



Lenolkulal v Director of Public Prosecutions & 2 others (Anti-Corruption and Economic Crime Constitutional Petition 7 of 2022) [2023] KEHC 17652 (KLR) (Anti-Corruption and Economic Crimes) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17652 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIME CONSTITUTIONAL PETITION 7 OF 2022

EN MAINA, J

MAY 25, 2023

BETWEEN

MOSES KASAINA LENOLKULAL PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

CHIEF MAGISTRATES COURT AT NAIROBI 3RD RESPONDENT

JUDGMENT

1. The Petitioner is a former Governor of Samburu County presently facing corruption charges before the Nairobi Milimani Chief Magistrates Court in Anti-Corruption Case No 3 of 2019. On 13th October 2022, during the pendency of the proceedings, the 1st Respondent filed an application seeking to withdraw the charges against the accused and his co-accused persons but subsequently withdrew the application and proceeded with the trial.
2. By this Petition dated 16th November 2022 supported by an affidavit sworn by the Petitioner on the same date, the Petitioner challenges the decision of the 1st Respondent to charge him and to withdraw the application dated 13th October 2022 by which it had sought to withdraw the criminal proceedings. The Petition is brought under Articles 10,19,20,21,22,23,27(1),28,47,48,50,157 and 165 of *the Constitution* and seeks the following reliefs:

“1 A declaration that the continuation of criminal proceedings and/or prosecution of the Petitioner herein in the criminal case serialized as Nairobi,



Milimani Chief Magistrates' Court Anti-Corruption Case No. 3 of 2019 is unconstitutional, unlawful null and void ab initio.

2. A declaration that the is Respondent's withdrawal of the application dated 13th October, 2022 and the consequential order by the 3rd Respondent allowing the said withdrawal was unfair, irregular, unprocedural, unconstitutional null and void ab initio.
3. A judicial review order by way of an order of Certiorari to remove and to bring before the High Court for the purposes of quashing and to quash the decision of the 1st Respondent communicating to court orally or in wiling to withdrawal the application dated 13th October, 2022 and which application was seeking in unequivocal terms leave to withdrawal and/or terminate criminal proceedings as against the Petitioner herein in the case serialized as Nairobi, Milimani Chief Magistrates' Court Anti-Corruption Case No. 3 of 2019.
4. A Judicial review order by way of an order of Certiorari to remove and to bring before the High Court for the purposes of quashing and to quash the decision of the 1st and Respondents to charge and prosecute the ex-parte applicant in Nairobi, Milimani Chief Magistrates' Court Anti-Corruption Case No: 3 of 2019.
5. In The Altenative; to prayer (3) above; An order of Certiorari to remove and to bring before the High Court for the purposes of quashing and to quash the decision of the 3rd Respondent to allow withdrawal of the 1st Respondent's application dated 13th October, 2022 which in unequivocal terms sought to withdraw the charges as against the ex-parte applicant in Nairobi, Milimani Chief Magistrates' Court Anti-Corruption Case No. 3 of 2019 and in its place allow the aforesaid application for being meritorious and supported by evidence therein
6. A judicial review order by way of an order of Prohibition directed to the Respondents, prohibiting further proceedings in Nairobi, Milimani Chief Magistrates' Court Anti-Corruption Case No. 3 of 2019 and further prohibiting the 1st and 2nd Respondents from instituting any future charges as against the Petitioner based on the same complaint or facts, the subject of the criminal charges in the said case.
7. An order of perpetual injunction prohibiting and restraining the Respondents herein from in any way whatsoever proceeding or instituting fresh criminal proceedings as against the Petitioner based on the same complaint or facts the subject of the criminal charges in the suit serialized as Nairobi, Milimani Chief Magistrates' Court Anti-Corruption Case No. 3 of 2019.
8. Compensation by way of general damages for violating and/or threatening to violate the guaranteed rights of the Petitioner.
9. Costs of this Petition.”



