



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 197 OF 2014

WILFRED MASINDE WANYONYI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE CHIEF MAGISTRATES COURT-NAIROBI2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner is an employee of the County Government of Nairobi, formally City Council of Nairobi, employed as an enforcement officer discharging his duties under the Physical Planning Act, Cap 286, Laws of Kenya. He has filed the petition to challenge the decision of the 1st respondent (hereinafter “DPP”), a constitutional body established under Article 157 of the Constitution whose mandate is inter-alia instituting and undertaking criminal proceedings on behalf of the Government of Kenya, to charge him in Kibera Criminal Case No 2450 of 2013 which is currently pending before the 2nd respondent.

2. The petitioner has, in that case, been charged with four counts of manslaughter contrary to section 202 as read with section 205 of the Penal Code and three counts of negligent acts causing harm contrary to the provisions of section 244 of the Penal Code. His contention is that the charges violate his rights under Article 236 of the Constitution and section 6 of the Physical Planning Act.

Background

3. Sometime in 2009, the Nairobi City Council inspected building structures erected on L.R No. 7107/2 off Airport North Road and found that they had been illegally erected as the developer had not sought development permission as required under Section 33 of the Physical Planning Act. It then issued various enforcement notices on different dates, namely 27th March 2009, 9th April 2010, 31st March 2010, 31st July 2010 and 19th April 2011 against the developers on the parcel of land in line with its statutory mandate under Section 38 of the Physical Planning Act. The said notices required the developers to cease construction and remove the developments within a period of seven days, failing which the City Council would demolish the illegal structures.

4. Following the issuance of the said notices, the developers moved to the High Court in **HCCC No. 155 of 2009** and obtained an injunction issued on 8th April 2009 restraining the City Council from effecting the enforcement notices. Subsequently, the developer sought orders of contempt against the Town Clerk

and four of the Council officers for alleged disobedience of the court order of 8th April 2009. Orders of committal to civil jail were issued on 25th November 2009 against the said officers. The City Council officers thereafter obtained orders staying the committal orders. Both the orders restraining enforcement of the enforcement notices and the order staying the committal to civil jail of the Council officers are still in force.

5. On 14th June 2011, the building under construction on L.R No. 7107/2 collapsed, allegedly due to poor workmanship, resulting in the death of four casual labourers, while several others sustained injuries. It is the collapse of the said building and the resultant casualties that precipitated the institution of criminal charges against the petitioner, amongst others. One of the petitioner's co-accused was one Justus Mwenda Kathenge.

6. According to the petitioner, Mr. Justus Mwenda Kathenge, who was his superior officer at the City Council of Nairobi, moved the High Court in **High Court Petition No. 372 of 2013** and the Court (Lenaola J) issued orders declaring the prosecution of the petitioner, Mr. Kathenge, null and void and prohibiting the Magistrate's Court from proceeding with the prosecution on the basis that it violated his indemnity under Article 236 of the Constitution and Section 6 of the Physical Planning Act. The Court also directed that its decision be transmitted to the Chief Magistrate's Court and placed in the court file.

7. On the basis of the decision in High Court Petition No. 372 of 2013, the petitioner filed an application dated 24th April 2014 before this Court in which he sought orders to stop his prosecution in the same criminal case, namely **Kibera Criminal Case No. 2450 of 2013** which had been scheduled for hearing on 13th May 2014. Upon hearing both parties in the said application, this Court, in its ruling dated 12th May 2014, granted interim orders restraining the Kibera Chief Magistrate's Court from proceeding with the prosecution of the petitioner in **Criminal Case No. 2450 of 2013** pending the hearing and determination of this petition. This judgment pertains to the substantive petition challenging the petitioner's prosecution in the said matter.

The Case for the Petitioner

8. In his petition and affidavits in support thereof, the petitioner alleges that the respondents, by instituting the proceedings against him and proceeding with his trial, are infringing on his rights as a public officer set out under Article 236 of the Constitution. He avers that the charges against him arise by virtue of his being an enforcement officer with the Nairobi City County, which is contrary to Article 236 of the Constitution and the court's decision in **Justus Mwenda Kathenge vs Director of Public Prosecution and 2 Others Petition No. 372 of 2013**.

