



**Andrew v Director of Public Prosecutions & 2 others; Chelimo (Interested Party)  
(Constitutional Petition E046 of 2021) [2022] KEHC 10235 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10235 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E046 OF 2021**

**JN ONYIEGO, J**

**JUNE 30, 2022**

**IN THE MATTER OF ARTICLES 2,3,19,20,22,23,25,27,28,31,40,47, 48,49,50,  
65,157,258,259 AND 260 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ABUSE OF PROSECUTORIAL POWERS IN  
DISREGARD TO PUBLIC INTEREST AND THE INTEREST OF THE  
ADMINISTRATION OF JUSTICE**

**AND**

**IN THE MATTER OF THE RIGHT TO FAIR ADMINISTRATION OF JUSTICE**

**BETWEEN**

**HAYWOOD MARK ANDREW ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**EVELYN JEPKEMBOI CHELIMO ..... INTERESTED PARTY**



## JUDGMENT

### Background

1. The Petitioner herein an Australian national working as a Training Superintendent at Base Toliara Madagascar was at all material times to this case based in Kenya operating on a retiree's permit. The 1<sup>st</sup> Respondent is an independent office established under Article 157 of the Constitution and whose powers are clearly enumerated under the said provision. The 2<sup>nd</sup> Respondent is the Government's chief legal adviser and the legal representative of the national government in court. The 3<sup>rd</sup> Respondent is an independent office created pursuant to Article 245 of the Constitution with the command over the National police service while the interested party is referred to as a business lady operating a bar cum restaurant at Diani in kwale and a former lover to the petitioner.
2. Vide a petition dated 14<sup>th</sup> August 2021 and amended on 30<sup>th</sup> August 2021, the petitioner herein moved to this court seeking various reliefs arising out of several alleged violations of his constitutional rights as follows;
  - a) A declaration do hereby issue that the Respondent's decision to charge the Petitioner over the allegations of forgery, providing false information and stealing made by the Interested party is malicious made with mala fides, is a threat to public interest and administration of justice as it is made in abuse of the criminal justice process, contrary to Article 157 (11) of the Constitution.
  - b) A declaration do hereby issue that the 1<sup>st</sup> Respondent's failure to review of the file and amounts to a gross violation of the Petitioner's right to a fair administrative action as guaranteed under Article 47 of the Constitution and together with section 4 an 6 of the FAIR Administrative Action Act 2005.
  - c) A judicial review order of Certioraridoes hereby issue for the purpose of bringing to this Honourable Court and quashing the decision of the Respondents to arrest, charge, arraign and or prosecute the Petitioner herein Haywood Mark Andrew over the forgery, providing false information and stealing, complaint made by the Interested Party herein at the Diani Police Station.
  - d) An order of prohibition do issue prohibiting the Respondents either by themselves or their servants or employees from arresting, arraigning and/or charging/prosecuting the Petitioner herein Haywood Mark Andrew over the forgery, proving false information and stealing complaint made by the Interested Party herein at Diani Police Station.
  - e) An order of Mandamus compelling the 1<sup>st</sup> Respondent, their agents, servants or assistants to immediately release to us the Petitioner/Applicant Ksh. 100,000/= received by the O.C.S Diani Police Station as Cash Bail.
  - f) An order directing the Respondents to compensate the Petitioner herein for the threat to the violation of his right to liberty as enshrined under Article 29 and for the violation of the right to fair administrative action under Article 47 of the Constitution as rad together with section 4 and 6 of the Fair Administrative Actions Act 2015.
4. The petition is anchored on grounds set out on the face of it and further amplified by averments contained in the affidavit in support sworn on the 16<sup>th</sup> August 2021 by the applicant. The applicant's case is that, sometime in the year 2014, he met and started an adulterous relationship with the interested



party herein. That in the course of their relationship, he bought two parcels of land referenced as; Kwale/Galu/Kinondo 897 and 898. He averred that around the year 2019, he again bought two pieces of land known as Kwale Diani 731 and 734 from Safaris Touts Limited.

