



**Nduati v Attorney General & another (Petition 1 of 2022)  
[2023] KEHC 21285 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21285 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
PETITION 1 OF 2022  
AK NDUNG’U, J  
JULY 27, 2023**

**BETWEEN**

**PETER NGOTHO NDUATI ..... PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Petitioner herein, Peter Ngotho Nduati was convicted of robbery with violence vide Nanyuki CM Criminal Case No 224 of 2013 and on 10/10/2016, he was sentenced to death. He appealed to this court vide Nanyuki High Court Criminal Appeal No 77 of 2016 whereby the Honourable Judge (Kasango J) upheld the trial court conviction and the sentence on 24/05/2017. The Petitioner did not inform this court whether he appealed to the Court of Appeal or not.
2. Meanwhile, the Petitioner has approached this court by a petition dated 16/02/2022 and supported by an affidavit dated the same day. The petitioner is challenging the conduct of his trial before the subordinate court since it was conducted by police prosecutors whom the Petitioner claims that they were not authorized by law and the Constitution to institute or undertake criminal proceedings against any person. His contention is that the proceedings before the subordinate court were materially and substantially defective.
3. The reliefs sought are as follows;
  - i. A declaration that the proceedings undertaken by the 1<sup>st</sup> Respondent in Nanyuki CM Criminal Case No. 224 of 2013 were defective for non-compliance with the mandatory provisions of Article 157(6) (a) and (b) of the Constitution.



- ii. An order of mandamus to compel the 1<sup>st</sup> Respondent to commence a new trial against the Petitioner in compliance with provisions of Article 50(6)(a) and (b) of the Constitution.
  - iii. A declaration that the petitioner be deemed innocent forthwith until proven guilty before a court of competent jurisdiction and competent prosecutors.
  - iv. An order that the Petitioner be released from lawful custody forthwith unless he is convicted and serving a sentence in any other offence.
  - v. A declaration that the Respondents are in breach of their constitutional and statutory mandate by failing to protect the best interest of the petitioner.
  - vi. In the alternative and interest of justice, that the honourable court to consider the time served by the Petitioner in custody as a result of defective proceedings as sufficient punishment and the petitioner be discharged forthwith from lawful custody.
  - vii. General damages.
  - viii. Costs of the petition.
4. The petition is grounded on the grounds contained on the face of the petition and the supporting affidavit. Briefly, the Petitioner's contention is that pursuant to Article 157(6)(b) of the Constitution, the 2<sup>nd</sup> Respondent was mandated to continue with criminal proceedings that had been instituted or undertaken by another person or authority. That at the commencement of the proceedings, the proceedings were presided over by Prosecutor Kengere, an Inspector of Police.
  5. Thereafter on 24/05/2013, 17/06/2013, 12/09/2013 and 19/02/2014, the proceedings before the subordinate court were presided over by Police Constable Agutu who was not authorised by law and Constitution to undertake criminal proceedings and in particular capital offences.
  6. On 17/04/2014, 04/03/2015, 12/12/2015 and 21/12/2015 the proceedings were conducted by Corporal Nzemya who was not authorised to undertake criminal proceedings and especially capital offences.
  7. The 2<sup>nd</sup> Respondent only took over the matter at defence stage on 25/08/2016. Therefore, the proceedings before the subordinate court were materially and substantially defective in substance as purported prosecutors Police Constable Agutu and Corporal Nzemya were not authorised by the Constitution to institute or undertake criminal proceedings and if they were authorised, that information was not availed to the public.
  8. That owing to the above, his rights to fair trial under Article 50 of the Constitution were violated and he has suffered prejudice for he has been serving a death sentence. He averred that Article 50(6) (a) and (b) of the Constitution permits a petition before this court for a new trial if new and compelling evidence has become available.
  9. The petition was opposed by the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent did not participate in these proceedings despite being served. The 2<sup>nd</sup> Respondent filed a replying affidavit dated 17/10/2022 opposing the petition on account that Peter Mualuko Nzemya Service No.55535 was a Police Prosecutor appointed by Director of Criminal Prosecutions pursuant to section 85 of the Criminal Procedure Code and section 20 of the Office of Director of Public Prosecutions Act when he prosecuted the matter and his appointment as a Police Prosecutor was only revoked on 28/09/2018 vide Gazette Notice No.10013.



