



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.372 OF 2013**

**BETWEEN**

**JUSTUS MWENDA**  
**KATHENGE.....PETITIONER**

**AND**

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

**THE ATTORNEY GENERAL.....2ND RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT, NAIROBI.....3RD RESPONDENT**

**JUDGMENT**

**Facts**

1. The facts relating to the Petition dated 17/7/2013 are largely uncontested and they are as follows;
2. On 14/6/2011, a building that was being constructed on L.R. No.7102/2 collapsed and a number of construction workers were fatally injured while others suffered serious physical injuries. Investigations were conducted and criminal charges were later preferred against the owner of the land, one Bernard Gakobo Karungo together with the Petitioner, Justus Mwenda Kathenge among others. In the charge sheet in **Kibera CM's Court Criminal Case No.2450/2013**, the Petitioner has been charged with four counts of the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** and three Counts of the offence of negligent act causing harm contrary to **Section 244** of the **Penal Code**.

The particulars of the offences are that he “*unlawfully killed*” certain individuals on 14/6/2011 at Pipeline Estate in Embakasi Area and that on the same day and place he “*unlawfully constructed a building without meeting the required standard which was [his] duty to do ...*” and that the said negligent act led to the collapse of the building on L.R. No 7102/2 causing harm to certain other persons.

3. I should also add that the land owner was separately charged with the offences of making false documents without authority contrary to **Section 35(a)** of the **Penal Code**; erecting a structure without approved plans contrary to **Section 30(1)** as read with **Section 30(2)** of the **Penal Code** and uttering a false document contrary to **Section 357(b)** of the **Penal Code**. The documents is

said to be an Architectural Plan Ex.No.668 and the illegal structure is a Commercial Storey Building on Plot No.27903/72 (*I will revert to this plot number later in the judgment*).

4. As to the Petitioner's alleged role in all the above, he was at all material times an Enforcement Officer at the City Council of Nairobi (*now Nairobi City County*) charged *inter-alia* with the enforcement of the Council's mandate to prohibit and control the use and development of land and buildings in Nairobi.

#### **Petitioner's Case**

5. In the Petition, the Petitioner's chief complaint as contained in his Affidavits sworn on 16/7/2013 and 8/10/2013 is that the prosecution against him for the offences set out above is "*malicious, discriminatory, illogical and in complete bad faith for there is no nexus between the collapse of the building and the actions/inactions of the City Council*" and by extension, himself. That in fact, the City Council, upon inspection of the construction aforesaid, found that;

(i) *the developer had not sought permission to commence construction under the **Physical Planning Act**, and specifically **Section 33** thereof.*

(ii) *the construction was hazardous to potential occupants and construction workers.*

6. Based on the above findings, it is the Petitioner's case that he caused enforcement notices to be issued to the developer who then moved to the High Court to challenge the notices and obtained orders of injunction in HCCC No.155/2009 and the effect was that the City Council was restrained from demolishing the building being constructed on L.R.7107/2. The orders issued on 8/4/2009 were later the subject of contempt proceedings against the Clerk of the City Council leading to further orders that the Clerk be committed to civil jail. The High Court later stayed those orders and during the pendency of the civil suit, the building collapsed with tragic and fatal consequences.
7. It is the Petitioner's argument therefore that his prosecution was initiated in contravention of his fundamental rights and in breach of **Article 236** of the **Constitution** which protects public officers in performance of their functions. That the collapse of the building aforesaid should and must be blamed solely on the developers who flouted the Building Code of Kenya, and later sought protection from the Court thus tying the City Council's hands in demolishing the illegal developments.
8. That therefore the following prayers are warranted in the circumstances;

***“(1) That a declaration do issue, declaring as null and void the decision by the 1st Respondent, the Director of Public Prosecutions, to present to Court and charge the Petitioner with the offence of Murder contrary to Section 203 of the Penal Code with an alternative of Manslaughter contrary to Section 203 as read together with Section 205 of the Penal Code.***

***(2) To prohibit the 3rd Respondent, the Chief Magistrate's Nairobi, and any other Magistrate from receiving and or continuing to entertain the counts and or charges against the Petitioner alleging criminal culpability for Murder contrary to Section 203 as read together with Section 205 of the Penal Code and or any other counts and charges from the said collapse of the building on Plot No.7102/2 over the same set of facts, time frame, circumstances and context.***

