



**Korir v Republic & another (Miscellaneous Criminal Application
E012 of 2024) [2024] KEHC 16163 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS CRIMINAL APPLICATION E012 OF 2024**

**RL KORIR, J
DECEMBER 19, 2024**

BETWEEN

PAUL KORIR APPLICANT

AND

REPUBLIC 1ST RESPONDENT

JAMES KINUTHIA 2ND RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application dated 10th June 2024 where he sought the following orders:-
 - i. Spent.
 - ii. Spent.
 - iii. That the directions and orders given to the police to release the motor vehicle be stayed.
 - iv. That the complainant herein shall not be condemned unheard and any adverse decisions against him be stayed.
 - v. Spent.
 - vi. That costs be in the cause
2. The Application was brought under Article 165 (3) (a) of the Constitution of Kenya and sections 69, 81 (2), (3) of the Criminal Procedure Act. It was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Paul Korir on 10th June 2024.



The Applicant's case.

3. The Applicant stated that he was the complainant in Sotik Criminal Case Number E215 of 2024, *Republic vs Weldon Kipngetch Kirui & James Kinuthia Kimani*. The Applicant further stated that he was aggrieved by the decision of the ODPP (1st Respondent) to convert the 2nd Accused, James Kinuthia Kimani into a Prosecution witness. That he was also aggrieved by the decision to release the motor vehicle registration number KBW 170J which ferried the stolen goods (hereinafter referred to as the subject motor vehicle).
4. It was the Applicant's case that the ODPP erred and was biased when it ordered the police to release the subject motor vehicle without affording the affected parties a hearing. That justice ought to be administered according to the law and not according to the whims of a Prosecution counsel. It was the Applicant's further case that the ODPP had not explained why it thought the police had not conducted proper investigations
5. The Applicant stated that the ODPP had not applied to the court to have the subject motor vehicle released and it left room for suspicion that there were other interests involved. The Applicant further stated that criminal law imposed individual responsibility yet the ODPP directed that the 2nd Accused's (James Kinuthia) father take responsibility for the 2nd Accused's actions.
6. The Applicant further stated that the ODPP's decision to release the motor vehicle was an attempt to muzzle and usurp the police's power to investigate and was therefore an affront to the independence of the police.

The 1st Respondent's Response.

7. Through a Replying Affidavit sworn on 14th October 2024 by Prosecution Counsel, Eric Waweru Kiarie, the 1st Respondent (Prosecution) stated that police investigations into the matter commenced on 8th February 2024 where the DCIO Sotik recommended that James Kinuthia (2nd Accused) and Weldon Kipngetch Kirui be charged with the offence of conspiracy to defraud contrary to section 317 of the Penal Code. That upon receipt of the police file, they advised the police to charge James Kinuthia (2nd Accused) and Weldon Kipngetch Kirui (1st Accused)
8. It was the Prosecution's case that goods worth Kshs 865,000/= were stolen from the Applicant within Sotik and they were collected by the 1st Accused, Weldon Kipngetch Kirui who presented a cheque from ABSA bank for payment of the goods. That the cheque was later found to be fake. It was their further case that the 2nd Accused, James Kinuthia who owned the subject motor vehicle was contracted by one Dominic Mwangi Karanja to ferry the goods to Eldoret which he did. That the police tracked down the cargo in Eldoret, loaded them in the 2nd Accused's subject motor vehicle and escorted them back to Sotik, where upon arrival the subject motor vehicle was detained. They further stated that the 2nd Accused was instrumental in the process of arresting Dominic Mwangi Karanja.
9. The Prosecution stated that in making the decision to charge, they were guided by the evidentiary test and the public interest test. That they were also guided by the threshold test which allowed them to charge a suspect upon reasonable suspicion and where there was a reasonable prospect of additional evidence being available. They stated that they relied on the threshold test based on the evidence available at that time.
10. It was the Prosecution's case that they advised the police to charge the two Accused based on the available evidence then. That the decision to charge was made in good faith and was not capricious.