9. The petitioner reiterates the factual basis giving rise to the petition set out above. He notes that the Council inspected the building structures erected on L.R No 7107/2, found them to be illegally erected on the parcel of land because the developer had not sought permission as required under the Physical Planning Act, issued enforcement notices against it, but that the High Court in High Court Civil Case No. 155 of 2009 granted orders restraining the City Council from effecting the enforcement order against the developer. It is also his case that the interim orders have been extended by the court since then, rendering it impossible for the Council to enforce the enforcement orders against the developer.

10. The petitioner contends that he and other officers from the then City Council are law abiding citizens and none of them has attempted to enforce the orders against the developer since that would amount to contempt of court.

11. It is also his deposition, however, that two attempts made by the City Council on 5th and 6th January, 2010 to enforce the notices were met with violence from the developer. The incidents were reported to the Embakasi Police Station on the same dates. He also avers that the developer had also filed an application dated 25th February 2010 against the Nairobi Town Clerk for allegedly disobeying the Court orders issued on 8th April 2009, and orders of committal for contempt of court were issued by the High Court on 25th November 2010.

12. The petitioner contends therefore that in light of the above matters, the intended prosecution against him and the enforcement officers by the DPP is malicious, discriminatory, and illogical and in complete bad faith as there exists no nexus between the collapse of the illegal building and the actions or inactions of the City Council.

13. The petitioner maintained that he is indemnified by section 6 of the Physical Planning Act from liability in this instance as there was no negligence or bad faith on his part or of that of his officers in carrying out their duties with respect to the said parcel of land. He states that his case is the same as that of the petitioner in **High Court Petition No. 372 of 2013**, and he therefore prays that the petition be allowed and that he be granted the orders sought in the petition.

The Case for the 1st Respondent

14. The DPP opposes the petition by way of an affidavit sworn by Corporal Patrick Muraguri on 10th day of June 2014 and submissions dated 21st July 2014.

15. Cpl. Muraguri deposes that after the collapse of the building on L.R.No. 7107/2 off Airport North Road, Nairobi, investigations by a team established by the Provincial Criminal Investigations Department, Nairobi revealed, among other things, that the deceased and injured workers were working on the construction site which at the time was owned by the developer, a Mr. Bernard Gakubo Karungu. The said Karungu had acquired the land by virtue of a conveyance dated 22nd April, 2010; that there were no drawings available on the site and the building collapsed due to use of low quality building materials, poor design, poor workmanship, and lack of proper supervision by a qualified structural engineer, among others.

16. According to the DPP, the petitioner, as a building inspector working within the then City Council of Nairobi was charged with the duty of inspection and monitoring of upcoming developments. He was also required under Section 38 of the Physical Planning Act to undertake enforcement measures.

17. Cpl. Muraguri avers that the contents of the petitioner's affidavit are misleading as first, in **HCCC No 155 of 2009**, the plaintiffs are the occupiers of the land known as L.R No 7107/2 whereas the defendants are the original owners of the said land and the City Council of Nairobi. Secondly, the said civil suit was in respect of allegations of a collusion between the City Council of Nairobi and the owners' attempt to demolish residential shelters already constructed by the plaintiffs. It was his averment, further, that the injunction issued by Hon. Dulu, J on 8th of April, 2009 was in respect of structures/shelters already erected on the said land as at that date. Consequently, the said order was applicable for the benefit of the plaintiffs in the civil suit.

18. The DPP contends that the developer, Bernard Gakobo Karungu, purchased a subdivision of the said land on 22nd April, 2010, a year after the issuance of the injunction order, and it is his case therefore that the developer was a stranger to the order.

19. Cpl. Muraguri further deposes that the construction by the developer commenced after approval was issued by the City Planning Department on 18th November, 2010, about a year and seven months after the issuance of the injunction. It is the DPP's case that in the circumstances, the said Bernard Gakobo Karungu was not a party to the civil suit and consequently, the order against demolishing, eviction and interference did not apply to him; and further, that the order of 25th November, 2010 is in respect of the parties in the said civil suit for acts undertaken pursuant to an application made on the 25th February, 2010 by the plaintiffs, which was prior to the purchase and construction undertaken by the developer, Mr. Karungu.