3. The Petition is premised on the following grounds as stated on the face of it and the supporting affidavit:-

- “ 1) That on or around the year 2019 the Petitioner herein was charged in a suit serialized as Nairobi, Milimani Chief Magistrates’ Court Anti-corruption Case No. 3 of 2019.
2. That all the prosecution witnesses have already testified except the investigating officer who is in the middle of his testimony.
3. That on or about 12th October, 2022 the 1st Respondent herein made an oral application to the Honourable Court informing the Court that they had perused and interrogated the entire evidence with respect to the anti-corruption case serialized as Nairobi, Milimani Chief Magistrates Court Anti-corruption Case No. 3 of 2019.
4. That upon perusal of the said case the 1st Respondent found and deemed it necessary to review the decision to charge the applicant herein.
5. That the 1st Respondent therefore sought to withdraw the charges as against the applicant herein but the trial magistrate did not allow the oral application for withdrawal of the charges and directed that the 1st Respondent do make a formal application to that effect.
6. That on or around 13th October 2022, the 1st Respondent herein went ahead and made a formal application dated 13th October 2022 and which application was under a certificate of urgency seeking to withdraw the charges against all the accused persons in Nairobi, Milimani Chief Magistrates Court Anti-corruption Case No. 3 of 2019.
7. That the said application was unopposed and noting the same was filed under certificate of urgency, the same ought to have been heard on or around 13th October, 2022 and where the 1st Respondent request withdrawal the charges as against the applicant herein would have been granted.
8. That the 1st Respondent through its principal prosecution counsel one Wesley Nyamache under oath deponed under paragraph 9 of the said supporting affidavit that any further prosecution of the said matter would amount to abuse of the legal process. The said paragraph reads as follows

“That the decision of the Applicant in making this application is based on public interest, interest of administration of justice and the need to prevent abuse of the legal process.”
9. That the said application dated 13th October, 2022 gave a chronology of the said anti-corruption case and indeed confirmed the same is based on solely conflict of interest but went ahead to demonstrate that indeed the said conflict of interest had been declared by the applicant herein vide a letter dated 5th April, 2013.



10. That the conflict of interest as against the applicant herein having been made therefore exonerated him from any wrong doing and as such the charges preferred against him were misplaced and had failed to consider this fact.
 11. That the 1st Respondent further deponed and confirmed to having received a letter dated 22nd September, 2022 from the head of treasury and who is the said letter confirms that no money was lost by the County Government of Samburu and that the County Government got value for their money.
 12. That the said letter dated 22nd September, 2022 and produced by the 1st Respondent further indicated and recommended that the applicant herein had not done any wrong as no money was lost and that the matter should not have attracted criminal sanction.
 13. That a reading of the application and the supporting affidavit together with the annexures therein confirms that indeed the applicant herein was not involved in any criminal act and the 1st Respondent under oath confirms the same.
 14. That the said application was not just supported by the supporting affidavit of principal prosecution counsel one Wesley Nyamache but was further supported by evidence in form of three documents “WN 1, WN 2 & WN 3”
 15. That unfortunately even with all this overwhelming evidence and a formal application urgency, the said application was still not allowed.
 16. That in a new twist of events the 1st Respondent ex-parte came back to the Honourable Court and unceremoniously withdrawal (sic) its application dated 13th October, 2022.
 17. That the 1st Respondent wants to now proceed with the criminal proceedings as against the Applicant herein and which proceedings under oath it deponed would amount abuse of legal process.
 18. That the facts and evidence as per the 1st Respondent's application dated 13th October, 2022 has not changed and as such any further proceedings as against the Applicant herein is clearly an abuse of court process and solely meant to punish the Applicant herein due to his political stance.
 19. That this Honourable Court has supervisory jurisdiction and which is meant to quash and remove such unfair, unmerited and abuse of criminal proceedings and legal processes forthwith.
 20. That the prosecutorial powers of the 1st Respondent are not absolute but are limited under Article 157(11) of *the Constitution*, 2010 and requires the 27 Respondent to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.”
4. Only the 1st Respondent filed a response to the Petition. The 2nd and 3rd Respondents did not enter appearance and neither did they file any responses or submissions to the Petition.



