the 2nd Respondent ought to have used them as prosecution witnesses but instead, it maliciously acted on the instruction of the 1st Respondent and preferred charges against them.

9. On 21st March 2023, they applied for the plea taking to be deferred and for the Prosecution to supply them with copies of the Charge Sheet, statements and all documents it wished to rely on during the hearing to enable them study and understand the same before taking plea which was allowed.
10. It was their contention that the Respondents had framed them on unfounded and baseless allegations as the 2nd Respondent condemned them without giving them an opportunity to be heard while the interrogations were still ongoing. They were categorical that the actions of the 1st and 2nd Respondents were calculated to subject them to public humiliation and embarrassment. They were apprehensive that in the event that they were charged and plea was taken, they risked being suspended and/or interdicted from their employment which would violate their constitutional right of freedom and livelihood being that they were breadwinners of their respective families.

The 1st And 2nd Respondents' Case

11. The 2nd Respondent opposed the Petition herein vide a Replying Affidavit that was sworn on 18th September 2023 by No 83212 Detective Moses Kibet Biwott of Hamisi Sub-County Directorate of Criminal Investigations and filed on even date. The 1st Respondent represented the 2nd Respondent herein in the proceedings herein.
12. The 2nd Respondent asserted that on 13th August 2020, two (2) suspects namely James Nakuti Ouya and John Angote Akhuyo were brought to Serem Police Station by one Dr Onesmus Kilonzo, the Regional Pharmaceutical Technologist based in Kakamega on allegations that the said James Nakuti Ouya had forged a certificate of enrolment as a Pharmaceutical Technologist serial number 002474 enrolment number 009818 belonging to John Angote Akhuyo and secured employment at Likindu Health Centre through the County Government of Vihiga, Department of Health.
13. It explained that the two (2) accused persons applied for a vacancy at Vihiga County, Department of Health. The applicants were required to have a Diploma in Pharmacy. The applicants appeared before the Petitioners for an interview on 15th May 2020 and presented their papers. The interviewing panel indicated in their interview score guide sheet that he had no practicing licence.
14. However, on 15th July 2020, the said James Nakuti Ouya was informed to pick his letter of appointment from the County Government of Vihiga and on 27th July 2020 he was deployed at Likindu Health Centre in Hamisi Sub-County as a staff in the Department of Health, Pharmaceutical Technician.
15. It contended that in his statement, the said James Nakuti Ouya stated that there was an arrangement between him and the Petitioners in that they were all aware that he did not have the original certificate of enrolment from Pharmacy and Poisons Board but the panel went ahead and recommended him for the job.
16. It further pointed out that the investigations also established that while the said James Nakuti Ouya was awarded the Certificate of Diploma in Pharmacy on 9th December 2019, the certificate of enrolment he produced before the panel had been issued on 6th June 2019. It thus established that the said James Nakuti Ouya had used a forged enrolment certificate to secure a job at Vihiga County Government.
17. It was categorical that the Petitioners abused their office for ulterior motives as the said James Nakuti Ouya did not have his original documents required for the interview and he also scored below average.



18. It pointed out that all the Petitioners and James Nakuti Ouya were deemed to have conspired during the interview and denied innocent and qualified Kenyans the chance of being Pharmacy Technicians at Vihiga County Department of Health.
19. It contended that it was based on the findings of the aforesaid investigations that it recommended that the Petitioners be charged with the offences as indicated on the charge sheet and the 1st Respondent preferred the charges against them on 1st March 2023.
20. It was its case that the Petition herein was vexatious, frivolous, abuse of the court's process, lacked merit and was meant to delay justice and restrain them from exercising its constitutional mandate. It prayed that the orders sought should not be granted.

Legal Analysis

21. Having considered the Petition, the affidavit evidence and the Petitioners' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were: -
 - a. Whether or not the Petitioners' constitutional rights had been infringed upon;
 - b. If so, what reliefs were they entitled to; and
 - c. Who was to bear the costs of this Petition
22. The court therefore deemed it prudent to address the aforesaid issues under the following distinct and separate heads.

I. Constitutional Rights & Fundamental Freedoms

23. The Petitioners submitted that pursuant to Article 27(1) of *the Constitution* of Kenya 2010, every person was equal before the law and had the right to equal protection and benefit of the law. They contended that the 1st and 2nd Respondents were abusing their powers to criminalise civil/commercial transactions for purposes extraneous to the criminal justice system.
24. They further submitted that the charges brought against them lacked proper factual basis or foundation to give rise to criminal charges. They pointed out that it was a basic requirement of a fair trial under Article 50(2)(b) of *the Constitution* that precise information be given to an accused person (s) as to the nature of the complaint against them.
25. They asserted that courts had held that framing of the charge or information particularised in the offence against an accused person was very crucial in proving the elements beyond reasonable doubt and that if the framing was ambiguous, an accused stood prejudiced and hence, such a charge could not form the basis of a fair trial.
26. They added that courts have held that fundamental provisions enshrined in *the Constitution* were conditional precedent and the trial court had to comply with them from the start. They were emphatic that a trial that contravened constitutional provisions was unconstitutional and therefore oppressive. They argued that their right to be presumed innocent until the contrary was proved was being contravened by the actions of the 1st and 2nd Respondents when they prosecuted the matter through the media.
27. They further contended that their right to dignity pursuant to Article 28 of *the Constitution* was not being respected and protected as the 1st and 2nd Respondents had deliberately gone out of their way to



