



**Rangara v Republic (Miscellaneous Criminal Application
E056 of 2022) [2023] KEHC 3646 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E056 OF 2022**

JN KAMAU, J

APRIL 25, 2023

BETWEEN

MARY GORETY AWUOR RANGARA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. In her notice of motion dated May 5, 2022 and filed on May 6, 2022, the applicant herein sought orders that the Independent Police Oversight Authority (IPOA) do furnish her with an authenticated copy of comprehensive report on their findings relating to murder of Fredrick Ojwang Otieno(hereinafter referred to as “the deceased”) which was recorded as OB 69/25/5/016 at Kisumu Central Police Station and that the Director of Public Prosecutions to show cause why the culprit should not be charged before the court in the same regard.
2. In opposition to the said application, on September 21, 2022, the respondent filed a preliminary objection dated September 19, 2022. It contended that the applicant had not moved the court properly. It pointed out that the orders she had sought were in the nature of judicial review and that she had not demonstrated that she obtained leave to institute judicial review proceedings. It added that she had also not demonstrated that she had sought the information without success as had been provided for in section 7 of the *Fair Administrative Action Act* No 4 of 2015 before seeking the orders herein.
3. It thus urged the court to allow its preliminary objection and strike out the applicant’s application.
4. The applicant herein did not file any written submissions. The respondent’s written submissions were dated October 11, 2022 and filed on November 24, 2022. This ruling is therefore based on the respondent’s written submissions only.



Legal Analysis

5. The respondent submitted that the applicant was seeking information from IPOA which she was entitled to under article 35 of the Constitution. It added that seeking information held by a state organ had to be by way of a constitutional petition. It pointed out that the applicant had not demonstrated that she had attempted to get information on the proceedings at IPOA and that she failed or that she had exploited other avenues before approaching the court for the orders that she had sought herein as the court was a last resort. It thus termed the said application as premature.
6. It contended that criminal proceedings had no time limitation and that the Office of the Director of Public Prosecutions (ODPP) filed murder charges upon conclusion of investigations and where there was evidence to support the charges.
7. It asserted that the application herein did not conform to the procedure provided in the law and that in the event that the applicant wanted to file her application under article 23 of the Constitution, then the same ought to have been by way of a constitutional petition and not by way of a miscellaneous application.
8. Notably, the office of the Inspector-General of National Police was established under article 245(1) of the Constitution of Kenya, 2010. Article 245(2)(b) of the Constitution of Kenya provides that the Inspector-General shall have independent command over the National Police Service and perform any other functions prescribed by national legislation. Article 245(4) of the Constitution of Kenya further adds that no person shall give a direction to the Inspector-General with respect to:-
 - a. the investigation of any particular offence or offences;
 - b. the enforcement of the law against any particular person or persons; or
 - c. the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
9. In the case of Communications Commission of Kenya v Office of the Director of Public Prosecutions & another [2018] eKLR, the Court of Appeal rendered itself as follows:-

“The import of article 245(4) of the Constitution... is to protect the independence of the Inspector-General of Police and safeguard the process of investigation of any particular offence from interference from any quarters. Furthermore, section 8(1) of the National Police Service Act provides that the service shall be under the overall and independent command of the Inspector-General. It is therefore clear that the Police Act exclusively grants the sole command over the police service, (under which the office of the Director of Criminal Investigations falls), to the Inspector-General of Police.”
10. Going further, article 157 (6) of the Constitution of Kenya states 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. subject to clause (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).”
11. Further, article 157 (4) of the Constitution of Kenya states that: _
- “The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.”
12. In addition, article 157(10) of the Constitution of Kenya stipulates that:-
- “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.”
13. From the foregoing, it was clear that although the Inspector-General (IG) had independent and sole control over the National Police Service (NPS) in as far as directing the latter to carry out investigations in any matter that was criminal in nature, the Director of Public Prosecutions (DPP) had power to compel the IG of the NPS to investigate any information or allegation of criminal conduct and the IG shall comply with any such direction. Further, the ODPP was the constitutional body that was vested with power to institute criminal proceedings against a suspect after investigations have been conducted by the NPS.
14. It was evident from the aforesaid provisions in the Constitution of Kenya that no person could direct the IG and DPP to act in a particular manner as they both derived their sole mandate from the Constitution of Kenya.
15. The High Court was in turn empowered by article 165(3)(d)(ii) of the Constitution of Kenya to determine the question of whether anything said to be done under the authority of the Constitution of Kenya or any law was inconsistent with or in contravention of the Constitution of Kenya.
16. The applicant herein sought an order in the nature of a *mandamus* to be issued to compel IPOA to furnish her with a comprehensive report on their findings relating to the investigations into the circumstances under which the deceased died in the hands of the police. This court had due regard to the case of Republic v Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 others [2018] eKLR where it was held as follows:-
- “mandamus is a prerogative order issued in certain cases to compel the performance of a duty....Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual.”
17. From the above dictum, it was clear that the High Court had jurisdiction to grant an order of *mandamus* where it was determined that a public authority or officer was obligated to perform a specific statutory duty but failed to do so. However, to ensure that there was no interference with the functioning of a public authority or officer, the order could only be granted if there was no other remedy available to the person claiming for the order to be granted.