10. That Stephen Agutu Force No.86111 was also a gazetted Police Prosecutor whose appointment was revoked vide Gazette Notice No.10013. That the proceedings before the trial court had been initiated by the Director of Public Prosecutions and the Police Prosecutors acted under the directions of the DPP in accordance to section 85(3) of the *Criminal Procedure Code*.
11. That all the rights to fair trial were accorded to the Petitioner during trial and did not suggest that his rights were violated when he appealed to the High Court. That the Petitioner has not demonstrated any new evidence that was not available during trial and that the Petitioner has not provided any compelling evidence capable of affecting the trial court and the high court judgment.
12. In response to the 2<sup>nd</sup> Respondent's replying affidavit, the Petitioner filed a supplementary affidavit and averred that the 2<sup>nd</sup> Respondent did not attach any proof to show that Peter Mualuko Nzemya and Stephen Agutu were appointed as Police Prosecutors in the year 2013 and throughout the trial. That the 2<sup>nd</sup> Respondent did not attach any proof to show that the criminal trial was initiated by the Office of Director of Public Prosecutions for the matter was commenced by a Police Prosecutor, Inspector Kengere whom the 2<sup>nd</sup> Respondent did not also prove that he was duly appointed as such. He averred that the 2<sup>nd</sup> Respondent failed to prove that the persons who undertook his prosecution were mandated to institute and undertake criminal proceedings pursuant to Article 157(6)(a) of the *Constitution* and section 85(3) of the *Criminal Procedure Code*.
13. The matter was canvassed by way of written submissions. The Petitioner's submissions asserted that the 2<sup>nd</sup> Respondent failed to avail a Gazette Notice on the appointment of the said Police Prosecutors and the particular of the scope of their work. It was submitted that the trial was commenced by Constable Stephen Agutu who took the evidence of PW1 and PW2 hence it was a grave mistrial since the said constable was not authorised to participate in the prosecution of the Petitioner. Reliance was placed on Meru High Court Criminal Appeal No. 134 and 137 of 2003 *Abmed Aden Kore & another v Republic* and Mombasa High Court Criminal Appeal No. 289 of 2002 *Bernard Mwangi Muraguri v Republic* where the judge quashed the conviction since the trial was conducted by a Police Constable and by dint of section 85(2) of the *Criminal Procedure Code*, a Police Constable was unqualified to lead evidence as a prosecutor.
14. The Petitioner further submitted that his right under Article 50(2)(h) of the *Constitution* was infringed for he was not informed of his right to have a counsel during trial and if he was unable to afford one, be assigned an advocate by the State.
15. The 2<sup>nd</sup> Respondent filed written submissions and argued that the Petitioner's petition failed to meet the test for petitions for failing to disclose the purported constitutional violations in accordance with Rule 10 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules*, 2013. That mere reference to Constitutional provisions without explaining how they were violated does not confer upon pleading the status of constitutional petition. Further, the Petitioner did not state how he suffered injury or likely to suffer injury for the said violation. Reliance was placed on the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR.
16. Counsel for the Respondent emphasised that the Petitioner appealed to the High Court where he had an opportunity to canvass on the issue at hand but failed to do so hence, he cannot be allowed to raise it as a Constitutional Petition.
17. It is further submitted that the Petitioner's petition is barred by the doctrine of *res judicata* since the Petitioner failed to raise the issue at hand before the High Court when he had a chance to do so. That the doctrine of *res judicata* also bars issues that ought to have been raised in a concluded case but were



omitted. Reliance was placed in *John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport and Infrastructure & 3 others* (2015) eKLR.

