



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL, JUDICIAL REVIEW DIVISION**  
**MISC. CIVIL APPLICATION NO. 32 OF 2014**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26  
LAWS OF KENYA**

**IN THE MATTER OF: ARTICLE 19, ARTICLE 20, ARTICLE 21(1) AND (4),  
ARTICLE 22(1), ARTICLE 25(a) and (c), ARTICLE 28, ARTICLE 29(a), (c), (d), (e), (f),  
ARTICLE 47, ARTICLE 48, ARTICLE 49 AND ARTICLE 165 AS READ WITH ARTICLE 20  
AND ARTICLE 23(1) and (3) (a), 9(e), (f) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: SECTION 14A (2) AND (3) OF THE POLICE ACT CHAPTER 84 LAWS  
OF KENYA**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF MANDAMUS**

**BETWEEN**

**KENNETH CHARO KARISA.....APPLICANT**

**VERSUS**

**1. THE DIRECTOR OF PUBLIC PROSECUTION**

**2. COMMISSIONER OF POLICE.....RESPONDENTS**

**RULING**

1. In this matter the ex parte Applicant Kenneth Charo Karisa seeks an order of **mandamus** be issued against the First Respondent to direct the Second Respondent to carry out investigations on the ex parte Applicant's complaint that he was seriously assaulted in the year 2009 by General Service Officers then attached to **Magandia GSU Camp** within Msambweni area of Kwale District now Kwale County.

2. In their reply to the Notice of Motion dated 28<sup>th</sup> June, 2016, the First Respondent through the Affidavit of one Sarah Ogweno an Advocate of the High Court of Kenya working in the office of the First Respondent depones that it has not been possible for the Respondents to carry out the investigations

because the ex parte Applicant has not complied with the requirements of Section 89 of the Criminal Procedure Code, (Cap 75, Laws of Kenya) for failure to supply the particulars of the person or persons (officers) who allegedly assaulted him, and that having failed to identify his attackers, the ex parte Applicant **“has no right to move the court for orders of mandamus against the Respondents”**.

3. This is in my view an obtuse argument. **Firstly**, because, reliance upon Section 89 of the Criminal Procedure Code is misplaced. That provision empowers a magistrate to allow or to reject information filed before the court if it does not disclose an offence. **Secondly** it has nothing to do with the First Respondent’s constitutional duty under Article 157 of the Constitution to direct the Second Respondent to carry out investigations into a complaint made by a citizen or other complainant.

4. Whereas Article 157(10) of the Constitution grants the Director of Public Prosecutions unfettered discretion on his prosecutorial powers and that he/she shall not be under the direction or control of any person or authority, the Director of Public Prosecutions is under clear and unambiguous constitutional duty to direct the Inspector-General of Police to investigate any information or allegation of criminal conduct, and the same sub-article imposes upon the Inspector-General of Police the like duty and obligation to comply with the directions of the Director of Public Investigations to investigate.

5. But whereas it is administratively procedural to write to the Regional or County Criminal Investigations Officer, the Constitution is clear, the directions by the Director of Public Prosecutions are made to, and the Inspector-General of Police **shall comply with any such directions**.

6. In this matter, the Director of Public Prosecutions has through his Regional Officer dilly-dallied with the ex parte Applicant’s complaint that the question of his assault allegedly by the **GSU Officers at Magandia Camp** at Msambweni area be investigated, because that was or would be criminal conduct.

7. In his ruling dated and delivered on 16<sup>th</sup> June, 2016, Muriithi J, described at length the nature of the remedy of **mandamus** as discussed by the Court of appeal in the case of **Kenya National Examinations Council vs. Republic, ex parte Geoffrey Gathenji Njoroge & Others [1997] eKLR**, and I do not propose to repeat it here. Suffice it to paraphrase the remedy (of mandamus) as issuing where a person, or authority invested with a power or duty to exercise some constitutional or statutory function fails to do so, the order of **mandamus** will issue to compel such person or authority or body of persons to carry out the constitutional or statutory function.

8. In this case, the First Respondent clearly failed to carry out his duty as required under Article 157(4) of the Constitution, to direct the Second Respondent the Inspector-General of Police to carry out investigations into the alleged criminal conduct of his offices at Magandia GSU Camp, Msambweni.

9. In the circumstances therefore, there shall issue an order of **mandamus** to the Director of Public Prosecutions to exercise his constitutional duty under Article 157(4) of the Constitution of Kenya 2010.

10. Though costs follow the event, I direct that costs herein shall abide the outcome of the investigations by the Director-general of Police.

11. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 14<sup>th</sup> day of October, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Ms. Maithya for Applicant

Mr. Wamotsa holdng brief Miss Ogweno for Respondent

Mr. Silas Kaunda Court Assistant