5. He further deposed that sometime in the year 2018, he proceeded to incorporate a company known as Ramilies limited which he allegedly intended to use in owning property in Kenya as he had made up his mind to apply for permanent residence or citizenship. That he included the interested party as a shareholder at an agreed consideration of kshs 5,000,000 for the allocated shares which money was never paid. He stated that after incorporating the said company, he transferred the four plots into the company's name at a consideration of one million per plot.
6. That due to some differences and his wife's arrival in Kenya sometime in month of October 2019, he terminated his adulterous relationship with the interested party a fact that was not kindly taken by the interested party. He further stated that owing to huge debts owed by the company to KRA for not filing annual returns as well as penalties as at 1<sup>st</sup> February 2021 amounting to Kshs 4000,000/=, he decided as the sole director to transfer the four properties from the company name into his name.
7. He averred that sometime on 22<sup>nd</sup> July 2021, the interested party invited him for lunch at her business premises only to be arrested by police officers on complaints received from her (interested party) for alleged offences of forgery, stealing and giving false information. Having been arrested and detained at Diani police station, he was released on a cash bail of kshs 100,000 with instructions to attend Kwale law courts on 29<sup>th</sup> July 2021 for plea taking. Unfortunately, he did not take plea as no charge sheet was presented before court.
8. He termed the allegations made against him as baseless as he was the sole purchaser and therefore the only beneficiary of the said properties. He averred that the interested party was using the police to harass him by preferring malicious prosecution charges as he did not commit any forgery nor give any false information to any one as alleged hence misuse of police powers. That it was the said malicious arrest and subsequent direction to appear before court for trial that triggered the petition herein seeking court protection by way of prohibition orders against any possible arrest and arraignment before court for prosecution.
9. Contemporaneously filed with the petition is a notice of motion seeking conservatory orders. When the matter was placed before the duty Judge, the court certified the same urgent and directed for service to be effected upon the respondents. The court further directed for the status quo to be maintained.
10. In response, the 1<sup>st</sup> Respondent filed grounds of opposition on 13<sup>th</sup> September, 2021 stating as follows;
  - a. That the orders sought by the Petition are premature in nature and there is no evidence on record that the 1<sup>st</sup> Respondent maliciously sanctioned charges against the Petitioner.
  - b. That there is material non-disclosure to demonstrate that the 1<sup>st</sup> Respondent violated its power under article 157 of *the Constitution*.
  - c. That the petition is devoid of merit and abuse of the court process aimed at preventing the 1<sup>st</sup> Respondent from exercising its powers under Article 157 of *the Constitution*.
  - d. That under Article 157 of *the Constitution* of Kenya in exercise of its authority the 1<sup>st</sup> respondent is subject to *the Constitution* and the law.
  - e. That the petition challenges a decision in which the 1<sup>st</sup> respondent never took and is an attempt to circumvent the law.



- f. That investigations being a statutory process must be allowed to run full course and any challenges thereto can only be raised at the conclusion of the process unless one can demonstrate that the same is ultra vires.
  - g. That in view of (f) above the matter is not ripe for determination and there are no live issues to be determined thus the same amounts to a waste of judicial time and is calculated to jeopardize criminal investigations to defeat the ends of justice.
  - h. That there is no iota of evidence presented by the Petitioner to demonstrate that the 1<sup>st</sup> Respondent has acted in bad faith, is procedurally unfair, unreasonable and or has taken irrelevant considerations into account.
  - i. That any action so far taken by the 1<sup>st</sup> Respondent does not, in its view contravene the Constitution or any other law and therefore the Petition is brought without merit, is calculated to interfere with enforcement of Criminal Law and the protection of the collective right of the people of Kenya to be protected against injury from any person and body whether private or public.
  - j. That the orders sought have far reaching consequences on the powers of the 1<sup>st</sup> respondent under the constitution and this honourable court is not clothed with supervisory powers to unclot the powers of the 1<sup>st</sup> respondent when it has acted within the parameter of the Constitution of Kenya.
11. On the other hand, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their grounds of opposition on 29<sup>th</sup> September, 2021 stating as follows;
- a) That the application and Petition filed is frivolous, vexatious, a non-starter and an abuse of court process.
  - b) That the 3<sup>rd</sup> Respondent is legally mandated to investigate complaints made by members of the public and make arrests where there is probable cause for the same.
  - c) That the 3<sup>rd</sup> Respondent is established under article 245 of the Constitution of Kenya as an independent office with competent officers capable of assessing whether a matter requires investigations or not.
  - d) That no person may give direction to the Inspector General with respect to the investigation of any particular offence or offences nor the enforcement of the law against any particular person or persons. The orders sought by the Petitioner are tantamount to interfering with the 3<sup>rd</sup> Respondent's independence.
  - e) That the Petitioner/Applicant has not attached any evidence to demonstrate and substantiate the allegations contained in their application and Petition
  - f) That Petition and Application is only but a diversionary tactic for the Petitioner to avoid the due course of the law clothed as a claim for violation of fundamental Constitutional Rights.
  - g) That it is imperative upon a party to co-operate with investigating officers as long as right to against self-incrimination is not violated. The Petitioner has not made such a claim in his Petition.
  - h) That the Petition and Application is fatally defective in substance and in form, incompetent and lacks merit.



