



**Munene v Director of Public Prosecutions & 3 others (Constitutional Petition
5 of 2022) [2023] KEHC 25900 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION 5 OF 2022
AC MRIMA, J
NOVEMBER 30, 2023**

BETWEEN

ANTONY KIBETU MUNENE PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

Introduction:

1. This Court has, once again, been called upon to look into the manner in which investigative and prosecutorial agencies discharge their duties in Kenya.
2. In this matter, the Petitioner, Antony Kibetu Munene, described himself as a Kenyan citizen living and carrying out his business within Lodwar town within the Turkana County. He is also a Director of Naipa Supermarket Limited, a company carrying out the business of a supermarket in Lodwar town.
3. Resulting from separate complaints lodged by the Petitioner and one Amin Ali Muhammed (hereinafter referred to as 'Amin') to the police, a decision was allegedly made by the 1st Respondent herein, The Director of Public Prosecutions, that the Petitioner be charged with the offence of assault even as further investigations were still underway.
4. The Petitioner decried the allegedly flawed manner in which the 1st Respondent carried out its duties. To him, the decision to charge him was biased, an abuse of the legal process and an affront to public interest and the administration of justice since the decision was reached while investigations were still



underway, and that the complaint laid by the Petitioner as against the said Amin was instead never considered.

5. The Petition was opposed by the Respondents.
6. The Court will now look at the parties' respective cases.

The Petitioner's case:

7. The Amended Petition was dated 24th June, 2022. It was hinged upon Articles 10, 19, 20, 21, 22 (1), 23 (1 & 3), 25, 26, 27 29, 39, 47, 159(2) (a & e), 165(3) (b & d), (6) & (7) and 258 of the Constitution.
8. The Petitioner pleaded that he was a licensed private firearm holder under Licence No 001219 and that he held a firearm Serial No A091405 Ceska. He was also a Director of Naipa Supermarket Limited which operated in Lodwar town within the Turkana County. He was a witness in Chief Magistrates Court at Lodwar Civil Case No E006 of 2021 *Naipa Supermarket Limited v Ekidor Norman & 2 others* (hereinafter referred to as 'the civil suit').
9. It was further pleaded that the civil suit was determined in favour of the Plaintiff and the Defendants were decreed to make some payments. An appeal was pending determination before the High Court of Kenya at Lodwar.
10. The Petitioner was aggrieved by the conduct of Amin on 23rd September, 2021. He alleged that in the morning and within the Court precincts in Lodwar Law Courts, as the Court was on a short break and in the presence of Advocates, the police and other members of public, he was physically assaulted by Amin.
11. It was further alleged that later in the afternoon, when the trial Court visited the locus quo; that was the business premises that housed the supermarket, Amin brought a group of rowdy youth who were armed with all manner of weapons and attacked the Petitioner in the full glare of the public and the police. He was, however, rescued by the police who accompanied the Court for the visit.
12. To his surprise, Amin then lodged a false complaint with the Lodwar DCI that the Petitioner had assaulted him and that he had also pointed him with a gun while in the supermarket. The Petitioner posited that Amin was his longtime friend, who had then turned a bitter business rival, and knew quite well that he was licensed to own a firearm. The Petitioner stated that he had not even carried his firearm on that day.
13. It was the Petitioner's further case that the DCI Lodwar investigated the matter and prepared a file. Unrelenting, Amin, then, complained to the DCI Regional Co-ordinator, Rift Valley Region who directed the DCI Trans-Nzoia to conduct fresh investigations. According to the Petitioner, the DCI Trans-Nzoia found that it was the Petitioner who was assaulted by Amin and that the allegations of threatening to shoot Amin with a gun were untrue.
14. It was posited by the Petitioner that both files were forwarded to the DCI Regional Co-ordinator, Rift Valley Region. However, only the file prepared by the DCI Lodwar was considered and that file was forwarded to the 1st Respondent for review and decision on the way forward. The 1st Respondent, it was alleged, also considered the single file and ordered that the Petitioner be charged with assault. The Petitioner was called upon by the Trans Nzoia CCIO and informed of the decision by the 1st Respondent.
15. The Petitioner, citing impartiality in the manner in which the matter was handled, rushed to this Court for reprieve.