Response by the 1st Respondent

5. The 1st Respondent opposed the Petition through the replying affidavit sworn on 23rd January 2023 by Wesley Nyamache, Prosecution Counsel. The 1st Respondent contended that the power to institute, or discontinue criminal proceedings is the constitutional mandate of the 1st Respondent and is informed by the National Prosecution Policy and the Decision to charge guidelines; that as such, the exercise of such a function cannot be deemed to be an abuse of the power; that pursuant to Section 5(4) (e) of the *Office of the Director of Public Prosecutions Act*, the Director of Public Prosecutions is obligated to continuously review any decision to prosecute at any stage before judgment is rendered, including that of the Petitioner; that *the Constitution* and the law has placed sufficient safeguards to ensure that any application is only allowed when the court is satisfied that such an application is merited; that the 1st Respondent successfully applied to withdraw the application for termination of the case against the Petitioner hence maintaining the status quo; that parties had neither filed responses nor had the application been considered by the trial court; that the Petitioner has failed to demonstrate how the 1st Respondent violated any of the provisions of *the Constitution*, or any written law, or any rules made thereunder, or demonstrated that the Director of Public Prosecutions acted without or in excess of his mandate/jurisdiction. Further, that granting the petition would amount to causing unnecessary and undue delay in the conclusion of the criminal case which is at its tail's end as the investigating officer is scheduled to conclude his testimony between 30th January and 3rd February, 2023. It is also contended that, for this court to delve into the sufficiency or insufficiency of evidence, as the Petitioner herein invites this court to do, would be to usurp the mandate of the trial court which is well equipped to interrogate the triable issues raised.
6. The Petition was canvassed by way of written submissions.

Submissions of the Petitioner

7. Learned Counsel for the Petitioner relied on his written submissions dated 14th March 2023. He framed four issues for determination namely, whether the 1st Respondent's withdrawal of its application dated 13th October 2022 was unfair, unprocedural and unjustified; whether the continued criminal proceedings as against the Petitioner are unfair and unconstitutional; whether writs of judicial review ought to issue against the Respondent; and whether the Petition is meritorious.
8. Learned Counsel for the Petitioner began by citing the case of Stanley Munga Githunguri v Republic [1986] eKLR and argued that the office of the Attorney General, as it then was, though independent, has limits to its freedoms in its operations with respect to prosecution and the court may intervene in the event of bias, lack of fairness and reasonableness; that the decision of the 1st Respondent to withdraw the Application dated 13th October 2022 to terminate the criminal proceedings against the Petitioner unceremoniously and without reasons was irrational; that the 1st Respondent did not give reasons for its change of mind to terminate the proceedings, despite having filed documentary evidence in support of the Application; that the undertaking to the Petitioner that the charges would be dropped must be honoured as the continued prosecution of the Petitioner in the trial court amounts to harassment, contrary to public policy and amounts to an abuse of court process.
9. On the second issue, Counsel submitted that the continued criminal proceedings against the Petitioner are unfair and unconstitutional; that the 1st Respondent acted in breach of the Petitioner's rights in Article 47, 28 and 27 of *the Constitution*.
10. On the third issue, Counsel stated that the Petitioner is entitled to the writs of judicial review to wit, certiorari and prohibition against the Respondents; that the applicable test is an objective tests



and that the decision to take a u-turn on the termination of the criminal proceedings against the Petitioner was unsupported by evidence. Counsel cited the decisions of the court in the cases of: PAK & another v Attorney General & 3 Others [2022] KEHC262 (KLR), Kevin Musau Mulei v Chief Magistrates Court; Syokimau Residents Association (Interested Party) [2021] eKLR, Republic v Director of Public Prosecutions & 2 others and the case of Evansons Muriuki Kariuki (Interested Party); ex parte James M Kahumbura [2019] eKLR. Counsel argued further that it is in the interest of justice and the canons of the rule of law that the Petition be allowed as prayed.

Submissions of the 1st Respondent

11. The 1st Respondent relied on its written submissions dated 6th April 2023. No issues were framed. Learned Counsel submitted that the 1st Respondent's constitutional mandate allowed it to withdraw its application for termination of the charges; that the substratum of this Petition is anchored and/or seeks redress through Judicial review orders; that, it is trite law that Judicial review orders interrogate the process of decision making and not the merit of the decision and to that end, the 1st Respondent cannot be faulted in filing and subsequently withdrawing the application dated 13th October, 2022 as that decision solely lies within the discretion of the 1st Respondent. To support this submission Counsel cited the case of Republic v District Criminal Investigation Officer, Kericho & 3 others and the case of Kiprono A Chumo (interested Party) ex parte Diriri Mohamed Diriri [2018] eKLR. Learned Counsel also submitted that the Petitioner's grievance in the withdrawal of the application cannot be a justifiable ground of citing a violation of rights since the proceedings have been ongoing since 2019 and at no time has the Petitioner sought to challenge the decision. Further, that the Petitioner has not demonstrated a violation of his constitutional rights to warrant the grant of the orders sought. For this Counsel cited the case of Republic v DPP and 3 others ex parte Bedan Mwangi Nduati & another [2015]. Counsel argued that it is an established principle of law that the court ought not to interfere with the mandate of independent constitutional bodies; that the court should shy away from delving into issues of evidence in this Petition as the trial court is best equipped to test the veracity, accuracy and admissibility of the evidence. Counsel placed reliance on the case of Beatrice Ngoyo Kariuki v DCI and another [2013] eKLR and Jago v District Court NSW [1989] HCA 46 and prayed that the Petition be dismissed.

