



Muasya & 4 others v Director of Criminal Investigations & 2 others (Miscellaneous Criminal Application E392 of 2023) [2025] KEHC 1370 (KLR) (10 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS CRIMINAL APPLICATION E392 OF 2023
AM MUTETI, J
FEBRUARY 10, 2025**

BETWEEN

**ROSEMARY KATUNGE MUASYA 1ST APPLICANT
PATRICK KYALO KITELE 2ND APPLICANT
HANNAH ZENA KITELE 3RD APPLICANT
ROSE KATUNGE KITELE 4TH APPLICANT
THERESIA SAUMU KITELE 5TH APPLICANT**

AND

**DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT
INSPECTOR GENERAL OF POLICE 2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT**

RULING

1. The applicants in this matter by way of an originating Notice of Motion expressed be brought under Articles 35 (1) (a) , 53 (1) (e), 53 (2) , 22 (1) , 22 (2), 22(3), 27 (1), 35 (1) (a), 50 (1) and 157 (4) of the Constitution approached this court under Certificate of Urgency seeking the following orders:-
 1. That this application is certified as urgent.
 2. That the order below operates as an interim order pending the hearing and determination of this application.
 3. That an order of mandamus is granted compelling the First and Second Respondents to immediately do all things necessary to conduct investigations into the killing of Paul Kilungu Muasya Kitele and any other criminal offences related to the killing before, during and after the



killing and where possible refer any person(s) found criminally liable to the Third Respondent, and in so doing record statements from all the individuals stated in paragraphs 13 & 14 herein below.

4. That the First and Second Respondents provide to the Applicants, within 30 (thirty) days of this order, electronic copies of the statements referred to in paragraph 3 above including any other further relevant information obtained from the investigations and/or their findings.
 5. That in the alternative to the above stated and in the event that the Respondents find that any person(s) have/had been investigated, prosecuted and convicted or acquitted for the killing and for any other criminal offences related thereto before, during and after the killing of the person named in paragraph 3 above, the Respondents provide to the Applicants, within 30 (thirty) day of this order, the record of the investigations, prosecutions, convictions or acquittal.
 6. That the cost of this application be paid by any person opposing this application.
2. The applicants in the application alleged to be the blood relatives of one Paul Kilungu Muasya Kitele Who was allegedly murdered in their ancestral home in Masewani Village Kikambuani Sub location, Kangundo Sub County Machakos County.
 3. The applicant raised 40 grounds on the face of the application which I need not reproduce in this ruling.
 4. The application basically seeks an order of mandamus against the three respondents to compel them to investigate the death of their kin.
 5. The applicants also seek to have in the alternative information provided to them regarding any investigation done by the Respondent as well as the results of the investigation. The request for information is hinged on the provisions of Article 47 of the Constitution and the Fair Administrative Actions Act.
 6. The applicants are interested to know why the respondents have not investigated the deceased's killing.
 7. The applicant's father claimed that they have since the death of the deceased discovered documents that could assist the respondents in uncovering the truth about their kin's death.
 8. The annexure to their affidavit swelled by Patrick Kyalo Kitele The documents they believe the respondents should subject to exhaustive investigations and bring to book the persons believe who are behind the killing of the deceased.
 9. The respondents in answer to the application filed an affidavit shown by No. 241423 IP Collins Maende the Sub County Criminal Investigations Officer Kangundo Sub County of Machakos County.
 10. Indeed in the affidavit the officer deposes that the killing of Paul Kilungu Muasya was investigated by the Criminal Investigation Department of the National Police Service in the year 1995.
 11. The incident was captured vide OB 364/22/03/1995 by the CID Kangundo.
 12. According to the officer, two suspects were arrested in connection with the incident namely Justus Mweu Kitele and Susan Mbula Mweu who were husband and wife.
 13. Following the arrest and investigations the officer states that they were charged with the offense of murder under Section 203 as read with 204 of the Penal Code.