- i) That the Petition and Application is bad in law, unmerited and abuse of the process of this Honourable Court and ought to be dismissed forthwith.
12. The interested party filed a replying affidavit sworn on 24<sup>th</sup> September 2021 deposing that she indeed had a romantic affair with the petitioner which was geared towards contracting their marriage. She averred that in the course of their relationship, they agreed to engage in joint investment by buying properties. That among the properties acquired through their joint effort were the aforesaid four properties which she assisted in sourcing. That they jointly incorporated Ramilies Company to which they transferred the four plots plus her own land LR number Kwale/Diani/1258 to the said company.
13. She denied Making any promise to buy her shareholding in the said company at the price of Kshs 5,000,000 as alleged by the petitioner. It was her position that at all times she was the custodian of all titles to the said properties. That the petitioner conspired with her daughter his secret lover to steal the said titles and there after transferred ownership into his name without her knowledge nor consent culminating to her complaint to the police who arrested him for interrogation.
14. She dismissed the petitioner's claim that their company was in arrears to kra to the tune of Kshs 4,000,000 as it was not engaged in any trading activities. That the petitioner's arrest was not actuated by malice but a criminal activity to which the petitioner is responsible. She claimed that if the orders sought are allowed she will stand to lose her property which the petitioner has since dispossessed her of ownership.
15. In his rejoinder, the applicant filed a supplementary affidavit on 2<sup>nd</sup> September 2021 stating that his relationship with the interested party was purely that of committing adultery and not a committed relationship. He claimed that the act of his arrest had caused him lose his job as his employer refused to renew his contract on account that his conduct with the interested party and subsequent arrest had tainted the company name.
16. When the matter came up for directions, parties agreed to compromise hearing of the application for conservatory orders in favour of the hearing of the main petition. Parties then agreed to file written submissions to dispose of the petition.

### **Petitioner's submissions**

17. Through the firm of Okeyo and company advocates, the applicant filed his submissions on 19<sup>th</sup> October 2021 submitting on three issues namely;
- a) Whether the first respondent was arrested and subsequently charged by the 1<sup>st</sup> respondent
- b) Whether the arrest and charging of the petitioner was informed by ill motive, malice and without any reasonable cause.
- c) Whether the orders and reliefs sought by the petitioner ought to be issued.
18. It was counsel's submission that the preferment of prosecution process of the applicant was without proper factual foundation or basis. In that regard, the court was referred to the holding in the case of *Republic v Director Public Prosecution and another Ex parte Chamanlal Vrajlal Kamani & 2 others* (2015) eKLR. Learned counsel submitted that in exercise of its discretionary powers to prosecute, the DPP's office must act properly and within the law and where the court finds that the discretion has been abused, it can intervene and bring such prosecution into a halt. To buttress that position, the court was referred to the case of *Agnes Ngenesi Kinyua aka Agnes Kinywa Vs Director of public prosecution & another* (2019)eKLR.



19. According to the petitioner, the fact that he was released on a cash bail, and directed to attend court which is proved by a cash bail receipt is sufficient proof that the DPP had acted in recommending illegal and malicious charges hence cannot argue that he had not sanctioned any prosecution against the petitioner.
20. As to whether the charges in question was commenced irregularly and maliciously, counsel submitted that the petitioner was never invited for interrogation nor was any statement recorded before preferring the charges. That this fact is clearly established by the respondents' failure to file a replying affidavit in response to the application.
21. It was submitted that the facts of the complaint did not fall within the purview of the criminal justice system. The court was urged to find that the burden to prove existence of sufficient evidence to charge the petitioner lay with the prosecution and none has been established so far. To fortify that argument, the court was referred to the case of *Diamond Hasham Lalji & another v attorney General & 4 others* (2018) eKLR.
22. As to whether the petitioner is entitled to the reliefs sought, counsel submitted that the respondents having failed to controvert the allegations made by way of a replying affidavit, the same should be held as the true position that the charges were maliciously preferred hence the inevitable award of punitive and exemplary damages. In arriving at that conclusion, the court was referred to the case of *Anthony Murimi Waigwe V Attorney General & 4 others* (2020) eKLR where the court awarded Kshs 4,500 as general damages and Kshs 500,000 as punitive damages.

