



**Otieno v Director of Public Prosecutions & another (Petition
E011 of 2021) [2023] KEHC 167 (KLR) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 167 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
PETITION E011 OF 2021
FA OCHIENG, J
JANUARY 23, 2023**

BETWEEN

PATROBA OCHANDA OTIENO PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

KENYA REVENUE AUTHORITY 2ND RESPONDENT

JUDGMENT

1. The petitioner, Patroba Ochanda Otieno, lodged his petition because he felt aggrieved with the actions of the respondents, who he accused of contravening his fundamental rights and freedoms which are enshrined in Article 49(1) and 50 of the Constitution of Kenya.
2. The petitioner said that he was a businessman who was operating Swyfcon Engineering Limited; Joyush Business Limited; Dolphus Software Limited And Macropharm Pharmaceutical Limited.
3. It was his case that in early January 2021, he received a demand notice from the 2nd respondent, The Kenya Revenue Authority. The said demand notice was asserting that the petitioner was in arrears on both his VAT and Income Tax Returns.
4. Upon receipt of the demand notices, the petitioner raised an objection and lodged a complaint with the Tax Appeal Tribunal.
5. The 2nd respondent has acknowledged that the 2 companies which the petitioner has confirmed to be a director of, did lodge appeals before the Tax Appeals Tribunal.
6. The 2nd respondent also confirmed that the said companies applied for Alternative Dispute Resolution (ADR), shortly after they had lodged their appeals at the Tax Appeal Tribunal.
7. It was the petitioner's case that the Tribunal did direct that the matter should go for ADR.



8. Despite the pendency of the proceedings before the Tribunal, the 2nd respondent invited the 1st respondent, The Director Of Public Prosecution, to prefer criminal charges against the petitioner.
9. In the light of that action, the petitioner became apprehensive that he could be arrested and charged with trumped up charges, in order to arm twist him to withdraw the complaint at the Tax Appeals Tribunal.
10. The petitioner said that if he was arrested and prosecuted, he would suffer double jeopardy.
11. As he had invested heavily in his business, the petitioner told the court his arrest and prosecution would tarnish his reputation and the reputation of his business.
12. In the circumstances, the petitioner expressed the view that the respondents ought to wait until the Tribunal had concluded its task, before deciding whether or not to commence criminal proceedings against him.
13. The petitioner sought the following prayers;
 - a. A declaration that the decision by the 2nd respondent to press for the arrest and prosecution of the petitioner by the 1st respondent, despite the existence of an ongoing Tax Appeals Tribunal Case violates the petitioner's constitutional right to a fair administrative action under Article 49(1) and the right to fair hearing under Article 50 of the Constitution.
 - b. An order of permanent injunction restraining the respondents, their agents, servants and whomsoever acting on their instructions, from recommending the arrest and prosecution or charging of the petitioner in a court of law in connection with any tax related matter.
 - c. Costs of the petition; and
 - d. Any other orders that the Honourable Court may deem just and fit to grant.”
14. When canvassing the Petition, counsel for the petitioners drew the court's attention to the fact that it was only the 2nd respondent who had responded to the petition.
15. I have carefully perused the petition, but failed to trace any factual allegations which the petitioner had levelled against the 1st respondent.
16. At paragraph 8 of the petition, it was asserted that;

... the 2nd Respondent had moved the 1st Respondent to recommend criminal prosecution against the Petitioner while the matter is still pending ADR.”
17. The petitioner has not indicated that the 2nd respondent had accepted the recommendation; leave alone taking any steps to either have the petitioner arrested or charged.
18. In any event, the Director of Public Prosecution is an independent constitutional office, which is required to take actions without any direction or control of any other person or authority. Pursuant to Article 157(10) of the Constitution of Kenya;

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.”



19. It therefore follows that even though the Kenya Revenue Authority might give a recommendation to the DPP, for the prosecution of the petitioner, such recommendation is not binding upon the said DPP.
20. For all we know, the DPP may choose to ignore the recommendation.
21. Of course, there is also the possibility that the DPP might take action based on the recommendation from KRA.
22. But as the DPP has not been shown to have made a decision to take action on the basis of the recommendation, I find that the apprehension expressed by the petitioner is founded upon nothing more than a presumption.
23. The DPP has neither acted nor threatened to act in such a manner as would violate the constitutional rights of the petitioner.
24. The petitioner submitted that it is the duty of the court to protect citizens against harsh and unfair treatment.
25. I have no doubt that the court is enjoined to ensure that the law is not only applied, but also that such application of the law is carried out in a just and equitable manner.
26. The petitioner submitted that his intended arrest and prosecution, on an issue that was being addressed by a legal forum which has the mandate to determine the veracity of the allegations made by KRA, would violate his constitutional rights to a fair hearing.
27. That submission brings to the fore, the question about the mandate of the legal forum which the petitioner is making reference to. In my understanding, the forum which the petitioner was talking about is the Tax Appeals Tribunal.
28. The Tax Appeals Tribunal is a creature of the [Tax Appeals Tribunal Act](#), No 40 of 2013. Its mandate is to hear appeals filed against any tax decision made by the Commissioner appointed under the [Kenya Revenue Authority Act](#).
29. In this instance, the Commissioner had notified the petitioner that he was in arrears in the payment of both his VAT and Income Tax.
30. The petitioner disputed the demand notice, and lodged the complaint with the tribunal.
31. In my understanding, the mandate of the tribunal is to determine whether or not the petitioner owed the money which the Commissioner had demanded from the petitioner.
32. The tribunal could find that the sums are owed; or that lesser sums are owed; or that no sums at all, were owed. The determination by the tribunal is in the nature of a civil “judgment.”
33. On its part, the KRA holds the view that regardless of how the tribunal may decide, the petitioner had committed criminal offences.
34. Therefore, as the Tax Appeals Tribunal lacks the mandate to address the criminal aspects of the cases against the petitioner, it was the opinion of KRA that the institution of criminal proceedings would address matters which cannot be dealt with by the tribunal.
35. I hold the considered view that if the Tribunal determined that the petitioner did not owe any arrears of VAT and of Income Tax, it would be an exercise in futility for the KRA to pursue criminal prosecution founded upon its contentions in that regard.



