



**Poghisyo v Republic (Miscellaneous Criminal Application E079 of 2022)  
[2022] KEHC 10495 (KLR) (Crim) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10495 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E079 OF 2022  
CW GITHUA, J  
JULY 28, 2022**

**BETWEEN**

**THOMAS KIPTUM POGHISYO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant, Lt. Col. Thomas Kiptum Poghisyo, was charged before the Court Martial at Kahawa Garrison in Court Martial Case No. 4 of 2021 with five counts of various offences under the *Kenya Defence Forces Act* and the *Penal Code*. In the course of the trial and after the prosecution closed its case, the Court Martial delivered a ruling on 11<sup>th</sup> February 2022 that the applicant had a case to answer and he was put on his defence.
2. Aggrieved by the said ruling, the applicant moved this court through a chamber summons application dated 11<sup>th</sup> March 2022 seeking leave to file an appeal against the court martial's decision out of time and orders staying further proceedings before the Court Martial pending hearing and determination of the application as well as the intended appeal.
3. On 16<sup>th</sup> March 2022, upon application by the applicant's learned counsel Mr. Otieno, this court granted interim stay of proceedings in the Court Martial pending mention on 21<sup>st</sup> March 2022 for further orders or directions.
4. During the mention on 21<sup>st</sup> March 2022 Mr. Yator, the learned prosecuting counsel in the court martial proceedings appeared and orally applied that the Director of Military Prosecutions be enjoined in the application being the office mandated by the law to conduct prosecutions in court martials. After brief oral submissions by the parties, I directed Mr. Yator to file a formal application to allow the other parties to respond effectively.



5. The application was filed on 29<sup>th</sup> March 2022. It sought that the Director of Public Prosecutions (DPP) be expunged from the application as the respondent and the Director of Military Prosecutions (DMP) be substituted in his place; that upon being admitted as the respondent, the DMP be granted leave to respond to all filings made by the applicant (1<sup>st</sup> respondent).
6. In the grounds anchoring the motion which are replicated in the depositions made in the supporting affidavit sworn on 25<sup>th</sup> March 2022 by Colonel Symon Cheberek Yator, the applicant contends that the Director of Public Prosecutions is wrongly named as the respondent in the application and that the proper respondent is the Director of Military Prosecutions who under Sections 213 and 214 of the [Kenya Defence Forces Act](#) is mandated to conduct prosecutions at the court martial; that under Article 156 (6) of the [Constitution](#), the DPP has no role in matters instituted or pending hearing in the court martial like the matter involving the applicant; that the DPP only plays a role in appeals filed to this court against decisions made in cases concluded by the court martial.
7. The application is opposed by both respondents. The 1<sup>st</sup> respondent filed a replying affidavit sworn by his learned counsel Mr. Norman Otieno while the 2<sup>nd</sup> respondent (the DPP) filed grounds of opposition dated 7<sup>th</sup> April, 2022. The gravamen of the opposition to the application by both respondents is that the application is misconceived and legally untenable in that the Office of the DPP is the one mandated by Article 157 (6) of the [Constitution](#) and Section 5 (b) (i) of the [Office of the Director of Public Prosecutions Act](#) to undertake prosecution against any person before any court (other than a court martial) in respect of any offence alleged to have been committed; that the court martial ceased to have jurisdiction over the 1<sup>st</sup> respondent's case once an application was filed in the High Court; that the 1<sup>st</sup> respondent's application does not form part of the proceedings in the court martial where the applicant has discretion to conduct prosecution.
8. In addition, the 2<sup>nd</sup> respondent contended that the applicant without any colour of right wants to usurp the powers of the DPP; that the applicant can only apply to be enjoined as an interested party in the application and cannot seek that the 2<sup>nd</sup> respondent be expunged from the proceedings instituted by another party.
9. At the hearing, the parties consented to prosecuting the application by way of written submissions. However, only the applicant and the 1<sup>st</sup> respondent filed written submissions. The 2<sup>nd</sup> respondent chose not to file submissions and instead relied on its grounds of opposition and the written submissions filed by the 1<sup>st</sup> respondent.
10. In its submissions, the applicant averred that the orders staying proceedings of the court martial were issued without the participation of the Director of Military Prosecutions who is statutorily mandated to conduct prosecutions in the court martial as provided in Section 213 of the [Kenya Defence Forces Act](#) and Article 157 (6) of the [Constitution](#). The applicant further submitted that the case against the 1<sup>st</sup> respondent in the court martial has not been concluded and the DPP has no role in proceedings pending before a court martial. To buttress its submissions, the applicant placed reliance on Nairobi High Court Petition No. 188 of 2019 [Major Erastus Hezbon Otieno V Director of Military Prosecutions & 2 Others](#), [2019] eKLR which in my view is not applicable to the current application as the petition involved a determination of whether the petitioner's constitutional rights had been violated in the course of the proceedings in a court martial. It did not address the issue in question in the instant application.
11. Learned counsel for the 1<sup>st</sup> respondent, Mr. Otieno in his submissions reiterated the depositions he made in his replying affidavit and emphasized that the pleadings filed before this court do not constitute proceedings in the court martial where the DMP is mandated to conduct prosecution; that the only



remedy available to the applicant is to seek to be enjoined as a party in the 1<sup>st</sup> respondent's application to work in conjunction with the DPP and not to seek to replace the DPP.