20. The DPP therefore argues that the petitioner failed and/or neglected to exercise enforcement measures as there is evidence substantiating the fact that the construction was still ongoing at the time the construction collapsed.

21. With respect to the decision in **High Court Petition No.372 of 2013**, the DPP argues that his office has lodged an appeal on 24th March, 2014 against the said decision, which appeal is pending determination. His case is that the protection of public officers under Article 236 of the Constitution does not exonerate a public officer who has failed or neglected to perform the functions of his office.

22. It was his case that he has acted in accordance with his mandate under Article 157, and the petitioner had not demonstrated that in making the decision to prefer criminal charges against him, the DPP acted without or in excess of the powers conferred by the law, or that he acted maliciously, infringed, violated, contravened or in any other manner failed to comply with or respect and observe the Constitution.

The Case for the 2nd Respondent

23. The AG filed Grounds of Opposition dated 11th July 2014. He argued, first, that the prayers sought amount to asking the Court to unreasonably and unjustifiably interfere with the DPP's independent constitutional powers under Article 157 (10) of the Constitution. It was his argument, further, that the prosecution of a person with the alleged commission of an offence does not amount to violation of a constitutional right, nor does arrest and indictment as these are all part of the criminal justice system which is sanctioned by the Constitution.

Petitioner's Rejoinder

24. In response to the averments by the DPP, the petitioner, in his further affidavit sworn on 23rd June 2014, argues that the building that collapsed was being constructed on L.R No. 7107/2 and the alleged L.R No. 27903/72 does not exist. He contends that the conveyance and indenture annexed to the affidavit of Cpl. Muraguri is not proof of the existence of the said parcel of land, and that if such a parcel of land exists, the DPP should have attached the title or the survey map. It is his case therefore that the enforcement notices were issued on the existing parcel of land, which is L.R 7107/2 and since the conveyance annexed to the affidavit of Cpl. Muraguri is not registered, it cannot be relied on by this Court in making its determination.

25. The petitioner maintained that the construction on L.R 7107/2 was conducted illegally as the alleged approval is a fraud, which is why the Nairobi City Council issued the enforcement notices against the developers on the 9th of April 2010, 31st March, 2010, 27th March, 2009, 21st July, 2010 and 19th of April 2011, seeking to stop the said constructions as they were unapproved and hazardous. He avers that the developers then moved to court and obtained the orders dated 5th April 2009 against the City Council, making it impossible for the Council and its employees to enforce the notices.

26. It is also his case that the structural report relied on by the DPP reveals that there were no drawings available on the site, a fact which further proves that indeed there was no approval from the City Planning Department as there needs to be drawings before construction can be allowed to commence.

27. The petitioner further argues that as late as 6th November, 2012, the Legal Department of the Nairobi City Council issued a Memo directing his Department not to take any action on plot No. 7107/2 unless advised, in view of the injunction.

28. The petitioner further notes that the unregistered conveyance annexed to the affidavit of Cpl. Muraguri refers, at clause 2 'a', to plot No. L.R 7107/2. He contends that the fact that the said conveyance is unregistered and therefore lacks legal basis leaves plot No. L.R 7107/2 as the only parcel recognizable in law, and which was the subject of the court order.

29. It is also the petitioner's contention that the purported approval by the Nairobi City Council dated 18th November, 2010 is not in respect of the subject parcel but relates to plot No. 10953/3 located in Karen along Ngong Road, and further, that it is in respect of a boundary wall and a gate house for World Vision International. He maintained that injunctive orders issued on 25th November, 2010 are still in force, that they did not cease to be in force when there was a purported conveyance to a new developer as they can

only be vacated by the court, and that they are still binding on the Nairobi City Council to date.