16. Based on the foregoing, the Petitioner sought the following reliefs in his Amended Petition, to wit: -
 - a. A declaration that
 - b.
 - c.
 - d.
 - e.
17. The Petitioner filed written submissions buttressing his case. He expounded on the issues raised and vehemently contended that his rights were variously infringed.
18. In the end, the Petitioner prayed that the Amended Petition be allowed as prayed.

The Respondents' Case:

19. As said, the Respondents opposed the Petition. They filed a joint Response to the Amended Petition. It was dated 9th February, 2023.
20. The Respondents contended that the Petition did not raise any constitutional issues. To that end, they referred to several decisions including the celebrated Anarita Karimi's case (supra).
21. They further averred that in the event the Court finds that the Petition was properly before Court, still the Petition was not proved since there was no evidence of violation of the Bill of Rights or the Constitution as a whole.
22. It was the Respondents' case that the 1st Respondent received a file from the DCI Lodwar for review and made a decision that the Petitioner be charged with assault even as the issue of possession of a firearm was still under investigation.
23. The 1st Respondent also averred that long after making the decision to charge the Petitioner, it was favoured with another file from the Trans Nzoia DCI for review and advice. The issue at hand involved the Petitioner's complaint against Amin. Before the 1st Respondent dealt with the matter, the instant proceedings were instituted.
24. The Respondents filed written submissions where decisions were referred to. They submitted that the Petition was not holding or at all and urged this Court to dismiss it.

Analysis:

25. Having considered the pleadings, the parties' submissions and the various decisions referred to, this Court formulates the following issues for determination: -
 - a. Whether the Petition raises constitutional issues.
 - b. In the event that issue (a) above is answered in the affirmative, whether the Respondents' actions on the Petitioner contravenes Articles 10, 27, 29, 39(1) and 47(1) of the Constitution.
26. This Court will now consider the above issues in seriatim.

a. Whether the Petition raises constitutional issues:

27. The jurisdiction of the High Court in dealing with Constitutional Petitions is properly invoked once a Petition that complies with the constitutional and legal requirements is lodged. The Court must,



therefore, decline any invitation by a Petitioner to deal with an alleged Petition which falls short of the laid down parameters on Constitutional Petitions.

28. Any challenge on the jurisdiction of the High Court to handle a Constitutional Petition ought to be addressed at the onset. In Petition No E282 of 2020 *David Ndi and 4 others v The Attorney General & others*, this Court discussed the legal concept of jurisdiction at length. This is what the Court stated: -

24. Jurisdiction is defined in *Halsbury's Laws of England* (4th Ed) Vol 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.

25. In *Words and Phrases Legally Defined* Vol 3, John Beecroft Saunders defines jurisdiction as follows: -

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

26. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

27. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulabi Abdi & another* Civil Appeal No 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.



- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.
28. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 Others* (2013) eKLR stated that: -
- So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren *cui-de-sac*. Courts, like nature, must not sit in vain.
29. On the source of a Court's jurisdiction, the Supreme Court of Kenya in Constitutional Application No 2 of 2011 *In the Matter of Interim Independent Electoral Commission* (2011) eKLR held that: -
29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid down in judicial precedent
30. Later, in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others* (2012) eKLR Supreme Court stated as follows: -
- A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.
31. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the Court of Appeal further stated:
- (44) a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...



29. Having delimited the concept of jurisdiction above, the Court now returns to the matter at hand. The Respondents contended that the Petition herein does not raise any constitutional issue, and as such, it should be struck out at the onset. Various decisions were referred to in support of the position.
30. The Petitioner is of the contrary position. Through the Petition, the Petitioner posited that this Court has jurisdiction over the matter as conferred under Article 165(3) of the Constitution and that the Petition was anchored on several Articles of the Constitution.
31. Long before the downing of the new constitutional dispensation under the Constitution of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. That position is echoed.
32. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as ‘the Mutunga Rules’) also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of petition.

10.

- (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
- (2) The petition shall disclose the following—
 - (a) the petitioner’s name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.

33. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of Petitions. They provide as follows: -

- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

34. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.



35. The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* case (supra) had the following to say on Constitutional Petitions: -

Although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

36. The South African Constitutional Court in *Fredricks & Othber v MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court. It stated as follows: -

the *Constitution* provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of the *Constitution* itself: if regard is had to the provisions of... *Constitution*, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the *Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of the *Constitution* are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the *Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

37. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

38. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the rest of the *Constitution*. In any case, the issue in dispute must demonstrate the link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement.