11. The Prosecution stated that it was later established that Dominic Mwangi Karanja was the mastermind of the conspiracy in cahoots with the 1st Accused, Weldon Kipngetich Kirui. They stated that the 2nd Accused/Respondent may have been a victim of circumstances and his testimony would fortify their case to the Applicant's benefit.
12. It was the Prosecution's case that after reviewing the evidence, they concluded that the evidence against the 2nd Accused/Respondent was insufficient to sustain a reasonable expectation of a conviction. That there was no reasonable ground to continue with his prosecution or detain the subject motor vehicle.
13. The Prosecution stated that after Dominic Mwangi Karanja was arrested, the Directorate of Criminal Investigations (DCI) recommended the withdrawal of the charge against the 2nd Accused/Respondent and the release of his motor vehicle. They further stated that the 2nd Accused/Respondent applied for the release of his motor vehicle and the trial court declined to grant the order stating that such powers lay with the 1st Respondent. That the same trial court in an Order dated 2nd May 2024 ordered that the subject motor vehicle be detained by the DCIO Sotik. That the two orders were in conflict and the Order for detention of the subject motor vehicle ought to be vacated to enable them carry their mandate.
14. It was the Prosecution's case that unless they are allowed to terminate the charge against the 2nd Accused, they stood the risk of a malicious prosecution suit. It was their further case that the Applicant's prayers did not benefit him at all and his Application was misconceived and an abuse of the court process.

The 2nd Respondent's Response.

15. Through his Replying Affidavit dated 25th June 2024, the 2nd Respondent stated that the power to initiate or discontinue criminal proceedings are contained in Article 157 of the Constitution of Kenya. That prosecutorial powers should not be exercised capriciously and that the rights of a victim should always be weighed against the rights of other people.
16. It was the 2nd Respondent's case that the continued detaining of his motor vehicle was malicious as it was established that there were two other motor vehicles that transported the stolen goods before he was contracted to ferry the goods to Eldoret. That the other motor vehicles that preceded his were motor vehicles registration numbers KCF 227Y and KCF 034R and the same vehicles were neither investigated nor detained.
17. The 2nd Respondent stated that the decision to drop the charges against him was made after Dominic Mwangi was arrested. That the said Dominic Mwangi was arrested while in possession of the stolen goods after he (2nd Respondent) had offloaded the goods in his house. He further stated that he was not involved in the theft as he only engaged to transport the goods and was thus a victim.
18. It was the 2nd Respondent's case that it was practice that if a motor vehicle was detained as an exhibit, the same would be photographed, certified and released to its owner as the trial continued. That this was done to avoid any economic detriment on the owner of the motor vehicle. It was his further case that the Applicant wanted to detain his motor vehicle for civil remedy purposes.
19. The 2nd Respondent stated that there was no evidence linking him to the theft. He further submitted that Dominic Mwangi was not his father as alleged by the Applicant.
20. It was the 2nd Respondent's case that the subject motor vehicle was his only source of income and was collateral for a loan from Platinum Credit Ltd. That the continued detention of the subject motor vehicle was occasioning him grave prejudice, loss and damages.



21. Parties took directions to have the Application canvassed by way of written submissions.

The Applicant's submissions.

22. Mr. Nyaingiri, learned counsel for the Applicant stated that he relied on the Supporting Affidavit dated 10th June 2024 sworn by the Applicant and the grounds thereof. Counsel submitted orally in court and stated that the 1st Respondent could not find the 2nd Accused innocent as that power only lay with the court. That he agreed with the Ruling of the trial court which stated that the subject motor vehicle should be detained by the DCIO Sotik. Counsel further stated that there were no conflicting Rulings in the trial court as the Ruling which the court had declined to release the subject motor vehicle was delivered in the criminal case and the Ruling which stated that subject motor vehicle should be detained by the DCIO Sotik was delivered in a civil suit.
23. It was counsel's submission that the decision of the 1st Respondent to terminate charges against the 2nd Accused/Respondent defeated public interest. That the investigators were opposed to the release of the subject motor vehicle. It was their further submission that the 2nd Accused/Respondent had not been tried and therefore remained an accused person and the subject motor vehicle was an exhibit.
24. Counsel submitted that under the [Victim Protection Act](#), the victim's participation did not take away the 1st Respondent's mandate.

The 1st Respondent's submissions.

25. Mr. Njeru, learned Prosecution counsel submitted that they relied on their Replying Affidavit sworn on 14th October 2024 by Prosecution Counsel, Eric Waweru Kiarie. That the Application was misconceived and if the Applicant was aggrieved by their decision to charge, his recourse lay in a Judicial Review. Counsel further stated that the 1st Respondent is clothed with among others, the power to terminate a charge.
26. It was counsel's submission that the criminal case was still active in the trial court and it was their view that the 2nd Accused/Respondent should be treated as a witness. That it was the role of the 1st Respondent to make such a decision without the participation of the victim. They relied on the Supreme Court case of [Waswa vs Republic](#) (Petition 23 of 2019) [2020] KESC 23 (KLR) (4 September 2020) (Judgment) where the court held that victim participation must not be prejudicial to the rights of the Accused.
27. Counsel submitted that there was no reason to detain the subject motor vehicle and they advised the police to release it. They relied on [Republic vs John Nganga Mbugua](#) (2014) eKLR. Counsel further submitted that the Applicant had failed to show that the 1st Respondent had been unfair or acted outside the law.

