



**Kalama v Director of Public Prosecutions & 3 others (Constitutional Application  
11 of 2022) [2024] KEHC 11242 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11242 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CONSTITUTIONAL APPLICATION 11 OF 2022  
AC MRIMA, J  
SEPTEMBER 27, 2024**

**BETWEEN**

**GEORGE NABISWA KALAMA ..... PETITIONER**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATES COURT AT KITALE ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Background:**

1. On 17<sup>th</sup> December 2020, George Nabiswa Kalama, the Petitioner herein, was arrested and charged in Kitale Chief Magistrates Court Criminal Case No. 2234 of 2020 (hereinafter referred to as ‘the criminal case’) for being in possession of ammunition contrary to Section 89(1) of the Penal Code.
2. In Count I, the Petitioner faced the charge of being in possession of 99 rounds of 7.62 mm (ordinary) and in Count II, he faced the charge of being in possession of 59 rounds of ammunition of 7.62mm (Special).
3. The Petitioner claimed that he came into possession of the ammunitions through entrapment. He asserted that a Police informer, one Geoffrey Simiyu alias Moses Wamalwa and Ann Wambui (his co-accused in the criminal case) persuaded him to collect the said ammunitions from Ann Wambui for delivery to the said police informer.



4. It was the Petitioner's case that on 17<sup>th</sup> December 2020 the Police informer in the company of a Police Officer met at Show Ground Kitale where he delivered the said ammunitions to the Police Officers. It is his case that immediately they took possession, two CID officers arrived and arrested him.
5. He claimed that he protested his arrest on grounds that the two officers were also culprits but the CID officers informed him that they were police informers.
6. The Petitioner claimed that the police officers went beyond their undercover duties and encouraged the Petitioner to commit the offence rather than discourage him.
7. He was aggrieved that the charges were based on entrapment and as such are illegal and any exhibit recovered during such times are inadmissible in Court.
8. The Petitioner then filed the Petition subject of this judgment.

**The Petition:**

9. Through the Petition dated 23<sup>rd</sup> November 2022 supported by the Affidavit of the Petitioner deposed to on a similar date, the Petitioner sought this Court's intervention for various claimed constitutional violations.
10. In the main, the Petitioner prayed for the following reliefs: -
  - a. A declaration that the Charges filed against the Petitioner amount to a violation of the Petitioner's Constitutional right to fair hearing and equality before the law.
  - b. A declaration that the ammunitions 99 rounds of 7.63 mm rounds and 59 rounds of 7.62 mm that the prosecution intends to rely on in its case as exhibits were procured illegally and this inadmissible.
  - c. A declaration that the undercover officer's act of encouraging the Petitioner to deliver the 99 rounds of ammunition of 7.62mm and 59 rounds of 7.62mm amounts to entrapment.
  - d. An order that the respondent should not abuse the Criminal Justice System by charging the Petitioner with offence of being in possession of ammunitions contrary to section 89(1) of the Penal Code.
  - e. The Respondent bear the cost of this petition.
  - f. Any other further relief or Orders that this Honourable Court deems fit and just to grant.

**The Petitioner's Submissions:**

11. The Petitioner filed written submissions dated 25<sup>th</sup> April 2023. It was his case that the manner in which the evidence was obtained violated his right under Article 50(1)(4) of the Constitution and that admitting it would be detrimental to the administration of justice.
12. The Petitioner submitted that the conduct of the police officers who entrapped him was unconstitutional since they did not have to go beyond their duty as undercover and encourage a civilian to commit a crime.
13. The decision in Petition No. 181 of 2010 Mohammed Koriow Nur -v- the Attorney General was relied upon where charges were quashed since it was established that an undercover police agent instigated the offence.



14. The Petitioner further asserted that the 1<sup>st</sup> Respondent's decision to prosecute amounted to breach of its constitutional right under Article 157(11) of the Constitution.

**The Respondents' case:**

15. The Respondents opposed the Petition through the Replying Affidavit of CPL Joseph Omondi, the Officer in Charge Kitale Police Station deposed to in 26<sup>th</sup> October 2023.

16. It was his case that it was indeed true that the Petitioner was arrested on 17<sup>th</sup> December 2020 and that Police Officer Henry Wanyonyi received information from a police informer that there was a middle-aged man in Kitale Show Ground who had evoked suspicion.