18. Whereas the applicant had a right to be provided with an authenticated copy of comprehensive report on their findings relating to the deceased's death under article 35(1)(a) of the *Constitution* of Kenya which provides that every citizen has a right to access information that was held by the State, she did not adduce any evidence to demonstrate that she had sought the said information and was denied the same. If she was denied the same, then she ought to have filed a constitutional petition seeking to be provided with the said information as that would have been a violation, infringement and breach of her constitutional rights.
19. It was clear from both articles 22 and 23 as read with article 165(3) of the *Constitution* of Kenya that the court had the mandate to redress denial, violation or infringement of or threat to a right or fundamental freedom in the bill of rights. A petitioner was required to move the court appropriately for purposes of determining violation of rights and fundamental freedoms and if satisfied as to the violations, the court was obligated to prescribe appropriate redress on the basis of the facts and circumstances of the case.
20. This court did not wish to pronounce itself on the applicability of judicial review proceedings herein save to observe that if the applicant's request for the information was denied, she ought to have demonstrated that her right of fair administrative action under article 47 (2) of the *Constitution* of Kenya was infringed. Indeed, as the deceased was dead, it was only her right to fair administrative action that could have been breached, violated and infringed upon.
21. Notably, article 47 of the *Constitution* of Kenya provides that:-
 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action (emphasis court).
22. The constitutional bodies from which an applicant could seek redress following an infringement, violation and/or breach of the right of fair administrative action is spelt set out in section 7(1) of the *Fair Administrative Action Act*. It provides as follows:-
 1. Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to—
 - a. a court in accordance with section 8; or
 - b. a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
23. Section 2(a) of the *Fair Administrative Action Act* states that a court or tribunal can grant redress where:-
 - a. the person who made the decision—
 - i. was not authorized to do so by the empowering provision;
 - ii. acted in excess of jurisdiction or power conferred under any written law;
 - iii. acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - iv. was biased or may reasonably be suspected of bias; or



- v. denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
 - b. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - c. the action or decision was procedurally unfair;
 - d. the action or decision was materially influenced by an error of law;
 - e. the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
 - f. the administrator failed to take into account relevant considerations;
 - g. the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
 - h. the administrative action or decision was made in bad faith;
 - i. the administrative action or decision is not rationally connected to–
 - i. the purpose for which it was taken;
 - ii. the purpose of the empowering provision;
 - iii. the information before the administrator; or
 - iv. the reasons given for it by the administrator;
 - j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
 - k. the administrative action or decision is unreasonable;
 - l. the administrative action or decision is not proportionate to the interests or rights affected;
 - m. the administrative action or decision violates the legitimate expectations of the person to whom it relates;
 - n. the administrative action or decision is unfair; or
 - o. the administrative action or decision is taken or made in abuse of power.
24. Going further, the applicant was at liberty to seek the information on the progress of the matter under the [Access to Information Act](#) No 31 of 2016. There was no evidence to show that she had done so. If she had sought the same, then the same was not apparent from her affidavit evidence.
25. Consequently, after carefully considering the application herein, this court found and held that the applicant did not demonstrate that her rights under article 47(2) of the [Constitution](#) of Kenya had been violated, infringed upon and/or violated and/or that the actions of the IG and the DPP fell within the actions that were set out in section 2(a)-(o) of the [Fair Administration Act](#) and/or that she sought information under article 35 (1) of the [Constitution](#) of Kenya and she was denied the same.
26. Although article 22 (3) (a) of the [Constitution](#) of Kenya provides that formalities relating to proceedings including commencement of proceedings was to be kept to the minimum, applicants are nonetheless required to set out their cases of infringement, violation or breach of their constitutional rights in a manner that was supported by the law to enable the court grant the appropriate order.



27. Nonetheless, if the applicant herein did not intend that the provisions in the *Constitution* of Kenya form the basis of her application, this court still found the same to have fallen short as she did not demonstrate that she had sought the information and the same was denied as has been stated hereinabove. She had only attached a copy of the post mortem form and certificate of death in her said application.
28. In the circumstances, this court was not persuaded that the applicant herein had approached the court in the proper manner to warrant the grant of the orders that she had sought.

Disposition

29. For the foregoing reasons, the upshot of this court's decision was that the respondent's preliminary objection dated September 19, 2022 and filed on September 21, 2022 was merited and the same be and is hereby upheld. The effect of this decision is that the applicant's notice of motion application dated May 5, 2022 and filed on May 6, 2022 be and is hereby struck out. There will be no order as to costs.
30. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL 2023

M. S. SHARIFF

JUDGE