2nd Respondent's submissions.

28. Through his written submissions dated 8th July 2024, the 2nd Respondent submitted that this court did not have the jurisdiction to deal with the present Application as the Applicant sought to challenge the 1st Respondent's decision to charge through a criminal revision. He relied on Articles 165 (6) and (7) of the [Constitution](#) of Kenya and section 362 of the [Criminal Procedure Code](#).
29. It was the 2nd Respondent's submission that the Applicant had no locus to standi to move this court since he was the complainant and ought to act through the 1st Respondent. He relied on [Kenya Revenue Authority vs Josephat Kamau & another; Director of Public Prosecutions \(Interested Party\)](#) (2021) eKLR.



30. The 2nd Respondent submitted that the 1st Respondent was empowered to act without the direction or control of any person. He relied on *Bitange Ndemo vs Director of Public Prosecutions & 4 others* (2016) eKLR. The 2nd Respondent further submitted that the Applicant's participation in the trial was only limited to giving information to the police and such views could not be used to delay criminal proceedings in the trial court. That the 1st Respondent's decision to convert the 2nd Respondent into a state witness was done within the proper exercise of their mandate. He relied on section 20 of the *Victim Protection Act, Kelly Kases Bunjika Vs Director of Public Prosecutions & another* (2018) eKLR and *Republic vs Chief Magistrate, Milimani Criminal Division & 4 others Ex-parte John Wachira Wambugu & another* (2018) eKLR.
31. It was the 2nd Respondent's submission that the decision to release his subject motor vehicle was made by the 1st Respondent and not by the trial court. That the Applicant's recourse would be to move this court through a Judicial Review as opposed to a Criminal Revision. It was his further submission that the 1st Respondent's decision to release his motor vehicle was in tandem with settled law and this court could not interfere with it. He relied on *Republic vs John Ng'ang'a Mbugua* (2014) eKLR.
32. I have gone through the Notice of Motion Application dated 10th June 2024, the 1st Respondent's Replying Affidavit dated 14th October 2024, the 2nd Respondent's Replying Affidavit dated 25th June 2024, the Applicant's and 1st Respondent's respective oral submissions in court and the 2nd Respondent's written submissions dated 8th July 2024. Two issues arise for my determination. Firstly, whether this court should revise the order of the ODPP (1st Respondent) to release the subject motor vehicle registration number KBW 170J, and; secondly whether this court could direct the ODPP on the on-going prosecution in the lower court.
33. It is important to note that this was still an active case in the trial court in Sotik and this court shall not delve into the substance of the case.
34. The present Application was anchored on Article 165 (3a), (6) and (7) of the *Constitution* of Kenya which provided:-
- (3a) Subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters.....
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
35. I am persuaded by Githua J. in *Karuguchu v Mwangi* [2023] KEHC 20959 (KLR) where she held:-
- “Secondly, the supervisory jurisdiction of the High Court over subordinate courts and tribunals bequeathed to the court by Article 165 (6) of the Constitution of Kenya 2010 should not be invoked by litigants as a matter of course to challenge decisions made routinely by subordinate courts in the exercise of their discretion in the disposal of cases properly before them. It should be invoked in weighty matters that exceed the jurisdiction of the lower court and which, if no intervention is made by the High Court would cause grave prejudice to the applicant and may lead to a miscarriage of justice. It should also not be invoked to impugn the merits of an order made by the lower where alternative remedies exist.”



36. Similarly in *Republic vs Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others(Interested Parties); Ex-parte Applicant: Pravin Galot* (2020)eKLR, Mativo J. (as he then was) held:-

“There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation.....

.....This power of superintendence conferred by Article 165 (6) of the *Constitution*, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee* is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the Constitution to interfere.”