#### **1<sup>st</sup> respondent's submissions**

23. The 1<sup>st</sup> respondent filed its submissions on 7<sup>th</sup> October 2021 through Maureen Anyumba prosecution counsel who submitted that the ODPP as an independent organ of the government has its mandate spelt out under Article 157 of *the constitution* hence cannot act under direction or control from anybody or authority. That the ODPP has powers to prefer charges it deems fit against any person where it finds sufficient evidence. In support of that submission, counsel referred to the holding in the case of Hon. James Ondicho Gesami vs The Attorney General & others petition No. 376 of 2011
24. Counsel further submitted that the police department equally is an independent body under Article 243 and 245 of *the constitution* hence should be left to act independently in carrying out investigations. Counsel submitted that the petitioner had failed to prove acts of infringement or specific violation against his rights as espoused by the supreme court in the case of *Communication commission of kenya & 5 others vs Royal Media Services limited & 5 others* (2014) eKLR.
25. Counsel further submitted that a constitutional court should not look at the merits of the case since judicial review is concern with the decision making process hence the work of the trial court to determine but not the high court. To support that position, the court was referred to the case of *Joram Mwenda Guantai vs The chief Magistrate* Nairobi civil appeal No. 228 of 2003(2007) 2 eKLR

#### **2<sup>nd</sup> and 3<sup>rd</sup> respondent's submissions**

26. Through the A.g's office, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their submissions on 5<sup>th</sup> Nov. 2021. M/s Opio litigation counsel for the A.G submitted that pursuant to Article 245 of *the constitution* and Section 24 of the *national police Service Act*, the inspector General of police is mandated to conduct investigations lodged by any complainant hence cannot be curtailed by anybody except where there is proof of a buse of office. Counsel relied on the holding in the case of *Daniel Manduku Ogwoka vs Director of Public prosecutions and 2 others* (2019) eKLR.



27. Learned counsel contended that upon receipt of the complaint from the interested party, the 3<sup>rd</sup> respondent was under obligation to investigate the offence. Concerning the question of whether the petitioner suffered any breach of his fundamental rights and freedoms, counsel contended that there was reasonable ground and probable cause to conclude that the petitioner had committed an offence. That the petitioner was lawfully arrested and subsequently granted cash bail pending his appearance in court in compliance with section 29 of the CPC. Counsel contended that the merits of the case will be determined by the trial court and not the high court.

### **Determination**

28. I have considered the amended petition herein, response thereof and rival submissions by counsel for the respective parties. Issues for determination are whether;

- a) Whether the petitioner was arrested by the 3<sup>rd</sup> respondent and subsequently charged before court
- b) Whether the said arrest amounts to a violation of the petitioner's fundamental rights
- c) Whether the petitioner is entitled to the reliefs sought.

29. The crux of the petition herein is the allegation by the petitioner that the complaint levelled against him by the interested party and subsequent arrest by police Diani police station was actuated with malice, ill will and influenced with ulterior motive. The role and mandate of the ODPP as spelt out under Article 157 of *the constitution* includes; the power to direct the inspector General of national police service to investigate any allegation or information of criminal conduct and the power to institute and undertake criminal proceedings against any person before any court in respect of an offence alleged to have been committed.

30. Article 157(10) of *the constitution* further provides that the DPP shall not require the consent of any person or authority for the commencement of any criminal proceedings and in exercise of such powers he or she shall not act under the control or direction of anybody or person or authority. Sub-Article 11 furthers provides that; in exercise of his or her powers, the DPP shall have regard to the public interest, interests of the administration of justice and the need to prevent and avoid abuse of the legal process

31. In view of the above quoted clear constitutional provisions, the ODPP is clothed with wide discretionary powers ranging from directing for investigation to be conducted in case of any complaint; institution and termination of criminal proceedings and taking over or discontinuation of privately instituted criminal proceedings. There is however a caveat attached to the exercise of such powers. In other words, the powers conferred on the DPP are not absolute. Where there is manifest abuse of power, proof of influence from some quarters, consideration of ulterior motive to settle personal scores or prosecution generally not in the interest of justice, the court will definitely be call upon to intervene by way of certiorari, mandamus or prohibition orders among other remedies.

32. In the case of Agnes Ngenesi Kinyua aka Agnes Kinywa vs Director of Public Prosecutions and another (supra) odunga J held that the DPP's discretionary powers must be exercised properly and that where its being abused or being used to achieve some collateral purposes which are not geared towards vindication of the commission of a criminal offence such as forcing a party to submit to concession of a civil dispute, the court will not hesitate to bring such proceedings to a halt.