39. The words of Learned Judge Langa, J in *Minister of Safety & Security v Luiters*, (2007) 28 ILJ 133 (CC) captured the essence of a constitutional issue. The Judge had the following to say: -

... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...

40. Whereas it is largely agreed that the *Constitution* of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in Petition No 236 of 2011 *Rapinder Kaur Atal v Manjit Singh Amrit* (2011) eKLR ‘... Courts must interpret it with all liberation they can marshal...’



41. Resulting from the above discussion, this Court agrees with the position in *Turkana County Government & 20 others v Attorney General & Others* (2016) eKLR where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
42. This Court will now apply the foregoing in determining whether the jurisdiction of this Court was properly invoked by way of a Petition that raised at least a single constitutional issue.
43. The Petition has been carefully perused and considered. It mainly impugned the manner in which the 1st Respondent discharged its constitutional and statutory duties. To that end, the Petitioner decried that his rights under Articles 10, 27, 29, 39(1) and 47(1) of the *Constitution* were variously infringed.
44. In other words, the Petitioner seeks the intervention of this Court on the basis that the Respondents have confronted his rights and fundamental freedoms guaranteed under the Bill of Rights in the *Constitution*. In such a scenario, the issues transcend the borders of ordinary issues into the realm of and crystallize into constitutional issues.
45. The Petition raises pure and serious constitutional issues for consideration by this Court. This Court is duty bound under Article 165(3) of the *Constitution* to determine any question as to whether a right or fundamental freedom in a Bill of Rights has been infringed, denied, violated or threatened.
46. In this case, even by taking the caution in *Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & Anor* case (supra), into account, still the Petition, no doubt, reveal that it has fully complied with Rule 10(1) and (2) of the *Mutunga Rules* as well as the requirements in Communications Commission case (supra).
47. This Court, hence, finds that the contention that the Petition is devoid of raising any constitutional issue cannot be maintained and the same is for rejection.
48. Having answered the first issue in the affirmative, a consideration of the next issue now follows.

b. Whether the Respondents’ actions on the Petitioner contravenes Articles 10, 27, 29, 39(1) and 47(1) of the Constitution:

49. As a precursor, suffice to remind ourselves that the *Constitution* is a solemn and sacred instrument which inter alia guarantees people’s rights and fundamental freedoms as well as appropriate legal redresses in protecting the *Constitution* itself and the said rights and fundamental freedoms.
50. Perhaps the sovereignty of the people, guaranteed under Article 1 of the *Constitution*, seals the unalienable right for a litigant to invoke this Court’s jurisdiction as established under Article 165 of the *Constitution*. There is indeed a calling on this Court to uphold and defend the *Constitution* as structured in Article 3 of the *Constitution*. Ultimately, a breach of the *Constitution* or any of the human rights and fundamental freedoms in the Bill of Rights is shunned and condemned.
51. The resolution of this issue calls for a scrutiny of the legal regime giving the 1st, 2nd and 3rd Respondents herein the mandate to investigate offences and to prosecute those culpable and to interrogate whether the Respondents exercised those powers within the constitutional and legal limits.
52. This Court has previously, and so broadly, discussed this issue in Nairobi High Court Constitutional Petition No E033 of 2021 *Maura Muigana v Stellan Consult Limited & 2 others* and also in Nairobi High Court Constitutional Petition No E216 of 2020 *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)* [2021] eKLR.



53. As part of the introduction to the subject in *Maura Muigana v Stellan Consult Limited & 2 Others case* (supra), this Court acknowledged the many writings by legal scholars and decisions by Courts and appreciated that whereas it would have been desirable to come up with all the marvellous work on the issue in a ‘one-stop shop’, that was a tall order given the time constraints and the need for expeditious disposal of cases. The Court, however, rendered a concise discussion on the subject.
54. The Court then traced the legal basis of the exercise of prosecutorial powers in Kenya to the *Constitution* and the law. Article 157 of the *Constitution* establishes the Office of the Director of Public Prosecutions as under: -
1. There is established the office of Director of Public Prosecutions.
 2. The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.
 3. The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a Judge of the High Court.
 4. 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.
 5. The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.
 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.
 9. 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.
 10. 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.
 11. In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.



12. Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.
55. There is, as well, the *Office of Director of Public Prosecutions Act* No 2 of 2013 (hereinafter referred to as ‘the ODPP Act’). It is an Act of Parliament aimed at giving effect to Articles 157 and 158 of the *Constitution* and other relevant Articles of the *Constitution* and for connected purposes. The *ODPP Act* provides in Section 4 the guiding principles in prosecution of cases as follows:
- (4) In fulfilling its mandate, the Office shall be guided by the *Constitution* and the following fundamental principles—
- (a) the diversity of the people of Kenya;
 - (b) impartiality and gender equity;
 - (c) the rules of natural justice;
 - (d) promotion of public confidence in the integrity of the Office;
 - (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
 - (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
 - (g) protection of the sovereignty of the people;
 - (h) secure the observance of democratic values and principles; and
 - (i) promotion of constitutionalism.
56. The *ODPP Act*, among other statutes, variously provide for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers by the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed.
57. Article 239 of the *Constitution* provides for the national security organs. They include the National Police Service. The primary object of the national security organs and security system is to promote and guarantee national security in accordance with the principles mentioned in Article 238(2).
58. Article 243 of the *Constitution* establishes the National Police Service. Under Article 244, the *Constitution* provides the objects and functions of the National Police Service as follows: -
- (a) strive for the highest standards of professionalism and discipline among its members;
 - (b) prevent corruption and promote and practice transparency and accountability;
 - (c) comply with constitutional standards of human rights and fundamental freedoms;
 - (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
 - (e) foster and promote relationships with the broader society.
59. The National Police Service is under the command of the Inspector-General of Police. The manner in which the Inspector-General of Police is to carry out its mandate is provided for under Article 245(2) (b) and (4) of the *Constitution* as follows: -
1. The Inspector General –



- a.
 - b. shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
4. The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may 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.
 5. Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.
60. Article 157(4) of the *Constitution* provides 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.
61. The independence of the Inspector-General of Police is constitutionally-insulated from any form of interference or directional command. Apart from the Director of Public Prosecutions and only to the extent so provided, no other person, body or entity has the power to give any form of directives to the 2nd Respondent on how to discharge its functions. The position is further ring-fenced in that even the power donated to the Cabinet Secretary under Article 254(4) of the *Constitution* to issue any directives to the Inspector-General of Police is only limited to policy issues.
 62. Pursuant to the provisions of Article 239(6) of the *Constitution*, The *National Police Service Act*, No 11A of 2011 (hereinafter referred to as ‘the Police Act’) was enacted on 30th August, 2011. It is an Act of Parliament to give effect to Articles 243, 244 and 245 of the *Constitution*; to provide for the operations of the National Police Service; and for connected purposes.
 63. Sections 24, 27 and 35 of the *Police Act* variously provide for the functions of the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations respectively as follows: -
 24. The Functions of the Kenya Police Service

The functions of the Kenya Police Service shall be the—

 - a. provision of assistance to the public when in need;
 - b. maintenance of law and order;
 - c. preservation of peace;
 - d. protection of life and property;
 - e. investigation of crimes;



- f. collection of criminal intelligence;
- g. prevention and detection of crime;
- h. apprehension of offenders;
- i. enforcement of all laws and regulations with which it is charged; and
- j. performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

27. The Functions of the Administration Police Service

The functions of the Administration Police Service shall be the—

- (a) provision of assistance to the public when in need;
- (b) maintenance of law and order;
- (c) preservation of peace;
- (d) protection of life and property;
- (e) provision of border patrol and border security;
- (f) provision of specialized stock theft prevention services;
- (g) protection of Government property, vital installations and strategic points as may be directed by the Inspector-General;
- (h) rendering of support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties;
- (i) co-ordinating with complementing Government agencies in conflict management and peace building;
- (j) apprehension of offenders;
- (k) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

35. Functions of the Directorate

The Directorate shall —

- a. collect and provide criminal intelligence;
- b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;
- c. maintain law and order;
- d. detect and prevent crime;
- e. apprehend offenders;
- f. maintain criminal records;
- g. conduct forensic analysis;



- h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the *Constitution*;
- i. co-ordinate country Interpol Affairs;
- j. investigate any matter that may be referred to it by the Independent
- k. Police Oversight Authority; and perform any other function conferred on it by any other written law.