***(3) That an order do issue prohibiting and restraining jointly and severally the 1st Respondent, the 2nd Respondent, and the 3rd Respondent, the Chief Magistrate, Nairobi in Chief Magistrate Criminal Case No.2450 of 2013 from presenting to Court and or accepting into Court, any counts and or charges relating to the alleged murder as against the Petitioner, and or requiring the Petitioner to take plea and or stand trial on any counts and or charges***

*relating to the afore-stated offence.*

**(4) That a declaration do issue that the fundamental rights of the Petitioner, to have details and reasonable access to the case against him were and are likely to continue being breached by requiring him to (i) Answer to a charge and cautionary statement; (ii) And or take a plea, without full details of all witness statements, documentary evidence and prosecution materials.**

**(5) That a declaration do issue that the Petitioner is not responsible for the alleged offence and that he cannot be held to be criminally responsible for the alleged offence.**

**(6) That a declaration do issue that the counts and 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 on all administrative actions done in good faith.**

**(7) That a declaration do issue that the 1st Respondent was motivated by ulterior motives unrelated to the cause of criminal justice in its election and zeal to charge and prosecute the Petitioner.**

**8. That a declaration do issue that the decision and election to charge the Petitioner was selective and discriminative, informed by ulterior motives, wholly and unrelated to any cause for criminal justice.**

**(9) That the Court can be pleased to issue any other or further orders and or directions as it may deem fair and just.**

**(10) That Director of Public prosecution (DPP) be condemned to pay costs”**

### **Respondents' Case**

1. The 2nd and 3rd Respondents hardly participated in these proceedings save that the 2nd Respondent filed the following Grounds of Opposition;

**“(1) That the Petition is odious, bad in law, vexatious and a total sham.**

**(2) That the Constitutional mandate of the Hon. Attorney- General does not include commencing or at all prosecuting criminal proceedings of any nature.**

**(3) That the Petitioner has not demonstrated to this Honourable Court, and has indeed not placed any material before this Court to show that the 2nd Respondent has unreasonably refused to furnish the Petitioner with any documents and that any such documents were requested from the 2nd Respondent.**

**(4) That the Petitioner has arrogated himself the duty of a Court of Law and prosecutor by pre-determining the outcome of the criminal case he is facing.**

**(5) That it is a fallacious assertion that the Attorney-General, the 2nd Respondent herein, advises the Director of Public Prosecutions, the 1st Respondent herein on how to prosecute its cases.”**

2. No Submissions were made in furtherance thereof and I will take them as they are.

3. The 1st Respondent on the other hand filed a Replying Affidavit sworn on 19/9/2013 and in it No.49963 Cpl. Patrick Muraguri deposed as follows;

That upon the collapse of the building on L.R.27903/72 subsequent investigations revealed;

***“(a) That the labourers were working on the construction site owned by the developer known as Bernard Gakobo Karungu.***

***(b) That the construction was undertaken without consultation with an architectural engineer which was a pre-requisite.***

***(c) That the architectural plan Ex.668 presented and relied upon was not genuine.***

***(d) That the materials used for construction was substandard and as such the construction was rendered structurally defective.***

***(e) That the procedures set in place for securing approvals (where time is of the essence) for the development of the construction were not followed as required by law.***

***(f) That the enforcement procedures set in place in terms of an illegal or substandard development were not followed as required by law.”***

4. Further, that the Petitioner, as Senior Planner and Acting Assistant Director, City Planning Department, at all material times was expected to “*co-ordinate the enforcement of City by-laws of the City Council and related laws*” by taking the following measures;

***“(a) Surveillance of the site in question;***

***(b) issuance of the pre-requisite enforcement notice;***

***(c) stoppage of the construction/demolish the construction/arrest and charge the developer for failing to respond to the enforcement notice”***

5. According to Cpl. Muraguri, further investigations revealed that because of failure on the part of the Petitioner to take the above measures, the illegal construction continued leading to the tragic deaths and injuries consequent upon the collapse of the building under construction. That the claim that the City Council and/or the Petitioner were unable to do anything because of the injunctive orders issued in HCCC No.155/2009 was false because that suit was filed by David Mburi Kathitu and fifteen other persons claiming the land as against the Estate of Joseph Maingi Mureithi (Deceased). The eviction notice against them had been issued by the City Council of Nairobi and the proceedings in HCCC No.155/2009 related to that notice and had nothing to do with the construction by Benard Gakobo Karungo. In any event, that the said Karungo purchased L.R. No.27903/72 Nairobi from Benson Riitho Murithi sometime in 2010 and the conveyance to him is dated 22/4/2010 long after HCCC No.155/2009 had been filed and that he was not a party to that suit which was in respect of L.R. No.7107/2 and not L.R. No.27903/72 on which the building collapsed.