17. He deposed that Police Officers went to investigate the report when they saw the Petitioner sitting down on the ground with a manila bag on his side who upon seeing the police fled with the bag.

18. He deposed that the Police chased and apprehended him whereupon they discovered that the manila bag contained 7.62mm of 99 rounds of ammunition and 7.62mm special 59 rounds of ammunition.

19. He deposed that the Petitioner was taken to Kitale Police Station and booked vide OB No. 40/17/12/25 and contents of his bag prepared but he refused to sign the inventory.

20. It was Mr. Omondi's deposition that upon recording a statement, the Petitioner mentioned that one Ann Wambui gave him the bag containing the ammunition for him to give it to one Jeff who had already found a buyer. He deposed that on that basis they apprehended Ann Wambui and interrogating her and she admitted that the ammunitions were given to her by one Charity Muthoni and that they were meant to be sold.

21. It was his deposition that Charity Muthoni approached the Petitioner whereupon the Petitioner informed her that he had found a buyer who deals in that business and accordingly handed over the ammunitions to him.

22. He deposed that the ammunitions were examined by a firearm examiner and it was established that they indeed were ammunitions under the Firearms Act.

23. In response to the claim of entrapment, he deposed that the issue will be dealt with by the criminal Court but investigations disclosed that he was aware that he was in possession of ammunition otherwise he would not have fled. It was his position that the Petitioner and his co-accused were lawfully arrested and charged.

24. He deposed further that the Petitioner had not adduced any evidence to support the assertion that he was delivering ammunition to Police Officers and there was no contravention of his rights under Article 50 of the Constitution.

25. He asserted that it is the Petitioner who set in motion the commission of the crime and was found in the process and that the Police did not in any way participate in committing the crime.

26. It was his case that there is no way his rights Under Article 21, 23, 27 and 28 of the Constitution were infringed as to meet the criteria under the decision in Anarita Karimi and Mumo Matemu cases.

27. He urged the Court to dismiss the Petition and to allow the process in the Criminal Case to take its course.



### **The Submissions:**

28. In their written submission dated 24<sup>th</sup> January 2023, the Respondents submitted that no evidence was adduced by the Petitioner to substantiate the claim that the ammunition was received from the Police.
29. The Respondent stated that the statement of Ann Wamboi corroborated the evidence that he got the ammunitions from Catherine Muthoni and the Petitioner helped her find a buyer.
30. It was its case that the circumstances of the instant suit do not meet the meaning of entrapment. To that end, the decisions in *Mohammed Kuriow Nur -v Attorney General* (2011) eKLR and the one in *Cyprian Nyakundi & Another -v- Director of Criminal Investigations & 2 Others, Victoria Commercial Bank (interested Party)* (2021) eKLR were relied upon where the elements of entrapment were discussed.
31. In conclusion, the Respondents submitted that there was no factual basis to warrant the Court to intervene.

### **Analysis:**

32. From the foregoing discourse, two main issues arise for determination.
33. They are as follows: -
  - i. Whether the Petitioner was entrapped into committing the offences, the subject of the Criminal Case.
  - ii. Reliefs.
34. The Court will now deal with the issues in seriatim.

### **Entrapment:**

35. An appropriate point to start off this discourse would be an appreciation of the legal meaning of 'entrapment'.
36. The *Black's Law Dictionary*, 12<sup>th</sup> Edition defines entrapment as follows: -

Entrapment: -

  1. A law enforcement officers or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to cause a criminal prosecution against the person.
  2. The affirmative defence of having been so induced. To establish entrapment (in most states), the defendant must show that he or she would not have committed the crime but for the fraud or undue persuasion.
37. The Court in *Mohamed Koriow Nur v Attorney General* (2011) eKLR discussed entrapment as follows: -

Entrapment occurs when: -

  - (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona-fide inquiry, and



- (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and include the commission of an offence .....

As far as possible, an objective assessment of the conduct of the police and their agents is required. The predisposition, or the past, present or suspected criminal activity of the accused, is relevant only as part of the determination of whether the provision of an opportunity by the authorities to the accused to commit the offence was justifiable. Further, there must be sufficient connection between the accused's past conduct and the provision of an opportunity, since otherwise the police suspicion will not be reasonable...