64. The above is the constitutional and statutory regime within which the Respondents must exercise their various powers. Suffice to say that the manner in which the Respondents ought to exercise such powers has been, over time, subject of many Court decisions.

65. For instance, the Supreme Court in Petition No 38 of 2019 *Cyrus Shakhbalanga Khwa Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR discussed some of the applicable parameters. On whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the Director of Public Prosecutions contrary to the *Constitution*, the Supreme Court stated as follows: -

(79) The High Court in its finding, prohibited the Respondents from proceeding with any criminal proceedings against the Appellant in relation to the suit property or any subject matter and transaction connected to the suit property. The Court of Appeal reversed this judgment by holding that the High Court had interfered with the discretion given to the Director of Public Prosecutions (DPP) to initiate and conduct prosecution. Essentially, the Court of Appeal found that the High Court went against public interest in preventing investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property and that the learned Judge interfered with the prosecutorial mandate of the DPP to decide on whether to charge or not to charge an individual.

[80] The 5th, 6th and 7th Respondents on their part, maintain the position that the decision to commence investigations against the Appellant was consistent with the provisions of Article 157 of the *Constitution* and Section 6 of the *Office of Director of Public Prosecutions Act*. They also submitted that the decision to institute criminal proceedings by the DPP is discretionary and that such exercise of power is not subject to the direction or control by any authority as provided for under Article 157(10) of the *Constitution*.

(81) Under Article 157(6) of the *Constitution*, the DPP is mandated to institute and undertake criminal proceedings against any person before any Court. Article 157(6) provides as follows:

- (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.”

Article 157(4) provides that:

- (4) 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.

However, Article 157(11) stipulates that:



- (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
- (82) Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of Article 157(11) have not been met, then the High Court under Article 165(3) (d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.
- (83) In that regard, the Court of Appeal in the case of *Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 Others* [2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power and held that: -

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of the *Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v R* [2002] 1 EA 205. See also *Kuria & 3 Others v Attorney General* [2002] 2 KLR. (emphasis supplied)

- (84) Furthermore, the Supreme Court of India in *R.P. Kapur v State of Punjab* AIR 1960 SC 866 laid down guidelines to be considered by the Court on when the High Court may review prosecutorial powers. They are as follows:
- (I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or



- (II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or
- (III) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or
- (IV) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

(85) We are persuaded that this is a good guide in the interrogation of alleged abuse of prosecutorial powers and read alongside Article 157(11) of the *Constitution*, we have sufficiently expressed ourselves elsewhere in this Judgment to show that the unconstitutional continuance of the criminal proceedings against the Appellant amounts to abuse of Court process and that, balancing the scales of justice, the weight would favor the Appellant and not the Respondents.

66. On public interest, the Supreme Court expressed itself as follows: -

- (86) On public interest, what is in issue is a dispute arising from a commercial transaction 24 years ago where the complainants have not denied receiving part payment of the purchase price. There is hardly any public interest element in such a transaction save the wide interest of the law to apprehend criminals.
- (87) The learned Judge of the High Court, in our view, was well within his mandate under Article 165(3)(d)(ii) as read with Article 157(11) of the *Constitution* to curtail the Appellant's prosecution and the DPP'S powers have not in any way been interfered with, outside the constitutional mandate conferred on the High Court.

67. This Court summed up the instances in which a Court may intervene and stop any prosecutions against a person in *Maura Muigana v Stellan Consult Limited & 2 others* case (supra) as follows: -

- (i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;
- (ii) Where the quashing of the impugned proceedings would secure the ends of justice;
- (iii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
- (iv) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged;
- (v) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.
- (vi) The prosecution is not in public interest;
- (vii) The prosecution is not in the interests of the administration of justice;
- (viii) The prosecution is oppressive, vexatious and an abuse of the court process;
- (ix) The prosecution amounts to a breach of rights and fundamental freedoms;



- (x) The investigation and prosecution amounts to abuse of power and discretion and is aimed at achieving an ulterior or improper motive;
 - (xi) The investigation and the prosecution are tainted with illegality, irrationality and procedural impropriety;
 - (xii) The investigation and prosecution is in gross contravention of the *Constitution* and the law;
68. It is, therefore, not contested that Courts have the powers to speak against a prosecution. However, in doing so, a Court must not lose focus of the required balance created by the *Constitution* and the law to the extent that lawful organs must be accorded space to discharge their mandates and that in doing so, such discharge must be within the *Constitution* and the law.
69. The institutions are also supposed to be independent in the manner they function. The Supreme Court of Kenya underscored the independence of Commissions and Independent offices in *Re The matter of Interim Independent Electoral Commission* [2011] eKLR as follows: -

It is a matter of which we take judicial notice that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the *Constitution*, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the *Constitution* as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. the *Constitution* established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the “independence clause.