30. The petitioner maintained that criminal liability is personal to an accused person; that the respondents have not shown any nexus between him and the collapse of the building; that his hands were tied by the court order; and that it cannot therefore be said that he failed to discharge his duties leading to the collapse of the building and he should not be punished for acting within the law.

31. He maintained that the criminal case brought against him shows an abuse of the powers donated to the DPP; that the charges have been leveled against him with an ill motive as there is no nexus, commission or omission on his part that led to the collapse of the building, and the Court has the jurisdiction to stop any manifest abuse of power on the part of the DPP.

Determination

32. This petition arises out of very tragic circumstances. Due to what was alleged to be poor construction and use of substandard materials, among other failures, a building under construction collapsed. Four of the labourers died, and several were injured. As a result, the petitioner, along with others, including the alleged developer, have been charged with four counts of manslaughter contrary to section 202 as read with section 205 of the Penal Code and three counts of negligent acts causing harm contrary to the provisions of section 244 of the Penal Code. The petitioner has challenged the charges against him, contending that they violate his rights under Article 236 of the Constitution and section 6 of the Physical Planning Act. He accuses the DPP of bringing the charges against him maliciously and alleges abuse of the DPP's powers under Article 157 of the Constitution.

33. The issue that this Court must determine therefore is whether there has been a violation of the petitioner's rights as alleged. In determining this issue, I must consider the powers and mandate of the DPP under the Constitution, and the role of the Court in petition alleging violation of constitutional rights.

34. I must, however, also consider the role of the petitioner and officers in the City Planning Department of the Nairobi City Council (now the Nairobi City County) in relation to enforcement of the Physical Planning Act, Cap 286 Laws of Kenya. This is in view of the peculiar facts of this case, which are somewhat convoluted and an unraveling of which is necessary to enable the Court reach its decision.

The Constitutional Powers of the DPP

35. The constitutional powers of the DPP are set out in Article 157 of the Constitution 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;

(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.

36. It has been observed in various decisions of this Court that the office of the DPP is constitutionally mandated to undertake prosecutions, and that the Court will not interfere with the exercise of such powers unless a clear violation of the Constitution or abuse of the constitutional powers has been made out. In the case of **Francis Anyango Juma vs The Director of Public Prosecutions and Another, Petition No 160 of 2012**, this Court observed as follows with respect to the powers of the DPP under Article 158(10):

[28.] Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself."

The Role of the Court

37. The DPP has challenged the jurisdiction of the Court in this matter. It has been submitted on his behalf that this is not the proper forum for the determination of the issues raised by the petitioner, and that the petitioner should have filed an application by way of judicial review. I need not repeat the words of the Court in **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited [1989] KLR 1** with regard to the importance of jurisdiction.

38. However, the jurisdiction of the Court in a matter such as this cannot be in doubt. Article 22 allows a party who alleges that his right or fundamental freedom has been violated or is threatened with violation to approach the Court for relief. At Article 165(3)(d), the Constitution provides that the Court has:

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

(i) ...

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

39. With regard to the reliefs that the Court can grant, Article 23(3) is clear that on a petition brought under Article 22, the Court can grant orders of judicial review. In my view therefore, the present petition cannot be successfully impugned on the basis that the petitioner should have challenged his prosecution by way of an application for judicial review.

40. However, the argument by the DPP has some merit with respect to the role of the Court in considering the factual matters giving rise to the petition. As argued by the DPP, the trial court, not the Court seized of a constitutional petition, has the mandate to examine the facts and determine whether or not an offence has been committed. This is indeed the correct position, as the Court (Warsame J, as he then was), so succinctly captured in the case of **Michael Monari & Another vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011**:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred

against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

41. The circumstances of this case, however, require that the Court addresses its mind to the factual situation giving rise to the petition, while exercising care not to make any findings with respect thereto. This is because the facts before it which are alleged by the petitioner to show malice and abuse of his powers by the DPP, and on the basis of which the petitioner alleges violation of his constitutional rights, are somewhat convoluted. I will therefore consider the facts on the basis of which the petitioner alleges violation of his constitutional rights.

