



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
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**Malalah & 7 others v DPP & 2 others (Judicial Review E003 of 2022)
[2023] KEHC 23025 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
JUDICIAL REVIEW E003 OF 2022
SC CHIRCHIR, J
SEPTEMBER 29, 2023**

BETWEEN

CLEOPAS WAKHUNGU MALALAH & 7 OTHERS APPLICANT

AND

DPP & 2 OTHERS RESPONDENT

RULING

1. What is coming up for consideration is the Applicant's Notice of Motion dated 18/7/2022. It seeks for the following orders:
 - a). That pending the hearing and determination of the Judicial review Application No. 3 of 2022, this honourable court be pleased to issue orders compelling the 1st Respondent herein to avail all necessary documents, communication and records in respect of the Decision to charge the Applicants in CMCN No. E335, E336 and E337 of 2021 including the letters to the DPP head office forwarding the investigations files for review and all recommendations received back, if any,
 - b). That an order do issue directing the 1st respondent to provide the Applicants with the following communications:
 - (i). Reply to the letter Ref. ODPP/KAK/CAM/5710 21/vol.4 dated 9th March 2021.
 - (ii). Communications between the 1st and 2nd Respondent, specifically the sub-county criminal investigating officer (SCCIO) Mumias Matungu regarding police case No. 925/66/2021 & police case No. 925/68/2021.
 - (iii). Reply to the Applicant's Advocate letter dated 30/3/2021 to the 1st Respondent if any.



- (iv). Results of review of files Mumias Criminal Nos. 925/66/2021, 925/67/2021 forwarded to the 1st Respondent for review and directions on 5th March 2021.
 - (v). That this court may be pleased to issue any other orders that may serve the ends of justice.
2. The Application is supported by the Affidavit of Charles Malala Advocate, and the grounds appearing on the face of the Application.

The Applicant's case

3. It is the Applicant's case that the charges preferred against them were done under questionable and skewed circumstances which can only be unraveled, if access is allowed to the above stated documents; that this fact can be gauged by the fact that the Applicants were charged only a few hours after the directions on charging were sent to the office of the Director of Public Prosecutions (ODPP)
4. The Applicants further argue that they are entitled to access the aforementioned documents as a matter of statutory and constitutional right and that the Respondents are under an obligation to provide the access.
5. It is contended that the communication on the decision to charge is critical in that it forms the basis of the pending judicial Review Application.
6. In their submission the Applicant argues that the right to access to information is a fundamental right guaranteed under Article 35 of *the Constitution*; that the right is important for the proper and democratic conduct of government affairs.
7. It is the Applicants contention that access should be allowed upon the citizen's request and the citizen seeking information need not provide a reason for the information.
8. The Applicant also relies on the provisions of Fair Administrative Act which obligates public officers to Act expeditiously on such requests.
9. It is argued the Applicants' right to fair hearing include the right to information.
10. The Appellant has referred the court to a number of Authorities which I have perused.

Respondent's Case

11. The 1st Respondent filed grounds of opposition dated 19/6/23 by way of a response. The Respondent argues that the right to access to information is not absolute; that the information being sought for were internal Communication between two officers of the D.P.P and had nothing to do with the decision on whether to charge the Applicants.
12. It is further submitted that investigation between investigative Agency is privileged information.
13. The Respondent further contends that by virtue of Article 157(10) of *the Constitution* of Kenya, the 1st Respondent does not require the consent of any person to commence criminal proceedings. The Respondent has referred the court to the case of Edwin Harold Dayan & 3 others vs Inspector General of police service.(supreme court petition No. 6(E007) of 2022

Determination

14. The right of access to information is set out under Article 35 of *the Constitution*. It provides as follows:



- (1) Every citizen has the right of access to:
 - a. information held by the state; and
 - b. Information held by another person and required for the exercise or protection of any right or fundamental freedom
- (2)
- (3)

15. Access to information Act No. 31 of 2016 (The Act) was enacted to give effect to Article 35(1) of the Constitution. Section 4 of the Act reproduces Article 35 of the Constitution.

16. The process of accessing the information is provided under Section 8 and 9 of the Act. It is imperative that I consider the process because it has a bearing on the substantive orders being sought.

17. The Sections provide as follows;

8. Application for Access

- (1) An Application to access information shall be made in writing in English or Kiswahili and the Applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.
- (2)
- (3)
- (4) A public entity may prescribe a form for making an Application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the Applicant has not used the prescribed form.

18. Section 9 provides as follows:

“processing of Application”

- (1). Subject to section 10 a public officer shall make a decision on an application as soon as possible, but in any event, within twenty one days of receipt of the application
- (2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.
- (3)
- 4. As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating—
 - (a) whether or not the public entity or private body holds the information sought;



(b) whether the request for information is approved:

5.

(6) Where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected

19. In *Andrew Omotatah Okoiti vs. A.G and 2 others* (2013) eKLR, Justice Musinga had this to say about the need to comply with sections 8 and 9 of the [Access to information Act](#): “Before an Application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom the Applicant must first demonstrate that a request for the information required was made to the state or other person in possession of the same and the request was disallowed. The court cannot be the first pot of call”

20. Also in the case of *Kenya Society for the mentally handicapped vs. A.G and others* (Nairobi Petition No. 155A of 2011[unreported]) the same Judge held:

“I am not inclined to grant the application as the petitioner has not requested for the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied.”

21. Thus the Act requires that before a party can invoke the jurisdiction of the court, the available remedies must first be exhausted. The above two decisions were affirming the principle of Exhaustion. The court of appeal decision in the case of *The Speaker of the National Assembly vs. Kameme* (1992) KLR 21 expounds on the doctrine. The court explained it thus: “where there is a clear procedure for redress of any particular grievance prescribed by [the constitution](#) or an Act of parliament that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures”

22. Further the court of Appeal in the case of *Geoffrey Mutaiya Kebirua and 2 others vs Samuel* (2015) eKLR. rationalized the doctrine as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be a fora of last resort and not the first pot of call the moment the storm brews. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interests within the mechanisms in place for resolution outside the courts”

23. Unlike the case of *The speaker of the National Assembly* (supra), *Geoffrey Mutaiya’s case* (supra) was decided post -2010 constitution , but the courts still laid emphasis on the need to exhausts existing avenues for seeking information before a party seeks the intervention of the courts on the basis of Article 35 of [the constitution](#).

24. I have perused the Application and the annexures in support, and I have not found any letter or any other document Addressed to the Respondents requesting for the documents . There is a reference to Applicant’s Advocate’s letter of 3013/2021 but this court does not know what the letter was all about as the same was never attached to the Application.



25. There is therefore no evidence that in seeking to exercise their rights under Article 35, the Applicants have complied with the requirements that have been clearly set out under sections 8 and 9 of the Act.
26. To the extent therefore that the Applicants had not complied with section 8 and 9 of the Act prior to approaching this court, then the present application is premature. The Applicants must first comply with the aforesaid sections and only come back to this court if the Respondents fail to provide access.
27. In view of the foregoing I find it unnecessary to delve into the merits and demerits of the Application.
28. In the circumstances, I do find that the Application is unmerited and the same is hereby dismissed.
29. I make no orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF SEPTEMBER 2023.

S.CHIRCHIR

JUDGE

In the presence of:

Ms Osoro for the 1st Respondent.

No appearance by the Applicant.