37. The Applicant's major grievance was the 1st Respondent's decision to release the 2nd Respondent's motor vehicle which in his view was crucial evidence that would help the police in their investigations. The question then became whether the 1st Respondent (ODPP) was a body exercising judicial or quasi-judicial functions.
38. The bodies mandated to perform judicial functions are the courts as established by Articles 163, 164, 165 and 169 of the *Constitution* of Kenya. In *Republic vs Chief Magistrate's Court (supra)*, the court defined a quasi-judicial body as:-

“.....A quasi-judicial body is a non-judicial body which can interpret law. It is an entity such as an arbitrator or tribunal board, generally of a public administrative agency, which has powers and procedures resembling those of a court of law or judge, and which is obliged to objectively determine facts and draw conclusions from them so as to provide the basis of an official action.”

39. The 1st Respondent was the National Prosecuting Authority established under Article 157 of the Constitution of Kenya with a mandate to 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. It is my finding that the 1st Respondent, being the National Prosecuting Authority of Kenya was subject to the supervisory jurisdiction by this court through judicial review. A judicial review would enable the court to interrogate the process by which the 1st Respondent exercised their decision making to charge or not to charge. In pursuing a Miscellaneous Application instead of a Judicial Review, the Applicant denied the court the platform from which to subject the decision-making process to the constitutional parameters.



40. The 1st Respondent is clothed with discretionary power to institute and terminate criminal charges. Article 157 (6) of the [Constitution](#) of Kenya provided:-

- (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 clauses (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).....
- (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.

41. In [Francis Anyango Juma vs The Director of Public Prosecutions and another](#) (2012) eKLR, Mumbi Ngugi J. (as she then was) held:-

“Clearly, the intention under the Constitution, was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under the Constitution, or violation of the Constitution itself.” (Emphasis added)

42. However, this court can interfere with the 1st Respondent’s decision to charge if there was evidence of abuse, malice and ill will in the discharge of their duties. In [Republic vs. Attorney General ex-parte Kipng’eno Arap Ngeny](#), H.C. 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 of improper purpose. Before instituting criminal proceedings, 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.” (Emphasis mine)

43. Similarly in [Reginal vs. Ittoshat](#) (1970) CRNS, 385 where the court held that:-

“This court not only has a right but a duty to protect citizens against harsh and unfair treatment. The duty of this court is not only to see that the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner.”

44. I have considered the Application and I have found no evidence of abuse, malice or ill will by the 1st Respondent in his decision to terminate the charge against the 2nd Accused/Respondent and release his motor vehicle. On the other hand, the 1st Respondent stated that after investigations were completed, it was their view and in line with their mandate that there would be no reasonable prospect



of conviction against the 2nd Accused/Respondent. That in fact the information given by the 2nd Accused was more helpful in prosecuting their case against the 1st Accused and one Dominic Mwangi.

45. In the final analysis, it is this court's view that while this court has the requisite jurisdiction to subject the ODPP's decision to a judicial review, it cannot do so within the limits of a Miscellaneous Application such as this one and on the material laid before the court inquire into and arrive at a decision that the ODPP was right in dropping charges against the 2nd Respondent. The court could only do that if seized of the evidence against the 2nd Respondent. The proper forum for such determination would therefore be the trial court or the superiors in the criminal investigation agency if such complaint arose at the very initial stage of the criminal investigation. Indeed it is this court's view that the complaint raised in the Application was one touching on accountability and transparency in the exercise of the prosecution function and ought to be ventilated and escalated to the Director, Criminal Investigations and the Director of Public Prosecutions who respectively would subject the decisions of their officers to higher scrutiny and direct as appropriate. Further the law has provided a remedy for DPP's inaction by allowing citizens to mount private prosecution where a case so demands.
46. With respect to Prayer III, it is apparent from the respective submissions of the parties that there were concurrent criminal and civil suits in which the issue of whether or not the subject motor vehicle should be released or not had been canvassed. Suffice to state that it would be within the trial court's jurisdiction before whom evidence is laid to determine whether or not such a motor vehicle was an exhibit warranting detention or one requiring photographic evidence only or production when needed by the court. In any case I have looked at the orders sought and there's no prayer asking this court to set aside or vary the orders of the trial court.
47. With respect to prayer IV, this court was unable to distil the particular remedy sought by the Applicant. The prayer as I understand it was an invitation to this court to generally supervise the trial in the trial court. Without any particularized action occasioning a miscarriage of justice or abuse of the court process, this court would exercise restraint and allow the trial court to conduct the trial within its constitutional mandate.
48. In the end, the Notice of Motion Application dated 10th June 2024 has no merit and is dismissed.
Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 19TH DAY OF DECEMBER, 2024.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Ondieki holding brief for Mr Nyaingiri for the Applicant, Mr. Njeru for the 1st Respondent, 2nd Respondent present in person and Siele (Court Assistant).