12. I have carefully considered the application, the affidavits sworn on behalf of the applicant and the 1<sup>st</sup> respondent as well as the grounds of opposition filed by the 2<sup>nd</sup> respondent. I have also considered the rival written submissions made on behalf of the applicant and the 1<sup>st</sup> respondent. Having done so, I find that the only issue arising for my determination is who between the applicant and the DPP is the proper respondent in the application filed by the 1<sup>st</sup> respondent.
13. In my view, the answer to this question lies in the interpretation of Section 213 of the *Kenya Defence Forces Act* (hereinafter referred to as the Act) and Article 157 (6) of the *Constitution*. The relevant provisions of Section 213 of the Act state as follows:
  - (1) There shall be a Director of Military Prosecutions in the Ministry responsible for Defence who shall be appointed by the Defence Council.
  - (2) A person shall not be appointed as the Director of Military Prosecutions unless the person is — (a) an officer not below the rank of "Lieutenant Colonel"; and (b) an advocate of the High Court of Kenya of not less than ten years standing.
  - (3) A person appointed as the Director of Military Prosecutions under this section shall—
    - (a) have power to direct military police to investigate any information or allegation of criminal conduct, and a military police shall comply with any such direction;
    - (b) exercise powers of prosecution under this Act and shall undertake prosecutions at a court-martial against any person subject to this Act in respect of any alleged offence under Part VI;
      - (ba) notwithstanding the provisions of section 157, have power to decide whether to prosecute or not to prosecute in relation to any offence under this Act wherein the accused person elects to be tried by court martial, or a commanding officer, or an appropriate superior authority remands the case for trial by court martial;
      - (bb) amend or substitute a charge referred to him or her by the Commanding Officer or appropriate superior authority at any time before a Court Martial is convened;
      - (bc) .....
    - (c) have power with the permission of the Judge Advocate to discontinue any proceedings before a court-martial at any stage before summing up by Judge Advocate.
  - (4) The Director of Military Prosecutions shall not discontinue proceedings before a courts martial unless with the permission of the Judge Advocate.”
14. Article 157 of the *Constitution* establishes the office of the Director of Public Prosecutions. Sub Article 6 stipulates the powers conferred on the DPP and states as follows:

“ 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 .....

15. A plain reading of the provisions of Section 213 of the Act leaves no doubt that the mandate of the office of the Director of Military Prosecutions is limited to the prosecution in a court martial, persons alleged to have committed offences under the Defence Forces Act. This in effect means that the DMP does not have authority to conduct any prosecution or defend applications filed in any court other than a court martial.
16. Article 157 (6) of the Constitution on the other hand clearly provides that the office of the DPP is mandated to prosecute any person before any court (other than a court martial) in respect of any offence alleged to have been committed.
17. In my view, the above constitutional provision seeks to separate the powers of the DPP from that of the Director of Military Prosecution to ensure that there is no clash between the prosecutorial powers donated by the law to the two independent offices. The provision aligns itself to Section 213 of the Armed Forces Act and makes it clear that whereas the DPP has power to institute and conduct the prosecution of any person before any court which includes the High Court, the DPP cannot undertake military prosecutions in a court martial which is exclusively reserved for the DMP.
18. That said, it is pertinent to note, as pointed out by the respondents, the proceedings currently before this court were instituted by the 1<sup>st</sup> respondent invoking this court's supervisory jurisdiction over subordinate courts which have been defined under Article 169 (1) of the Constitution to include court martials.
19. Although it is not disputed that the proceedings in the court martial have not been concluded, this fact by itself does not give the Director of Military Prosecutions authority or any legal basis to defend the application filed in this court. It is common knowledge that the application though emanating from proceedings in the court martial is distinct and separate from those proceedings and this being a conventional court not a court martial, the DMP cannot be the respondent in the 1<sup>st</sup> respondent's application.
20. Flowing from the foregoing, it is my finding that the forum for the proceedings involving the 1<sup>st</sup> respondent having changed from the court martial to this court, the office of the DPP was properly named as the respondent in the application.
21. Having found as I have above and noting that the proceedings before the court martial are still pending determination and taking into account the applicant's role in the said proceedings as stated earlier, I find that it would be in the wider interests of justice if the applicant was enjoined in the proceedings before this court as an interested party as appreciated by the respondents in their responses to the instant application.
22. In order to expedite the conclusion of the 1<sup>st</sup> respondent's application, even though the applicant had not prayed to be enjoined in the application as an interested party, I hereby exercise my discretion and direct that the applicant be enjoined in the application as an interested party.
23. For the foregoing reasons, it is my finding that the instant application is devoid of merit and it is hereby dismissed.

**It is so ordered.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022.**



**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr Otieno for the original applicant/1st respondent

Ms Kirui for the intended respondent/applicant

Ms Oduor for the 2nd respondent

Ms Karwitha: Court Assistant