12. Issue for determination

2. Whether the decision of the 1st Respondent to withdraw its application dated 13th October 2022 and hence the continuance of the criminal proceedings against the Petitioner in Nairobi Milimani Chief Magistrates Court Anti-Corruption Case No 3 of 2019 is unconstitutional.

Analysis and Determination

13. It is trite that the Office of the Director of Public Prosecutions (ODPP) as established under Article 157 of *the Constitution* is an independent office with the authority to exercise its functions without the direction or control of any person or authority. The functions of the ODPP relevant to these proceedings are provided for under Article 157(6), (7) and (8) of *the Constitution* which stipulates that:-

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(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 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).

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.”

14. The Petitioner contended that the decision of the 1st Respondent to unceremoniously and without reasons withdraw the application dated 13th October, 2022 to terminate the criminal proceedings against him was irrational and as such the continuance of the criminal proceedings in Chief Magistrates Court ACC No 3 of 2019 is in breach of his right to fair administrative action under Article 47, right to fair trial under Article 50 as well as his rights under Articles 28 and 27 of *the Constitution* of Kenya. That the 1st Respondent as a public body is enjoined to adhere to the national values under Article 10 of *the Constitution* which include transparency.
15. While it is not disputed that the 1st Respondent sought, on two occasions, to discontinue the proceedings in Chief Magistrates ACC No. 3 of 2019, the oral application and formal application dated 13th October 2022 were withdrawn before they could be heard by the court. The Petitioner contended that the filing of an application to withdraw criminal charges amounts to an undertaking upon which the 1st Respondent was bound. This I do not agree with. The law as it stands is that whereas the Director of Public Prosecutions cannot withdraw a criminal prosecution without the permission of the court (Article 157(8) of *the Constitution*) there is no corresponding provision that a court can on its own motion compel the Director of Public Prosecutions to withdraw or to discontinue a prosecution. Indeed, Article 157(10) of *the Constitution* provides 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.” (Emphasis mine). Whereas the courts have often but sparingly exercised their judicial review jurisdiction to interfere with the decision of the Director of Public Prosecutions to charge I have not come across any provision in the law that would warrant this court to compel the Director of Public Prosecution to withdraw a criminal prosecution. The Director of Public Prosecutions acted within his constitutional mandate to withdraw that application and I see no justifiable reason to warrant this court to interfere with his decision. The decision to discontinue/terminate a prosecution is a discretionary one and is not as opposed to fair trial, a right guaranteed to an accused person. That being the case this court would only interfere with the DPP's exercise of that discretion if it is shown that “there is a gross abuse of discretion, manifest injustice or palpable excess of authority” none of which



have been demonstrated in this case - (see the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice and 2 others SC Petition No. 42 of 2019; [2021] eKLR)).

16. The Petitioner has not demonstrated that he has a constitutional right which has been violated by the DPP's action to withdraw the application. His right to fair trial remains intact. As to the merits of the charges against him that must be left to the trial court as held by the Supreme Court in the case of Praxidis Namoni Saisi & 8 others v The Director of Public Prosecutions and 2 others Petition No. 39 of 2019 (unreported) where the court stated:-

“(92) It is our considered opinion that these are no issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High court while exercising its judicial review jurisdiction. In Hussein Khalid and 16 others v Attorney General & 2 others, SC Petition N0. 21 of 2017; [2019] eKLR this Court held that it was not for the High Court as a Constitutional Court to go through the merits and demerits of the case as that is the duty of the trial court. Similarly, and as we have held hereinabove, it not for the judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.

(93) We are emphatic that the High Court, whether sitting as a constitutional court or a judicial review, may only interfere where it is shown that under Article 157(11) of *the Constitution*, criminal proceedings have been instituted for reasons other than enforcement of criminal law or otherwise abuse of the court process. We reproduce the words of this Court in Hussein Khalid and 16 others v Attorney General & 2 others [supra] as follows;

“[105] It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it will not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence(s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount.” [Emphasis added]

17. In the premises, I find no merit in this petition and the same is dismissed with costs to the 1st Respondent.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF MAY, 2023.

E N MAINA

JUDGE