The Factual Scenario

42. The DPP has brought charges against the petitioner following the collapse of a building under construction within the jurisdiction of the then City Council of Nairobi. The petitioner and his colleagues in the then Council's City Planning Department had the mandate, under section 38 of the Physical Planning Act, to control development within the City and to enforce compliance with such development conditions as they may impose. Section 38 which is titled "Enforcement Notice" provides as follows:

(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.

(5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.

(6) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.

(7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4), (5) or (6).

43. Under section 39 titled "Supplementary provisions as to enforcement" a local authority, in the

present case, the City Planning Department, is granted the powers to enforce its notices in the following terms:

1. If, within the period specified in the enforcement notice or within such further period as the local authority may determine any measures required to be taken (other than discontinuance of any use of land) have not been taken, the local authority may enter on the land and take those measures and may, without prejudice to any penalties that may be imposed or any other action that may be taken under this Act, recover from the person on whom the enforcement notice is served, any expenses reasonably incurred by it in connection with the taking of those measures.

(2) If such person has not lodged an appeal under section 38 he shall not be entitled to question the validity of any action taken by the local authority under subsection (1) upon any grounds, that could have been raised in such appeal.

(3)....

(4) Any person who obstructs, or otherwise interferes with, a local authority in the execution of its functions under subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding fifty thousand shillings or to an imprisonment not exceeding two years or to both.”

44. Thus, the law grants power to the local authority to take action with respect to any development undertaken without development authority, or which is being undertaken in contravention of the development conditions imposed by the local authority.

45. It would appear, then, that regardless of the title to a property, and whether or not a property has been subdivided and the title in respect thereof issued, the local authority has the mandate to control development on any land within its jurisdiction.

46. I say this because of the arguments advanced by the petitioner in this matter. As I understand it, the petitioner's case is that the building that collapsed was on L.R No. 7107/2 in respect of which an injunction had been issued. The DPP argues that the case revolved around the collapse of a six storey building constructed on a sub-division of L.R No. 7107/2 being L.R No. 27903/72. The petitioner counters that this land parcel does not exist as there is no title or survey map in respect thereof.

47. However, in my view, the arguments around the parcel of land on which the building that was under construction was situated, whether it is L.R No. 7107/2 or L.R No. 27903/72, obscures the point. Whichever land parcel the development that collapsed was located on, there was a statutory duty imposed on the City Planning Department and its officers under section 38 of the Physical Planning Act. If a dereliction of this duty is made out and criminal liability in respect thereof established, it would not matter which land parcel was in contention.

48. Again, as I understand it, the core of the petitioner's case is not that he and his colleagues in the City Planning Department did not have an obligation with respect to the provisions of the Physical Planning Act. His argument, rather, is that they were prevented from performing their duties by an order issued by the Court in HCCC No. 155 of 2009. Indeed, as is evident from the decision of the Court in **High Court Petition No. 372 of 2013 - Justus Mwenda Kathenge vs Director Of Public Prosecutions & 2 Others**, the Court was satisfied that the order of the court in HCCC No. 155 of 2009 prevented the enforcement of orders in respect of the land by the City Planning Department of the City Council, the petitioner's then employer. In his decision, Lenaola J observed as follows:

“What is the connection between HCCC No.155/2009 and the building that collapsed? I have read the *Plaint in that matter and certain other pleadings on record. The suit had been instituted by David Mbuvi Kathitu and fourteen others against the City Council of Nairobi, Stephen Mureithi, Ritho Mureithi, Wanjiru Mureithi and Nyaga Thungu Limited seeking only one order;*

“A permanent injunction restraining the Defendants whether by themselves their servants or agents

from evicting or demolishing the shelters/structures constructed on L.R. No.7107/2 off Airport Road, Nairobi.”