humiliate, embarrass and undermine them. They asserted that the said Respondents were abusing the state machinery and agencies by infringing their rights.

28. It was their contention that under Chapter 6 of *the Constitution* of Kenya, the responsibilities of leadership governing the conduct of state officers which dealt with leadership and integrity were set out and that the Director of Public Prosecutions (DPP) could give directions under Article 157 (11) of *the Constitution* of Kenya only to the Inspector General of Police who was in charge of all police officers in line of their duty. They pointed out that the 1st and 2nd Respondent were acting in bad faith and discriminatorily.
29. They were emphatic that the 1st and 2nd Respondents had exercised their discretion without conforming to the principles of independence, impartiality, equality of all citizens before the law and the judicious exercise of power and authority and that their actions demonstrated abuse of power, abuse of process, unfairness, unreasonableness and oppression.
30. They pointed out that there were instances where a court could exercise its discretion and stop a prosecution such as where the criminal proceedings amounted to abuse of the court's process, where the quashing of the proceedings would meet the ends of justice, where there was a legal bar against the continuance of the proceedings, where there was no legal evidence to prove the charge, where prosecution was oppressive, breached rights and fundamental freedoms, where it failed to act in the public interest and in the interests of the administration of justice and where the investigations were tainted with illegality, irrationality and procedural impropriety.
31. They placed reliance on the case of *Rosemary Wanja Mwagiru & 2 Others vs Attorney General & 2 Others* (eKLR citation not given) where it was held that the criminal process ought not be used to harass or oppress any person through the institution of criminal proceedings against him or her and that should the court be satisfied that the criminal proceedings were being used for such said purposes, it ought to step in and stop such manoeuvres and prevent the process of the court for being used unfairly.
32. They further relied on the case of *Thuita Mwangi & 2 Others vs Ethics and Anti- Corruption Commission & 3 Others* (eKLR citation not given) where it was held that the discretionary power vested in the DPP was not an open cheque and such discretion had to be exercised within *the Constitution* of Kenya. They also placed reliance on the case of *Peter George Anthony Costa vs Attorney General & Another Petition No 83 of 2010* (eKLR citation not given) where it was held that the process of the court had to be used properly, honestly and in good faith and was not be abused.
33. The National Police Service (NPS) was charged with the duty to carry out investigations into suspected criminal activities and to apprehend those culpable. The 1st Respondent exercised the state's power of prosecution of criminal cases. However, in carrying out their respective mandates, both institutions were subject to *the Constitution* of Kenya and statute.
34. The Petition herein had challenged the manner in which the NPS and the 1st Respondent had discharged their respective duties in relation to a criminal complaint that was lodged by the aforesaid Dr Onesmus Kilonzo.
35. As was pointed out herein above, the legal basis of the exercise of prosecutorial powers in Kenya was anchored in *the Constitution* of Kenya and statute.
36. The 1st Respondent's office was established by Article 157(6) of *the Constitution* of Kenya which provides that: -

“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.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).”

34. Article 157(8)-(12) further provides that: -

- “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.”

37. Going further, the Office of Director of Public Prosecutions Act No 2 of 2013 (hereinafter referred to as ‘the ODPP Act’) was enacted to give effect to articles 157 and 158 of *the Constitution* and other relevant articles of *the Constitution* and for connected purposes.

38. Section 4 of the ODPP Act gives the guiding principles in prosecution of cases as follows: -

“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.”