6. That based on the evidence on record and a proper analysis of that evidence, the 1st Respondent, pursuant to his mandate to direct investigations, institute and prosecute crimes, was within the law when he ordered the prosecution of the Petitioner. That therefore the Petition is without merit and should be dismissed.

### **Opinion**

7. I have taken note of Submissions by Mr. Omogeni, Senior Counsel and Mr. Njogu, Learned Prosecution Counsel. At the heart of this matter is the question whether the 1st Respondent acted within his constitutional mandate when he ordered the prosecution of the Petitioner. That mandate is to be found in **Article 157** of the **Constitution** which provides as follows;

*“(1) There is established the office of Director of Public 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) 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.”**

8. It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under **Article 157(11)**;

(i) *he has acted without due regard to public interest,*

(ii) *he has acted against the interests of the administration of justice,*

(iii) *he has not taken account of the need to prevent and avoid abuse of Court process.*

9. These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st Respondent. I say so taking into account the following decisions where the issue has been addressed;

**(i) Githunguri vs Republic [1986]KLR 1 -**

In this case, where a prosecution was commenced long after the alleged offence had been committed and where the Attorney-General (*at the time having powers similar to those of the DPP*) had assured the Applicant that he would not be prosecuted, the Court stated *inter-alia* that;

**“A prosecution is not to be made good by what it turns up. It is good or bad when it starts”**

**(ii) Gulam & Anor vs Chief Magistrate's Court & Anor [2006]eKLR** where the learned judge held that;

**“Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any Prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other improper purpose such as undue harassment of a party or abuse of the process of court.”**

Further, that;

**"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before institution of criminal**

*proceedings, there must be in existence material evidence on which the Prosecution can say with certainty that they have a probable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."*

The learned Judge proceeded to state that;

*"Prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest."*

He then concluded thus;

*"The rationale for prohibiting such proceedings is that for a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the Court (of its inherent power to prevent abuse of its process). On the score of cost alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup."*

**(iii) Peter D'Costa vs AG & Anor, Petition No.83/2010 (U.R.)**

where the Court stated thus;

*"The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioners' fundamental rights as the petitioner will not receive a fair trial. It is the duty of court to stop such abuse of the justice system."*

**(iv) Michael Monari & Anor vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011** where Warsame, J. (as he then was) stated as follows;

*"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."*

1. The reasoning in all the above cases would lead to only one conclusion; whereas the DPP has the ultimate discretion in determining which complaint should lead to a criminal prosecution, where that power is seen to have been manifestly abused, the High Court can intervene by powers conferred by **Articles 165(3)(d)(ii)** of the **Constitution** and stop that abuse, including where the Court system is being used to settle scores and to put an accused person to great expense in a case which is clearly not otherwise prosecutable.
2. In the present case, a number of issues need to be analysed and I am doing so well aware that I am not sitting as the trial Court. But for me to determine whether the Petitioner's complaints meet the threshold for this Court's intervention, I must, as of necessity therefore address the following issues;

(i) there seems to be a controversy regarding the land on which the building collapsed. Is it L.R. No.702/2 (as claimed by the Applicant) or L.R. No.27903/72 (as claimed by the 1st

*Respondent*) The issue is important to confirm the nature of the investigations conducted by Cpl. Muraguri and whether he deliberately and with malice dragged the Petitioner into a matter in which he had no role at all.

In that regard, I have seen a map dated 2/5/2003 (Annexure JMKI) indicating that L.R. No.7107/2 exists 37° East of the Equator within Nairobi area. There is no clear evidence before me that L.R. No.27903/72 exists anywhere and there is no answer to the Petitioner's contention that such a parcel of land does not exist in any records in Nairobi. In his Affidavit, Cpl. Muraguri deponed that L.R. No.27903/72 Nairobi exists because a Conveyance dated 22/4/2010 was executed by Benson Riitho Muriithi to Benard Gakobo Karungo. I have however perused that conveyance by indenture and the connection between the two land reference numbers is there; that L.R. No.27903/72 may actually be a sub-division of a much larger parcel of land No.7107/2 (*which measured 50 acres*) – See **Clause 2(f)** of the **Conveyance**. The whole controversy around that issue ends there save to state that the Conveyance is unregistered and cannot *per se* be wholly relied upon.