38. In *Polski -v- United States* 33 F. 2d 686 the elements of entrapment were discussed as follows: -

...An essential element of entrapment is that the acts charged as crimes were incited directly or indirectly by officers or agents of Government...It is not entrapment that one has been induced by some other person other than a person acting for Government to commit a crime, even if he would not otherwise not have committed it and even if the person inducing him to commit it intended to later betray him to the Government...

39. From the above definition and authorities, it is discernible that the parameters that will guide this Court to ascertain the validity of the Petitioner's claim are the following sub-issues: -

- i. A law enforcement officer or Government agent was involved.
- ii. Fraud or undue influence was demonstrated.
- iii. Whether the Petitioner would not have committed the crime had not been for the inducement.

40. In dealing with the above sub-issues, one thread that runs across is the aspect of proof. The reason is that the sub-issues are factual in nature, and as such, the Petitioner bears the burden to prove each of them.

41. The burden of proof in law is two-pronged; the legal burden of proof and the evidential burden of proof.

42. Sections 107(1), (2) and 109 of the [Evidence Act](#), Cap 80 of the Laws of Kenya deals with the burden of proof. It states as under:

Sections 107(1) and (2):

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.and

Section 109:

Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

43. The foregoing is the legal burden of proof and it always rests on the Claimant or the party seeking to prove its case.



44. The evidential burden of proof arises when the Claimant lays sufficient evidence as to satisfy the Court that the Respondent or the party sued by the Claimant ought to be called upon for rebuttal. In such a case, the evidential burden shifts from the Claimant to the other party. In the event the sued party successfully rebuts the Claimant's evidence, then the evidential burden reverts back to the Claimant for further substantiation.
45. Therefore, whereas the legal burden of proof is static on the Claimant, the evidential burden of proof shifts depending on the evidence tendered.
46. Returning back to the first sub-issue, the Petitioner's claim of entrapment lies in proving that the persons that were at the heart of the offence were Police Officer or Government agents and induced him to commit the offences.
47. This Court has carefully perused the record. The pleadings, dispositions and submissions are well noted.
48. In his Affidavit in support of the Petition, the Petitioner deposed as follows: -
- ... I came into possession of the said ammunitions through entrapment whereby a police informer namely Geoffrey Simiyu alia Moses Wamalwa and Ann Wambui my co-accused ... persuaded me to collect the said ammunitions from my co-accused for delivery to the police informant...
49. On the part of the Respondents, it was deposed how the police were informed of a person who carried a sack and raised suspicion. When the police approached him, he ran away only to be arrested after a chase. He was found in possession of the ammunitions. The person was the Petitioner herein.
50. For the Petitioner to outweigh the Respondents' position, he had to lead evidence that would rapture that defence.
51. The Petitioner's evidence is utterly wanting. The alleged police informer one Geoffrey Simiyu alias Moses Wamalwa is not a party in this matter. Further, there is no evidence on whether there is a person in that name and if so, whether the said person is truly a police informer.
52. In order to succeed, in a preliminary manner, the Petitioner had to prove that indeed Geoffrey Simiyu alias Moses Wamalwa was a police officer or a Government agent. It was also upon him to prove that a police informer is one of the documented Government officers in law.
53. In this case, the Petitioner did not prove any of the above. As such, he failed to adduce evidence to make the evidential burden of proof shift to the Respondents.
54. The upshot is that even if the Respondents did not oppose the Petition, still the Petition would not have seen the light of the day. The Petition suffered a false evidential start.
55. In the premises, dealing with the rest of the sub-issues will not add any value herein. It is apparent that the matter ought to come to rest.
56. As such, the Petition and the Notice of Motion are without merit and the following final Orders hereby issue: -
- a. The Petition and Notice of Motion both dated 23<sup>rd</sup> November 2022 are hereby dismissed.
  - b. The conservatory orders issued on 28<sup>th</sup> November 2022 staying the criminal proceedings against the Petitioner herein in Kitale Chief Magistrates Criminal Case No. 2234 of 2020,



Republic -v- George Nabiswa Kalama are hereby vacated. For clarity, the hearing of the criminal case shall proceed forthwith and on a priority basis.

c. The Petitioner shall bear the costs of the Petition.

57. It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered virtually and in the presence of: -

No appearance for Mr. Kimani, Learned Counsel for the Petitioner.

Miss Kiptoo holding brief for Mr. Odongo, Learned State Counsel instructed by the Office of the Hon. Attorney General for the Respondents.

Chemosop/Duke – Court Assistants.

