



**Republic v Director of Public Prosecutions & another;
Thendiu (Exparte) (Judicial Review Application E104 of 2022)
[2023] KEHC 1278 (KLR) (Judicial Review) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E104 OF 2022
AK NDUNG'U, J
FEBRUARY 23, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE CHIEF MAGISTRATES COURT AT MILIMANI 2ND RESPONDENT

AND

ISAAC NJORO THENDIU EXPARTE

JUDGMENT

1. The application before this court is the *ex parte* applicant's Amended Notice of Motion dated December 19, 2022 brought under section 3A of the [Civil Procedure Act](#), order 53 rule (3) and (4) of the [Civil Procedure Rules](#), the [Law Reform Act](#) and section 5(4) of the Office of Director of Public Prosecutions Act, 2013.
2. The application seeks a raft of prayers as follows;
 1. That an order Of certiorari does issue to remove into the High Court and quash the 1st respondent decision to proceed with charges against the applicant which decision is set out in the amended charge sheet dated June 14, 2022 and registered before the 2nd respondent in Milimani Chief Magistrate Criminal Case no 690 of 2015.



2. That an order Of prohibition does issue directed to the 1st respondent, its officer(sic) and any other authority acting on its instructions from prosecuting of proceeding with prosecution of the applicant on the offence of six counts of manslaughter contrary to section 202 as read together with section 205 of the Penal Code or any other related charges.
 3. That an order Of Prohibition does issue directed to the 2nd Rrespondent prohibiting the 2nd respondent from hearing, proceeding with or in any way entertaining Milimani Chief Magistrate Court Criminal Case no 690 of 2015.
 4. That this honourable court be at liberty to make such further orders that as(sic) it deems fit to meet the ends of justice.
 5. That the costs of application be provided for.
3. The application is supported by the grounds on its face, a Statutory Statement dated August 8, 2022 and a Verifying Affidavit sworn by Isaac Njoro Thendiu on even date.
 4. The *ex parte* applicant's case is that following the collapse of his residential building in which six construction workers were fatally injured, he was charged with six counts of manslaughter contrary to section 202 as read with section 205 of the Penal code. It his case that he had invested 30 million in the said project and being that he was not a technical person he contracted a qualified team of professionals to advise him and progressively update him on the project. According to the government structural report the building collapsed owing to the use of poor concrete, material and workmanship.
 5. In response the 1st respondent filed a Replying Affidavit sworn by Berryl Marindah who swears to be an Advocate practicing as a senior prosecution counsel on October 19, 2022.
 6. In the affidavit learned counsel observes that indeed the charges against the *ex parte* applicant emanate from the collapsed building and further that although the *ex parte* applicant was the owner of the building he had contracted professionals to handle the work.
 7. Learned counsel observes that one Julius Kagai Warachi who was the structural/civil engineer was engaged by the *ex parte* applicant in the month of October 2013 to carry out a consultancy for the said building by undertaking an Environmental Impact Assessment project report and structural designs as per the approved architectural plans. Mr Warachi is said to be duly registered with the Engineers Board of Kenya and is also a lead expert registered with the National Environmental Management Authority.
 8. Other duties of the engineer are said to have included design and production of the structural drawing, approval of construction materials and recruitment of the implementation contractor and sub-contractors. The engineer is said to have been retained during the entire duration of the project. His case is said to have been withdrawn contrary to section 87(A) of the CPC despite all evidence of his negligence.
 9. The role of the architect on the hand is said to have been creating the architectural design, project management, advising the client on the appointment of other consultants, advising the client on the feasibility of the project, cost implications of the project and managing the construction project in accordance with the design contract.
 10. Learned counsel contended that any variation or change in the contract was to be approved by the consultants this included the structural engineer and architect. The *ex parte* applicant is said to have acquired all requisite statutory approvals.



11. It is the 1st respondent's case that immediately construction began the *ex parte* applicant handed the site over to the consultants and as such they bear responsibility for as long as they were still part of the project at the time of collapse. Further that as the cases against the engineer and architect who had the most responsibility were withdrawn, the criminal case as a whole is weakened and the prosecution appears selective.
12. Parties do not appear to have filed submissions as there are none on record.
13. I have considered the case adduced by both parties and I note that the only issue for determination is whether the orders sought by the *ex parte* applicant is merited.
14. Article 157 of the 2010 Constitution provides the legal foundation for the 1st respondent's expansive and unrestricted control over public prosecutions. According to the article, the 1st respondent may begin criminal proceedings without the approval of any person or authority and may execute his or her powers or functions without being subject to the direction or control of anyone. He or she must respect the public interest, the interests of administering justice, and the necessity to prevent and avoid misuse of the legal system, as provided under sub article 11.
15. The Court of Appeal in the case of Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR, extensively considered in detail the applicable law and circumstances under which the court could interfere with the exercise of prosecutorial discretion by the DPP. Among the guiding principles outlined in section 4 of the ODPP's Act no 2 of 2013 and the National Prosecution Policy formulated by the DPP pursuant to section 5(1)(c) of the ODPP Act are that; "The decision to prosecute as a concept envisages two basic components namely; that the evidence available is admissible and sufficient and that public interest requires a prosecution to be conducted."
16. Paragraph 4 (B)(Z) of the said policy provides;