39. Although the 1st Respondent was not bound by any directions, control or recommendations made by any institution or body under Article 165(3) (d)(ii) of *the Constitution* of Kenya properly interrogate any question arising therefrom and make appropriate orders where it was shown that the expectations of Article 157(11) of *the Constitution* of Kenya had not been met.
40. This court had due regard to the case of Commissioner of Police & Another vs Kenya Commercial Bank Ltd & 4 others [2013] eKLR where it was held that whereas there could be no doubt that the field of investigation of criminal offences was exclusively within the domain of the police, it was well settled that the aforesaid powers were designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law.
41. In premises foregoing, courts were called to wait for investigations to be completed and the suspect charged. The 1st Respondent was enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process.
42. The court’s role was to ensure that the 1st Respondent and the NPS undertook all their functions in accordance and compliance with the law. If the court was satisfied that there had been abuse of power, then it would intervene in order to secure the ends of justice and restrain abuse of power that could lead to harassment or persecution.
43. The 1st Respondent was therefore called upon to always act judiciously and not act in perpetuation of an unfair and malicious criminal complaint when prosecuting matters. It was to be guided by the principle that the right to a fair trial cannot be limited thus raising the bar in the determination of the question whether to prosecute or not.
44. In the case of Diamond Hasham Lalji & Another vs Attorney General & 4 Others [2018] eKLR, it was held that the exercise of prosecutorial discretion enjoyed some measure of judicial deference and as numerous authorities established, the courts could only interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases.
45. The burden of proof rested with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence was adduced to establish a breach, the evidential burden shifted to the 1st Respondent to justify the prosecutorial decision.
46. Based on the above analysis, the Petitioners were required to show the manner in which the rights they alleged had been infringed. They were also required to set out in a clear manner the basis of each of their grievances.
47. Indeed, Sections 107(1), (2) and 109 of the *Evidence Act* Cap 80 (Laws of Kenya) required that whoever desired any court to give judgment as to any legal right or liability and depended on the existence of facts, he or she had to prove that those facts existed.
48. The Petitioners submitted that their rights under Article 27(1) of *the Constitution* of Kenya had been violated. The said Article provided that every person was equal before the law and had the right to equal protection and equal benefit of the law. The Petitioners ought to have demonstrated how the law



- was unequally applied to them or how they were discriminated against. They failed to do so. As they did not demonstrate with precision the manner in which their right to equal protection of the law was so allegedly infringed, their assertion could not succeed.
49. They further contended that their right under Article 28 of *the Constitution* of Kenya which stipulates that every person has inherent dignity and the right to have that dignity respected and protected had been infringed upon. They did not demonstrate how the alleged contravention of the right to dignity ensued in the circumstances of the case. Indeed, their being charged in the criminal case was not in contravention of Article 28 of *the Constitution* of Kenya per se. As such, this assertion was also unsuccessful.
 50. They further argued that their right under Article 50(2)(b) of *the Constitution* of Kenya had been infringed upon. Article 50(2)(b) provided that every accused person had the right to a fair trial, which included the right to be informed of the charge, with sufficient detail to answer it.
 51. The impugned charges were the subject of this Petition. The Petitioners alleged that they were not informed of the charge and sufficient time to answer to the same. However, they had indicated that the matter was deferred so that they could be furnished with the documentary evidence that the 1st Respondent wished to rely upon. The decision to charge them was made by the 1st Respondent. As per the 2nd Respondent's Replying Affidavit, it was clear that the decision to charge them was inevitably based on the evidence on certain investigations that had been done.
 52. The Petitioners' assertions that Article 50(2)(b) of *the Constitution* of Kenya had been violated were not established and hence this was therefore not a plausible argument to stop the criminal proceedings in Vihiga SPM Cr Case No E222 of 2023. Their contention thus fell by the wayside.
 53. The Petitioners were apprehensive that if the criminal case was allowed to proceed, then that would impact negatively on their jobs. However, they failed to demonstrate to the court how the 1st Respondent acted contrary to public interest, the interests of the administration of justice or failed to prevent and avoid abuse of the legal process.
 54. The 1st Respondent was under a public duty to ensure that offences were prosecuted and those culpable attended to as the law required. That was the balance created by the law and which the court was called upon to take. In fact, that was the essence of the rule of law.
 55. It was this court's considered view that it was in the interest of justice that the criminal case be heard and the Petitioners be given a chance to defend themselves in a fair trial.
 56. The termination of the intended prosecution of the Petitioners in the circumstances of the instant case would frustrate, instead of advance, the rule of law. There were constitutional safeguards to protect their rights even when undergoing the trial as they would be accorded an opportunity to challenge the veracity of the evidence including whether the evidence was properly obtained during trial.
 57. In the circumstances foregoing, this court found that the Petitioners had failed to show how the criminal case was an abuse of the criminal justice system. They failed to prove that the prosecution of the criminal case infringed Articles 27, 50, 28 and 157(11) of *the Constitution* and were thus not entitled to any reliefs.

II. Costs

58. Having analysed the evidence as above and as the Respondents herein were government entities this court deviated from the general rule that costs follow events.



Disposition

59. For the foregoing reasons, the upshot of this court's decision was that the Petitioners' Petition dated 5th April 2023 and filed on 6th April 2023 was not merited and the same be and is hereby dismissed. As it would be punitive to award costs to the government against its citizens, it is hereby directed that there will be no orders as to costs.

60. Orders Accordingly.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF JUNE 2024

J. KAMAU

JUDGE