(ii) **What is the connection between HCCC No.155/2009 and the building that collapsed?** I have read the Complaint 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 - 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.
4. At this stage it is important to revisit the collapse of the building on L.R. No.7107/2 or its sub-division L.R. No.27903/72. The collapse occurred on 14/6/2011 and it is obvious that construction was on-going when the enforcement notices were issued and that was so because the High Court had stopped any attempts by the City Council of Nairobi (and its Successor, the Nairobi County Government) from demolishing the illegal structures or putting a stop to the on-going construction.
5. With all the above matters now put into perspective, what is the connection or nexus between the Petitioner as an individual and not as an officer of the City Council of Nairobi and the events set out above? I will not spend a minute on the question because there is none.
6. If one looks at the charges that he is facing, they relate to the obtaining of an Architectural Plan Ex. No.668 and erecting an illegal structure. It is obvious that those offences can only reasonably and logically attach, with sufficient evidence, on the owner of the land and the developer, both of

whom have been charged alongside the Petitioner. What is even more baffling to me is that Cpl. Muraguri in his Affidavit did not even attempt to show what evidence, if at all, he had gathered to tie the Petitioner with the offences noting that criminal culpability is personal to a suspect. Why then is he being vexed with an offence that very clearly has nothing to do with him? Why should this court allow a public officer whose execution of his mandate was stopped by the High Court to be taxed with a criminal trial when the same Court had tied his hands, threatened to jail his superior for alleged breach of an order which allowed another party to continue its illegal actions leading to deaths and injuries? The remoteness of the Petitioner's role is so glaring that this Court cannot in good conscience allow the injustice to continue.

7. The Petitioner has raised two other issues which I consider important;

(i) The import and meaning of **Article 236** of the **Constitution** which provides as follows;

*“A public officer shall not be—*

*(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or*

*(b) dismissed, removed from office, demoted in rank or*

*otherwise subjected to disciplinary action without due process of law”*

I need not belabour the point because as I have shown above, there is no connection between the Petitioner and all the issues at play and even if there had been, I have shown that from all the material before me, he cannot be punished for acting within the law.

(ii) Whether the prosecution against him was malicious and ill founded and an abuse of Court process; Again, the issue is crystal clear. On the basis of the authorities of **Githunguri (supra) and Gulam (supra)** as applied to this case, no other conclusion can be reached than that someone was acting with malice to punish a public official who otherwise had acted within his mandate.

### **Conclusion**

8. This Court has been more than steadfast in upholding the authority and independence of the office of DPP in the prosecution of criminal matters – see for example **Beatrice Ngonyo Kamau & Others vs Commissioner of Police & Others, Petition No.251 of 2012** **Hasit Shah & Others vs A.G & Anor Petition No.226 of 2011** and **Paul Ng'ang'a Nyaga & Others vs A.G & Others.** In all these cases and others, this Court has told the Petitioners, like Warsame J. did in **Monari** (supra) to go and canvass all their issues in the trial Court because the DPP had not crossed the constitutional line of his mandate. I am unable to say the same in this case and I have shown.

9. 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. In saying so, I am exercising the mandate of this Court conferred by the same Constitution and I have not in any way assumed the mandate of the trial Court.

10. In the event, while allowing the Petition, the only reasonable and proper orders to be made out of all those proposed by the Petitioner are the following;

**“(1) That a declaration do issue, declaring as null and void the decision by the 1st Respondent, the Director of Public Prosecutions to present to Court and charge the Petitioner with the offence of Murder contrary to Section 203 of the Penal Code with an alternative of Manslaughter contrary to Section 203 as read together with Section 205 of the Penal Code in Kibera CM's Court Criminal Case No.2450/2013.**

**(2) An order of prohibition is hereby issued to prohibit the 3rd Respondent, the Chief Magistrate, Nairobi, and any other Magistrate from receiving and or continuing to entertain the counts and or charges against the Petitioner in Kibera CM's Court Criminal Case No.2450/2013 alleging criminal culpability for Murder contrary to Section 203 as read together with Section 205 of the Penal Code and or any other counts and charges from the collapse of the building on Plot No.7102/2.**

**(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 on all administrative actions done in good faith.**

**(4) That this Judgment be transmitted to the Chief Magistrate Kibera, and to be placed in CM's Court Criminal Case No.2450 of 2013”**

11.As to costs, the Petitioner has regained his freedom and that is sufficient recompense for his troubles. Let each party therefore bear its own costs.

12.Orders accordingly.

13.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence:**

Irene – Court clerk

Mr. Omogeni for Petitioner

Mr. Wamotsa for 2nd Respondent

Miss Kithiki for 1st Respondent

**Order**

Judgment duly read. Copies of the Judgment and proceedings to be supplied.

**ISAAC LENAOLA**

**JUDGE**