" the evidence test- public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available."
17. In the diamond's case (*supra*), the court held at para 42 as follows;

"The burden of proof rests with the person alleging unconstitutional power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.
18. In para 45 the court went further to state thus;

"(45) In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP's decision is made establishes a *prima facie* case necessitating prosecution. At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative."



19. It is trite that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise sparingly. Lenaola J (as he then was) summed it up aptly in *Patrick Ngunjiri Muiruri v DPP* [2017] eKLR where he stated;
- “The law and practice, then, are quite clear; while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the court can review the DPP’s decisions for rationality and procedural infirmities, it cannot review them on merit.”
20. In the case before us the *ex parte* applicant is challenging the 1st respondent’s decision to charge him with manslaughter for being made maliciously and in bad faith as he is not a professional in construction and thus he could not have in anyway contributed to the collapse of his building.
21. The *ex parte* applicant also contends that he stands to suffer irreparable harm and injury should the orders sought not be granted as he will be constrained to go through an unjustifiable criminal prosecution with a risk to his liberty should he be unable to comply with any terms that may be issued.
22. The respondent acknowledges that the cases against the civil engineer and the architect having been withdrawn the criminal case as a whole is weakened and the prosecution appears selective. The withdrawal of the charges against the professionals engaged in the construction in which 6 innocent lives were lost is baffling to say the least. This coming in the background of an unprecedented increase in such incidences sends the wrong signal to rogue professionals. This court cannot, however, draw any conclusions on the culpability of the said professionals as that matter is better left in the hands of the 1st respondent based on evidence gathered in investigations.
23. That said, it is a fact that the applicant was the owner of the subject building. The DPP has, based on the available evidence, decided as is within his powers to charge the applicant and to maintain the charges even after the withdrawal of the charges against the professionals. It is not for this court to determine the sufficiency or lack thereof of evidence in support of the charges. The court’s jurisdiction in the current application is to consider the legality, rationality and procedural propriety of the process leading to the charges, the charges themselves and the trial.
24. It is important at this stage to set out the applicable principles and circumstances under which the court will grant order prohibiting the commencement or continuation of a criminal trial process. In this respect, the court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The merits of the case, and particularly whether the criminal proceedings have a likelihood of success, or that the Applicant has a good defence is also not a ground for halting criminal proceedings by way of judicial review in light of the purpose and limits of judicial review.
25. However, if an applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this Court will not hesitate in putting a halt to such proceedings as that would fall squarely within its mandate as a judicial review Court. The cases of *Peter Ngunjiri Maina v DPP & 2 Others* (2017) eKLR, and *R v DPP & 2 Others ex parte Nomoni Saisi* (2016) eKLR identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows:
- a. Where there is an abuse of discretion;



- b. Where the decision-maker exercises discretion for an improper purpose;
 - c. Whether decision-maker is in breach of the duty to act fairly;
 - d. Whether decision-maker has failed to exercise statutory discretion reasonably;
 - e. Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
 - f. Where the decision-maker fetters the discretion given;
 - g. Where the decision-maker fails to exercise discretion;
 - h. Where the decision-maker is irrational and unreasonable.
26. The matter before court is clearly in great public interest. The applicant has readily available to him the constitutional and legal safeguards for a fair trial. The trial court has the wider latitude to test the veracity of the evidence before it. The applicant shall have the opportunity to demonstrate that he had complied with all requirements as required by the law and that culpability was on the professionals and not himself.
27. In my view the question whether the withdrawal of the cases against the civil engineer and the architect is fatal should be better left to the trial court. As observed earlier in this judgement, The DPPs reaction to the current application is mind boggling. If after the withdrawal of the charges against the structural engineer and architect the case remains weak, why has the DPP who has the mandate to prosecute without any directions from any quarter not found fit to apply to have the matter withdrawn? Why has this application not been conceded? Could there be an attempt to kill an otherwise good case through the use of judicial review process and have the court cleanup after the dirt of the prosecution or using the court as rubber stamp? This scenario can only be explained and resolved at the trial and should the prosecution turn out to be malicious, then the applicant will have open to him legal remedies as per the law provided.
28. In light of the foregoing, I make the finding that the application herein has no merit. I dismiss the same and order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2023

A K NDUNG'U

JUDGE