14. The police the police file number was indicated to be CR 444/102/1995 and Court file Number 965/95.
15. The two accused are said to have opted to plead guilty to the lesser offense of manslaughter and were placed under probation for 18 months by the SRM's Court Machakos.
16. The officer further deposed that family of the disease is fully seized of the facts of the matter and that they push for renewed investigations is intended to solve family feuds which this court should not be drawn into.

Analysis And Determination

17. The applicants are desirous of obtaining an order of mandamus from this court to have the respondents compelled to investigate the death of Paul Kilungu Muasya With a view to having the person responsible for the death charged.
18. An order of mandamus can only issue where there is proof of that existence of a public duty (ministerial in nature) by a public officials and proof that the public official concerned has deliberately failed, refused or neglected to perform the safe duty.
19. The court cannot however Compel a public official to perform a discretionary duty unless the discretion has been exercised unlawfully.
20. It is also incumbent upon the applicant for an order of mandamus to prove to the court that he or she demanded the performance of the duty by the public official and that their demand has been refused or ignored.
21. In the present case clearly, the respondents had a duty to investigate the death of the deceased and according to the officer IP Collins Maende that duty was performed leading to the arrest and prosecution of the two suspects.
22. Quite understandably, the applicants may have been and still are unhappy with the manner in which investigations were done and the action taken by the respondents as a whole.
23. The question that arises is whether the court can issue an order of mandamus against the respondents in view of the facts put forth by the investigator IP Collins Maende.
24. It is clear to this court that the duty to investigate was performed by the 1st and 2nd respondent and so was the duty to prosecute by the 3rd respondent.
25. It cannot therefore be said that there was neglect of the duty and or non-performance of the constitutional and statutory duty placed upon the 1st, 2nd and 3rd respondents respectively.
26. The Court of Appeal in Republic Vs Kenya National Examinations Council ex parte Gathenji & Others [1997] eKLR held that :-

For an order of mandamus to issue there must be a specific legal duty owed to the applicant(s) and that the applicants must have a clear right to their performance of that duty.
27. The applicants being the immediate blood relatives of the deceased had an enforceable right to have the death of the deceased and the police ordered them that duty.
28. Article 245 (4) of *the constitution* provides :-

Command of the National Police Service.



245.

- (1) There is established the office of the Inspector-General of the National Police Service.
- (2) The Inspector-General—
 - (a) is appointed by the President with the approval of Parliament; and
 - (b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
- (3) The Kenya Police Service and the Administration Police Service shall each be headed by a Deputy Inspector-General appointed by the President in accordance with the recommendation of the National Police Service Commission.
- (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
 - (a) the investigation of any particular offence or offences;
 - (b) the enforcement of the law against any particular person or persons; or
 - (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
- (5) Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.
- (6) The Inspector-General shall be appointed for a single four-year term, and is not eligible for re-appointment.
- (7) The Inspector-General may be removed from office by the President only on the grounds of—
 - (a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;
 - (b) gross misconduct whether in the performance of the office holder's functions or otherwise;
 - (c) physical or mental incapacity to perform the functions of office;
 - (d) incompetence;
 - (e) bankruptcy; or
 - (f) any other just cause.
- (8) Parliament shall enact legislation to give full effect to this Article.

29. The duty of the police to investigate crime is thus constitutionally underpinned and in carrying out investigations the Inspector General of the National Police Service is largely independent and can only take written directions of the Director of Public Prosecution regarding the investigations of any offense that comes to the knowledge of the Director of public Prosecution.