3. Interim orders of injunction in the above terms were granted by Dulu J. ex-parte on 8/4/2009 and it is the breach of those orders that led Sitati J. on 25/11/2010 to order the arrest of Philip Kisia, Clerk of the City Council of Nairobi, Stephen Mureithi, Ritho Mureithi, Wanjiru Mureithi and Daniel Oloo Murika, and their committal to civil jail. What triggered the suit? At paragraph 11 of the Complaint it is averred that the City Council of Nairobi on 4/4/2009 issued a notice seeking to demolish all structures on LR No. 7107/2 as they had been illegally erected. I have seen copies of four Enforcement Notices under the Physical Planning Act, Cap. 286 Laws of Kenya addressed to the “owner/developer Plot opposite Kenya Builders and Concrete Ltd. Embakasi Mukuru”. “Owner/Developer /Occupier L. R. 7107/2 – off Airport Road, Nairobi”, and “The Developer/Occupiers L.R. No.7107/2 - off North Airport Road, Pipeline, Embakasi”. They are dated 9/4/2006, 27/3/2009, 31/5/2010 and 19/4/2011 respectively. All the Notices seek that the construction of buildings and structures on the land should stop and the same should be removed and/or demolished. It is obvious that once the order of injunction was issued and warrants of arrest issued as stated above, no enforcement of the Notices could be made by the named defendants including the City Council of Nairobi which was the Petitioner's employer.”

49. Like Mr. Kathenge, the petitioner in Petition No. 372 of 2013, the petitioner is being prosecuted in respect of the collapse of a building that was being erected on L.R.7107/2, or a subdivision thereof. Orders had been issued in respect of the structures and developments on the said land. Rightly or wrongly, the said orders were interpreted as stopping all enforcement of any notices against the said property, and indeed, orders of contempt had been issued against the then Town Clerk for contempt of court.

50. In the circumstances, I believe that the Court rightly came to the conclusion, in Mr. Kathenge's case, that there was no nexus between his act or omission, and the collapse of the building on 14th June 2011. Perhaps the Council, in the proper exercise of its powers under the Physical Planning Act, could have challenged the basis for the issuance of the orders in HCCC No. 155 of 2009. That, however, is now water under the bridge.

51. As matters currently stand, I am constrained to agree with Lenaola J in his decision in the case of **Justus Mwenda Kathenge** (supra) when he stated:

“Where a prosecution is based on a complete misapprehension of the facts and the applicable law and where a suspect is being lumped together with others for no credible reason, that is what is called abuse of the process of the Court. Where a man is being vexed for no clear unlawful action or inaction on his part, then the actions of the prosecutor are not in public interest and is against the interests of the administration justice. Where Article 157(11) of the Constitution has been breached, Article 165(3)(d)(ii) must be invoked and the DPP told that he has acted inconsistently with the authority conferred upon him by the Constitution.”

52. With respect to the orders sought by the petitioner, I am satisfied that he is entitled to similar orders as were issued to his superior, as follows:

1. That a declaration be and is hereby issued declaring that the decision by the 1st respondent, the Director of Public Prosecutions to present to court and charge the petitioner with the offence of manslaughter contrary to section 202 of the Penal Code and with the offence of negligent acts causing harm contrary to section 244 of the Penal Code in Kibera Chief Magistrate's Court Criminal Case No 2450 of 2013 is null and void.

2. That an Order of Prohibition be and is hereby issued prohibiting the 2nd respondent, the Chief Magistrate's Court, Nairobi, and any other court from receiving and or continuing to entertain the counts and or charges against the Petitioner in Kibera Chief Magistrate's Court Criminal Case No. 2450 of 2013 alleging criminal culpability for manslaughter contrary to section 202 of the Penal Code

and or any other counts and charges from the collapse of the building on Plot No.7107/2.

3. That a declaration do issue that charges against the Petitioner are unjust as they violate his indemnity under Article 236 of the Constitution and section 6 of the Physical Planning Act, Cap.286 Laws of Kenya indemnifying him in respect of all administrative actions done in good faith.

53. With respect to costs, I direct that each party bears its own costs of the petition.

Dated, delivered and signed at Nairobi this 30th day of July 2015

MUMBI NGUGI

JUDGE

Mr. Omogeni instructed by the firm of Okongo Omogeni & Co. Advocates for the petitioner.

Ms. Kithiki instructed by the Director of Public Prosecutions for the 1st respondent.

Mr. Kemunya instructed by the State Law Office for the 2nd respondent.