70. The Supreme Court further expounded on the Commission’s autonomy in *Communication commission of Kenya & 5 Others v Royal Media Services limited & 5 others* [2014] eKLR as follows: -

[I]ndependence’ is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance... How is the shield of independence to be attained” In a number of ways. The main safeguard is the *Constitution* and the law. Once the law, more so the *Constitution*, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain ‘independence’ in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these ‘other safeguards’ can singly guarantee ‘independence’. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence.



71. This Court also finds wisdom in the pronouncements of the South African Constitutional Court in *New National Party v Government of Republic of South Africa & others* (CCT9/99) [1999] ZACC5 on the aspect of independency of Commissions. The Court expressed itself thus: -
- In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to “independence”. The first is “financial independence” ... The second factor, “administrative independence”, implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the *Constitution* and the Act.
72. With the above regulatory framework, this Court will now ascertain if the Petitioner’s rights and fundamental freedoms were impugned.
73. In this case, and as stated elsewhere above, the Petitioner took issue with the manner in which the 1st Respondent arrived at the decision to charge him.
74. There is consensus that both the Petitioner and Amin lodged complaints with the police over the events of 29th September, 2021. Further, it is undisputed that the 2nd and 3rd Respondents initiated twin investigations over the complaints.
75. According to the Respondents, the complaint laid by Amin preceded that made by the Petitioner. They averred that the complaint laid by Amin against the Petitioner was investigated and the file forwarded to the 1st Respondent for review and way forward. A decision to charge the Petitioner was made. It was further posited that long after the 1st Respondent made the decision to charge the Petitioner, it received another file which was in respect of the complaint laid by the Petitioner against Amin. That, by the time the instant proceedings were initiated, the 1st Respondent was yet to review the said file.
76. There was no further response to the Respondents’ Response to the Amended Petition. In such a case, therefore, the averments in the Response to the Petition on the manner the 1st Respondent received the files in respect of the two complaints remained uncontroverted.
77. Holding it as it is, since the 1st Respondent had already made the decision to charge the Petitioner way before it received the other file, then the 1st Respondent cannot be reasonably faulted for not considering both files. The position would have, however, been different had both files been placed before the 1st Respondent and then the 1st Respondent goes ahead to decide on one of the files and in total disregard to the other. But, as pointed out, the position is different.
78. It is also undisputed that the 1st Respondent is yet to make any decision on the Petitioner’s firearm and also on the complaint lodged by the Petitioner.
79. It now turns out that the manner in which the 1st Respondent acted in this matter cannot be faulted. There is neither evidence that the 1st Respondent acted in breach of Articles 10, 47(1) and 157 of the *Constitution* nor is there evidence that the Petitioner’s rights under Articles 27, 29 and 39(1) of the *Constitution* were impugned.
80. As the Petition seems to suffer unsustainability, and since both complaints arose from the same facts and circumstances and the Petitioner is yet to be charged, then, it will be prudent that the 1st Respondent considers the other file as well and then makes decisions on both. That way, the 1st Respondent is likely to come up with a more balanced decision on the way forward.
81. The second issue is, hence, answered in the negative.



Disposition:

82. As this Court comes to the end of this judgment, it wishes to apologize for the late delivery of this judgment due to immense pressure of work. The delay is highly regretted.
83. In the end, the Petition is hereby determined in the following terms:
- a. The Amended Petition dated 24th June, 2022 be and is hereby dismissed.
 - b. The Petitioner shall, however, not be charged in relation to the events of 29th September, 2021 pending the decision by the Director of Public Prosecutions on the Petitioner's complaint lodged against one Amin Ali Muhammed.
 - c. Parties to bear their respective costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF NOVEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Teti, Learned Counsel for the Petitioner.

Miss. Cheruiyot, Learned Counsel for the Respondents.

