



**Otieno & 3 others v Inspector General of Police & 2 others (Petition E412 of 2024)
[2025] KEHC 2754 (KLR) (Constitutional and Human Rights) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E412 OF 2024

AB MWAMUYE, J

FEBRUARY 20, 2025

**IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 20, 21, 22, 23, 27, 28, 29,
31, 32, 33, 36, 37, 38(1)(C), 39(1), 40(1), 43(1)(A), 43(1)(C), 43(1)(D),
43(2), 47, 48, 49, 50, 159, 165, 244, 258, AND 259 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF THE VIOLATION AND THREATENED VIOLATION
OF THE RIGHTS AND FUNDAMENTAL FREEDOMS OF DANCAN
ADHIAMBO OTIENO, CALVIN OCHIENG ODONGO, KENNEDY
OCHIENG ASEWE AND JOSIAH AUGO OTIMO**

BETWEEN

**DANCAN ODHIAMBO OTIENO 1ST PETITIONER
CALVIN OCHIENG ODONGO 2ND PETITIONER
KENNEDY OCHIENG ASEWE 3RD PETITIONER
JOSIAH AUGO OTIMO 4TH PETITIONER**

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT



DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

JUDGMENT

1. The Petitioners filed a petition dated 14th August 2024 seeking the following reliefs:
 - i. A Declaration that the Respondents have violated articles 10, 27, 28, 29, 31, 32, 36, 37, 38(1)(c), 39(1), 40(1), 43(1)(a), 43(2), 43(1)(c), 43(1)(d), 47, 48, 49, 50(1), 50(2), 244 of the Constitution of Kenya, 2010.
 - ii. An Order permanently restraining the Respondents or anyone acting under their instructions from profiling, targeting, singling out, harassing, intimidating, persecuting, arresting, prosecuting or restricting the liberty and freedom of movement of the Petitioners on account of their membership of Bunge la Wananchi, their political activism and advocacy, their participation in peaceful and unarmed protests, and their perceived association with Jimi Wanjigi.
 - iii. An Order prohibiting the Respondents from charging the Petitioners.
 - iv. An Order of certiorari to quash the Respondents' decision to investigate and/or to charge the Petitioners arising from the events of 08 August 2024 at the residence known as Number 44 Muthaiga Road, Nairobi.
 - v. An Order compelling the Respondents to compensate the Petitioners for the violations of their rights and fundamental freedoms as declared in (i) above.
 - vi. An Order compelling the Respondents to report to the Honourable Court within sixty (60) days of this judgment the measures and/or steps taken to ensure compliance with Order (i) above.
 - vii. Costs and interest thereof of this Petition.
2. The Petitioners are Kenyan citizens hence subject to the operation of the Constitution of Kenya, 2010. The petitioners have an unfettered right to enjoy the fundamental freedoms as enshrined under the Constitution of Kenya, 2010.
3. The Petitioners, are members of Bunge la Wananchi, a grassroots movement advocating for good governance and accountability. They claim they were arrested on 8th August 2024, following their participation in peaceful protests (#RejectFinanceBill, #GenZProtests, #NaneNane).
4. The Petitioners allege unlawful arrest, detention, torture, discrimination based on political beliefs, denial of medical treatment, and violation of various constitutional rights.
5. The Respondents justify the arrests on the basis of reasonable suspicion that the Petitioners were in possession of four smoke grenades, two walkie-talkies, seven walkie-talkie assorted chargers, personal mobile phones, and identification documents were found in a vehicle associated with the Petitioners, and that due process was followed in their detention and prosecution.
6. The Petitioners argue that their arrest and prosecution were an abuse of power by law enforcement agencies. They contend that their participation in a peaceful political demonstration was constitutionally protected, yet they were unlawfully detained and charged.