18. It is urged that the Petitioner must meet both conditions stipulated in Article 50 (6) (a) and (b) of the *Constitution* to benefit from that provision but the Petitioner's petition failed to do so. That the question on who presided over trial is not a question of evidence but a question of procedure which question does not constitute matters of evidence hence, there is no new and compelling evidence that the Petitioner has disclosed since he has not discovered a fact that would go to the root of the charges or ingredients of the offence. That the Petitioner's petition is an afterthought and a clear demonstration that he just invented a new cause of action since he was represented by counsels during trial and during his appeal and he did not object on how the trial was conducted by police prosecutors.
19. It is submitted that the inspectors who conducted the matter were persons qualified to be appointed as per section 85(2) as opposed to section 85(1) of the *Criminal Procedure Code* and that the said section does not states that the DPP should inform the members of the public that certain people have been appointed as such. Furthermore, section 85 does not discriminate on the rank and who should conduct prosecutions. Counsel submits that the cases relied by the Petitioner were in respect to the repealed section 85 and were decided before promulgation of the new Constitution and the enactment of section 85 as it is now.
20. That the Petitioner was tried under the new Constitution and section 85 which made no distinction as to the ranks of police officers who can exercise delegated prosecution. On the claim that the 2<sup>nd</sup> Respondent did not attach the gazette showing the appointment of police prosecutors, counsel submitted that the petitioner was the one who was alleging that he was tried by persons who were not qualified yet he failed to discharge the onus of proof to show that the police prosecutors were not qualified. Reliance was placed on the case of *Leonard Otieno v Airtel Kenya Limited* (2018). Furthermore, the Gazette Notice revoking the appointment of Police Prosecutors implies that the Police Prosecutors were indeed duly authorised to act as so.
21. It is submitted that prayer 1 is not merited since the proceedings were not undertaken by the 1<sup>st</sup> Respondent and that an order of mandamus cannot be issued against the 1<sup>st</sup> Respondent since the AG has no power to conduct public prosecution. It is the 2<sup>nd</sup> Respondent who is mandated to conduct prosecutions. That prayer 4-6 cannot be granted since that would amount to Petitioner arguing secondary appeal before the same court. But if the petition is merited, the counsel urged this court to order for a new trial in line with Article 50(6) of the *Constitution*.
22. I have duly considered the petition, the replying affidavit and the submissions filed by the parties herein. The petitioner claim is that his rights to fair trial were violated. This is based on the fact that he was tried by unqualified Police Prosecutors. According to him, the trial was defective in substance for non-compliance with Article 157(6) (a) and (b) of the *Constitution*. In the written submissions, he claimed that his right under Article 50(2)(h) of the *Constitution* was also violated for he was not informed that he needed an advocate during trial and if unable to afford one, be assigned an advocate by the State.
23. To determine whether any of his rights were violated, I think it is prudent to determine first whether the Police Prosecutors who conducted the trial were qualified to do so. The bone of contention is that Stephen Agutu and Peter Nzemya were not qualified to conduct the trial as they were not authorised by law and the *Constitution* to undertake criminal proceedings and especially capital offences.
24. In his submissions however, he only faulted part of the trial that was conducted by Stephen Agutu who was at the time of the trial, a Police Constable. Reliance was placed on the case of *Abmed Aden* case (supra) and *Bernard Mwangi* case (supra) where convictions were quashed after those courts found



- that the Police Prosecutors who were of the rank of a Police Constable were unqualified to conduct the matter in accordance with section 85 of the *Criminal Procedure Code*.
25. The 2<sup>nd</sup> Respondent contention is that the Police Prosecutors who conducted the matter were indeed appointed to do so and were qualified to conduct trial in line with section 85 of the *CPC* and Article 157(9) of the *Constitution*. The 2<sup>nd</sup> Respondent attached a Gazette Notice to its replying affidavit dated 28/09/2018 which revoked the appointment of the two police prosecutors as police prosecutors. Counsel for the 2<sup>nd</sup> Respondent further argued that section 85 of the *Criminal Procedure Code* did not discriminate on the rank and did not state that a Police Constable could not conduct a trial. That the cases that the Petitioner relied on were decided before the promulgation of the new *Constitution* and before section 85 of the *Criminal Procedure Code* was repealed.
26. It is noteworthy that the Petitioner's trial commenced in the year 2013 hence the law applicable then was the *Constitution* of Kenya 2010 and the current section 85 of the *Criminal Procedure Code*. Section 85 of the *Criminal Procedure Code* gives Director of Public Prosecutions powers to appoint public prosecutors. It states;
- (1) The Director of Public Prosecutions, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.
  - (2) The Director of Public Prosecutions, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case.
  - (3) Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions.”
27. Article 157(9) of the *Constitution* provides;
- The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
28. As was submitted by the 2<sup>nd</sup> Respondent, section 85 does not discriminate on the rank of the person appointed to conduct criminal proceedings. What is clear is that the 2<sup>nd</sup> Respondent relied on the repealed section 85 of the *Code*. The repealed section stated that;
- (1) The Attorney General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.
  - (2) The Attorney General, by Writing under his hand may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any case.
  - (3) Every public prosecutor shall be subject to the express directions of the Attorney General.”
29. The above section was repealed by The *Statute Law (Miscellaneous Amendments) Act* No. 7 Of 2007 which came into force on 10/10/2007 amending section 85(2) as follows;
- 85(2) Delete the words "not being a police officer below the rank of Assistant Inspector of Police.
30. The cases relied by the Petitioner were decided way before the amendment of section 85.