30. The Article thus leaves the Inspector General with the operational discretion to determine who investigates what crime and when.
31. The court cannot direct the Inspector General on the manner to carry out investigation in relation to any offence.
32. It therefore follows that the intervention of the court would only be limited to the non-performance of the duty by the Inspector General.
33. If the courts were to venture into directing the Inspector General on the scope of investigating that would be a blatant violation of the provisions of Article 245 of *the Constitution* as well as a direct assault on the doctrine of separation of powers.
34. The courts would only step in to check maladministration and the excesses of the Inspector General of Police in the performance of his duty.
35. The results of any investigations undertaken by the Inspector General are to be processed and forwarded to the 3rd respondent who under the Article 157 has to make the ultimate decision on whether or not the material gathered by the Inspector General of Police establish the Commission of an offence and if so, who are the persons responsible to be prosecuted and for what offence.
36. The role of the 3rd respondent is also protected under article 157 (10) of *the Constitution*. The Director of Public Prosecutions shall in the discharge of that function not be subject to the direction or control of anybody or authority. The court would only intervene just like in the case of the Inspector General to check any excesses by the Director of Public Prosecutions.
37. The applicants have not been able to demonstrate that the 3rd respondent has neglected to perform his constitutional function to warrant intervention by the court.
38. That is the design of our Constitution meant to ensure that the state institutions maintain a healthy relationship in the discharge of their respective functions.
39. The applicants have not proved to this court that the respondents did not investigate the deceased's death.
40. In fact the originating notice of motion at paragraphs 9,10 and 11 clearly reads as follows:-
 9. That the relatives present during the killing later informed us that the two relatives involved in his killing and/or responsible for his killing had been arrested by the Police and charged with the offence of murder.
 10. That according to the relatives present during the killing incident, the two relatives allegedly arrested for the murder were my uncle namely Justus Mweu Kitele and his partner/wife namely Susan Mbula Kimatu.
 11. That subsequently it was alleged by the relatives present that the above stated two had been prosecuted and either imprisoned or acquitted.
41. No doubt therefore that the 1st and 2nd and 3rd respondents performed their respective duties thus an order of mandamus if granted, would be issued in error. In the face of the facts before this court that order is unavailable to the applicants.
42. Mandamus is a remedy of last resort. The courts cannot issue such an order where there exists adequate alternative legal remedy to the applicant.



43. This court has closely examined the pleadings of the applicants and it does appear that just like IP Collins Maende States in his affidavit that there are deep-seated family squabbles that this court cannot resolve through this kind of an application.
44. Judicial Review orders are specific in scope. The court cannot venture into matters outside the purview of the order of mandamus specifically concerned with the non-performance of a public duty.
45. In Republic Vs Jomo Kenyatta University of Agriculture and Technology Ex parte Elijah Kamau Mwangi [2021] eKLR the court held but the court cannot usurp the role of other public bodies through issuance of orders of mandamus.
46. The applicants in the instant matter if dissatisfied with the scope of investigations by the police or even the decision of the court that placed the two accused persons on probation the options available to them lie outside the scope of an order of mandamus.
47. The 1st and 2nd respondents if any of the applicants is aggrieved about the manner in which they performed their respective duties under the law, the remedy lies in the Independent Policing Oversight Authority Acts No. 35 of 2011 as well as the *Commission on Administrative Justice Act* 2011.
48. The two bodies have the requisite powers to inquire into the manner of exercise of power by the police and if any lapses detected by them in the exercise of their powers may be remedied within the scope those statutes.
49. As far the 3rd respondent the applicants have not been able to prove any duty that he has failed to discharge to warrant the granting of an order of mandamus against him.
50. The claim against the 3rd respondent therefore cannot attract the grant of an order of mandamus.
51. Lastly, regarding the supply of documents held by the 1st, 2nd and 3rd respondents the applicants have also not proved to the satisfaction of this court that they sought the information they seek through prayers 4 and 5 of the originating motion from any of the respondents and have been refused or denied access to such information
52. The court cannot therefore issue an order to compel the respondents in the circumstances to do that which the have already done. If the applicants have any new evidence they may as well present that to the respondents for action.
53. The applicants are at liberty to seek information from the respondents and if the respondents decline to supply only then will there be a live issue capable of resolution by this court. Simply put, the matter is not ripe for determination with respect to the supply of information for there is no evidence that the applicants have sought the same and the respondents have declined. The application therefore offends the doctrine of ripeness.
54. The application by the applicants therefore fails in its entirety and is accordingly dismissed with no orders as to costs.
55. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF FEBRUARY 2025.

A. M. MUTETI

JUDGE

In the presence of:



Court Assistant: Kiptoo

In person for 1st, 2nd, 3rd, 4th & 5th Applicant

Ms Ogega for Respondent