36. Therefore, from a logical perspective, it would be prudent to have the Tribunal make its determination first, before the DPP could decide whether or not to prefer criminal charges.
37. However, the KRA is convinced that even if it were finally determined that the petitioner did not owe any VAT and Income Tax arrears, he might still be criminally culpable for some of his actions or omissions.
38. I have given careful consideration to this aspect of the petition. I find that if any criminal proceedings were founded upon the alleged non-payment of all the VAT and Income Tax which was payable by the petitioner, it would be wrong to compel the petitioner to face up to more than one parallel legal process. I so find because there would then arise the possibility that the Tribunal and the Court might arrive at inconsistent decisions.
39. However, I am also alive to the fact that there might be some criminal offences which could have been committed whether or not the petitioner was in arrears. Examples of such offences have been enumerated by the 2nd respondent, as including;
- i. Failure to submit a tax return by due date contrary to Section 94 of the [Tax Procedures Act, 2015](#);
 - ii. Failure to pay tax by the due date contrary to Section 95 of the [Tax Procedures Act, 2015](#);
 - iii. Deliberately making a false statement and/or misleading statements while filing income tax and VAT returns contrary to Section 96 of the [Tax Procedures Act](#).
40. If indeed, the petitioner had filed returns which showed that he had not received any income; and if the 2nd respondent was able to prove that the petitioner had received income, it would not matter if the petitioner thereafter paid the requisite tax on the income. The fact that the petitioner had originally indicated in his returns that he had not received income, would still constitute a criminal offence.
41. In such circumstances, if the DPP were to decide to prefer criminal charges against the petitioner, I find the said decision would not expose the petitioner to double jeopardy.
42. In the case of [Douglas Maina Mwangi vs KRA & Another](#), Constitutional Petition No 528 of 2013 the court said:
- When dealing with the decision as to whether or not to prosecute, the office of the DPP exercises independent judgment as envisaged under Article 157(1) of the [Constitution](#) and Section 5 of the [DPP Act, 2013](#); and the court cannot interfere unless it is shown that the exercise is contrary to the [Constitution](#), is in bad faith and amounts to an abuse of the process.”
43. As that authority was cited by the petitioner, it is clear that he fully appreciates the fact that the Director of Public Prosecution exercises his discretion independently. He is not subject to control of any other person or authority. Even the Kenya Revenue Authority cannot direct the DPP on the issue concerning whether or not to prefer criminal charges against the petitioner.
44. In this case, the DPP has not made a decision on the issue. Therefore, it is definitely premature and speculative for the petitioner to conclude that he is likely to be arrested and charged.
45. In the event that the DPP should decide to prefer criminal charges against the petitioner, the court could only be called upon to interfere with that decision if the exercise of the DPP’s discretion was shown to be contrary to the [Constitution](#).



46. As the DPP has not yet made any decision on the question as to whether or not to prefer charges against the petitioner, I find no merit in the petitioner’s contention that the DPP was;
- ... being used to settle a score between the 2nd respondent and the petitioners.”
47. In the final analysis, I find that the recommendation by the KRA, to have the DPP institute criminal charges against the petitioner is not unconstitutional.
48. The petitioner has not demonstrated that KRA was “pressing” for his arrest and prosecution. But even if KRA were to “press”, the DPP cannot be compelled by KRA to act.
49. The DPP is under a legal obligation to act fairly and independently.
50. The existence of an ongoing case before the Tax Appels Tribunal is not, of itself, a bar to the institution of criminal proceedings against the petitioner.
51. In the event that the Director of Public Prosecution is satisfied that there is sufficient material evidence which can sustain the prosecution of the petitioner, it would be an affront to the justice system to restrain him from undertaking the very task that the law bestows upon him. I therefore decline to issue a permanent injunction to restrain the respondents from;
- ... recommending the arrest and prosecution or charging the petitioner in a court of law in connection with any tax related matter.”
- This court does not know whether or not the petitioner had committed any offence of a criminal nature, in relation to his tax affairs. I cannot give a blanket amnesty to the petitioner against prosecution; “in a court of law in connection with any tax related matter.”
52. If the court were to issue such an order, it would have literally granted a wholesome impunity to the petitioner, against prosecution for any matter related to tax. I decline the request.
53. Accordingly, the petition stands dismissed. The petitioner shall pay to the 2nd respondent, the costs of the petition.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF JANUARY, 2023.

FRED A. OCHIENG

JUDGE