33. It is incumbent upon the DPP to critically assess the information or complaint and evidence presented before him or her to ascertain whether such evidence is reasonable at least on a prima facie basis to prefer charges before a court of law. Institution of criminal proceedings is not a ritual or a mechanical process



but rather a meticulous process which must be undertaken with a reasonable and sober mind to avoid transgressing on other peoples' right of freedom or liberty. In the case of R vs Attorney General Exparte Kipngeno Arap Ngeny high court Civil application number No. 406 of 2001 the court expressed itself that before instituting criminal proceedings, there must be in existence material evidence on which prosecution can say with certainty that they have a prosecutable case.

34. On the other hand, the office of the IP General of police is a creature of *the constitution* under Article 243 to 245. Among the duties of the office of the IPG is to investigate crimes and recommend prosecution to the DPP who has the final say on whether to charge a suspect or not. Principally, a court cannot stop investigation of a crime. Once a complaint has been lodged over commission of a crime, there is a legitimate expectation that such complaint shall be investigated to conclusion. Whether the suspect is eventually charged or not will all depend on the evidence or material presented before the investigating officer and finally the decision arrived at by the DPP. In the case of Daniel Ogwoka Manduku vs Director of public prosecutions & 2 others (supra) the court stated that the powers of the police to investigate crime cannot be challenged because the police is there principally to combat crime.
35. Similar position was held in the case of *Mape Building & General Engineering vs the Attorney General & 3 others* (2016)eKLR where the court held that the IP G was under a constitutional obligation to investigate alleged criminal activities and where investigations and prosecutions of suspected criminals are involved, the wider public interest that criminals are brought to book through a fair process that does not bring the criminal justice system to disrepute must always be weight against any individual's interest and right.
36. In the instant case, a complaint over fraudulent transfer of various properties belonging to Ramilies Company limited to which the petitioner was the sole director to himself without the knowledge of the interested party a co-shareholder was lodged at Diani police station. Upon receipt of the complaint, investigations commenced culminating to the arrest of the petitioner for interrogation and later released on cash bail to appear in Kwale court to answer criminal charges.
37. Constitutionally, the 3<sup>rd</sup> respondent was under obligation to investigate the complaint and recommend the charges to the DPP (1<sup>st</sup> respondent). The petitioner does not deny that the interested party was a shareholder to the company. He does not deny that he unilaterally transferred the four properties from their company to his name absolutely. The interested party claimed that the transfer of the company properties without company resolution or her knowledge amounted to acts of fraud hence the petitioner's liability.
38. From the facts of the case, there is a prima facie case capable of prosecution hence its outcome will be a matter for the trial court to decide. It is trite that the merits of the evidence of any case is a matter for the trial court to determine and not the constitutional court. See *Erick Kibwott & 2 others vs Director of public Prosecutions & 7 others* (2014) eKLR where the court held that issues relating to merits of a case are purely within the ambit of the trial court.
39. A criminal trial is a legal process which can only be halted where there is clear proof that there is apparent violation or likelihood of infringement of one's constitutional rights. The burden of proof with a certain degree of precision as to the specific constitutional provisions violated lies with the person alleging such violation. See *Anarita Karimi Njeru v Republic* (1979) KLR.
40. In the instant case, the petitioner claimed that he transferred unto himself what belonged to him. However, there is the issue of whether due process in transferring company property to individual ownership without company resolution or approval of the shareholders was legal or merely an act of fraud to defraud other share-holders. As to whether the corporate veil of accompany as a legal person



against acts of a director is to be lifted will depend on the nature of the evidence that will be laid before the trial court.

41. The petitioner was summoned, interrogated and then released with instructions to appear in court. He will have an opportunity to cross examine the witnesses. I do not find any violation of the petitioner's rights under any of the quoted constitutional provisions. Fair administrative action process was followed by summoning him and then released on cash bail. Whether guilty or not, that is for the trial court to determine. Indeed, time and again, courts have held that courts should be cautious and slow in halting prosecution of a criminal trial since criminal proceedings are matters of public interest in nature and that there are other remedies available even after the trial. See Supreme court decision in *Hussein Khalid and 16 others v Attorney General & 2 others* (2019) eKLR and *Republic v Director Public Prosecutions & another Ex parte Justus Ongeru* (2019) eKLR.
42. Having held as above, it is my finding that the petitioner has not established to the required degree any violation of his constitutional rights as alleged. Consequently, the prayer for the reliefs sought cannot apply. Accordingly, it is my finding that the petition herein lacks merit and therefore dismissed. As to costs, I will exercise my discretion given the public nature of criminal proceedings to order that each party bears own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30<sup>TH</sup> DAY OF JUNE  
2022**

**J.N.ONYIEGO**

**JUDGE**