31. The 2<sup>nd</sup> Respondent as stated earlier attached a Gazette Notice revoking the appointment of the two Police Prosecutors who conducted the trial before the subordinate court. This shows that the two Police Prosecutors were duly appointed to conduct criminal trials. The Petitioner tried to shift the burden of proof to the 2<sup>nd</sup> Respondent by stating that the 2<sup>nd</sup> Respondent did not attach a Gazette Notice to show that indeed the two Police Prosecutors were appointed to act as such. He offers no evidence in that respect. The 2<sup>nd</sup> Respondent has by way of evidence demonstrated the revocation of the appointments of the challenged officers.
32. The burden was on the Petitioner to prove that the two police prosecutors were not properly appointed and that they acted beyond the scope of their power. The Supreme Court in Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) held that;
- “A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes...Aside from bare allegations, the 1<sup>st</sup> appellant did not adduce even an iota of evidence to back her claims. Even in situations where a respondent did not file or tender evidence to counter the petitioner’s case, the petitioner bore the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard was met would depend on whether a court based on the evidence was satisfied that it was more probable that the allegation(s) in issue occurred.”
33. In his submissions, the petitioner claimed that his right under Article 50 (2) (h) of the Constitution was violated in that he was not informed of his right to be represented by a counsel and if he could not afford one, the right to have one assigned by the State. Article 50 (2) (h) states that every accused has a right to fair trial which includes;
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”
34. It is noteworthy that the Petitioner did not claim that this Article was violated in his petition. This was only raised in his submissions which is an afterthought. The Respondent was not accorded a chance to respond on this issue. It is trite law that parties are bound by their pleadings and diversion from their pleadings cannot be allowed. I align myself with the pronouncement of the court in Independent Electoral Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR where the court held that;
- “for the proposition that for the sake of certainty and finality each party is bound by their pleadings and cannot be allowed to raise a different or fresh case without a proper amendment being made.”
35. This position is affirmed in Adetoun Oladeji (nig) Ltd v Nigeria Breweries Plc S.c. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, as follows;
- “...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”



36. I will therefore not comment on the alleged violation of his rights under Article 50(2)(h) of the Constitution.
37. To sum up, the reliefs sought in the petition were hinged on the fact that he was tried by unqualified police prosecutors who were not authorised by law and the Constitution to conduct criminal trial. Having found that the Petitioner failed to prove that the Police Prosecutors were not appointed to act as such and having found that they were indeed appointed as police prosecutors as the Respondent attached a Gazette Notice revoking their appointment and, there being no evidence to the contrary, his prayers in the petition fails.
38. While I think I have said enough to dispose of this application by way of a dismissal, I need to point out that the applicant seems to prosecute his matter piecemeal. He appealed before this court and never raised an issue over the propriety of the impugned proceedings as he does now. He is caught up by the doctrine of *res judicata*. His petition is an abuse of the court process.
39. With the result that the petition herein lacks merit and is dismissed.

**DATED, SIGNED AND DELIVERED AT NANYUKI THIS 27TH JULY 2023**

**A.K.NDUNG’U**

**JUDGE**