7. The Office of the Director of Public Prosecutions (ODPP) is constitutionally bound to act in the public interest and prevent the misuse of legal processes. However, in this case, the decision to prosecute was allegedly driven by ulterior motives rather than justice.
8. The Petitioners submit that no credible evidence was provided to justify their prosecution. They argue that law enforcement officials falsely claimed to have recovered offensive weapons from a vehicle allegedly associated with them. However, no search warrant was obtained, and their legal representatives were barred from witnessing the search.
9. Additionally, official records do not show any inventory of recovered weapons, further undermining the credibility of the prosecution's claims. According to the Petitioners the charges were fabricated to suppress their political activism.
10. The Petitioners' submission highlights inconsistencies in the Respondents' statements regarding the alleged recovery of the weapons. Initially, police authorities claimed that grenades were found, but later, the prosecution described them as smoke grenades and explosive canisters. These contradictions raise doubts about the authenticity of the evidence and suggest that law enforcement officials manipulated facts to justify the Petitioners' prosecution. The Petitioners contend that such contradictions demonstrate bad faith and an abuse of the criminal justice system.
11. The Petitioners urge the court to exercise its constitutional authority to prevent abuse of power and halt the prosecution against them. The Petitioners emphasize that their case meets the criteria for judicial review, as their arrest and prosecution were oppressive and unjustified. They conclude by requesting the court to declare the charges unconstitutional and order immediate dismissal.
12. The Petitioners rely on the case of Commissioner of Police & Director of Criminal Investigation Department & Hon. Attorney-General v Kenya Commercial Bank Limited & Others [2013] KECA 182, where the Court held that prosecutions must not be used to settle political scores or suppress dissent. They also rely on *Cyrus Shakhlanga Khwa Jirongo v Soy Developers Ltd & Others* (Petition 38 of 2019) [2021] KESC 32, which reaffirmed that prosecutorial discretion must not be exercised in bad faith.
13. The 2nd Respondent filed Grounds of Opposition dated 20th August 2024 praying that the Petition be dismissed with costs and to oppose the Notice of Motion Application dated 14th August 2024 and the Petition on the following grounds that:
 - a. That the powers and functions of the 2nd Respondent as provided for in the *Constitution* of Kenya 2010 and other laws do not include the power to arrest and detain persons.
 - b. That the Director of Public Prosecutions makes decisions to charge or otherwise while having regard to the evidential threshold, public interest, interest of administration of justice and the need to prevent and avoid abuse of the legal process.
 - c. That the Petitioners have not demonstrated a prima facie arguable case on breach of any Constitutional Provision or fundamental and human rights or any other provision of the law by the 2nd Respondent.



- d. That the orders being sought by the Petitioners are not available against the 2nd Respondent since it has not been demonstrated how the 2nd Respondent violated their Constitutional Rights.
14. The 1st and 2nd Respondents filed submissions opposing the Petitioners' claims of constitutional rights violations and seeks to justify the actions taken by the law enforcement agencies. The Respondents argue that the police officers acted within their legal mandate when they arrested the Petitioners, and there is no sufficient ground for the court to interfere with the investigative and prosecutorial process. They emphasize that the petition is merely an attempt to obstruct due legal processes and delay criminal proceedings.
15. The Respondents outline the facts leading to the arrest of the Petitioners, stating that on 8th August 2024, officers from the Directorate of Criminal Investigations (DCI) observed two suspicious vehicles within Nairobi's Central Business District. The behaviour of the occupants, including carrying arms and acting as security for an unidentified individual, prompted police intervention.
16. According to the Respondents, the suspects attempted to flee but were eventually arrested at a residence in Muthaiga. A search of the vehicles led to the discovery of smoke grenades, walkie-talkies, mobile phones, and identification documents, leading to the Petitioners' detention for further investigation.
17. The Respondents contend that the police had reasonable suspicion to conduct the arrests and search, as required by law. They argue that the police have a duty to investigate crimes and that courts should not interfere unless there is clear evidence of abuse of power. They maintain that the Petitioners have not demonstrated how their constitutional rights were violated during the investigation or arrest process. Furthermore, they argue that the continuation of the case before the courts does not amount to a violation of rights but is instead a necessary legal process.
18. Another key argument presented is the independence of the Director of Public Prosecutions (DPP). The Respondents emphasize that the DPP operates autonomously under Article 157 of the [Constitution](#), 2010 and does not require permission from any authority to initiate criminal proceedings. The prosecution process must be guided by public interest and justice, and courts should not interfere unless there is clear evidence of improper conduct. Several judicial precedents are cited to reaffirm that courts generally avoid halting criminal prosecutions unless there is proof of bad faith or abuse of legal procedures.
19. It was the Respondents argument that the Petitioners have not met the legal threshold required to grant their prayers in the petition. Their claims of rights violations are unsubstantiated, and the Petition is viewed as an attempt to delay justice. The Respondents urge the court to dismiss the petition to allow the criminal proceedings to continue without undue interference.
20. The Respondents rely on *Republic v Commissioner of Police & Another ex-parte Michael Monari & Another* [2012] eKLR, which held that as long as the prosecution is conducted lawfully and in good faith, courts should not interfere. They also cite *Diamond Hasham Lalji & Another v A.G. & 4 others* [2018] eKLR, where the Court of Appeal emphasized that judicial review of prosecutorial discretion should be exercised only in cases of manifest abuse of power.
21. I have considered the pleadings and the rival submissions by the parties and I find the following issues arising for determination;
 - i. Whether the Respondents violated the Petitioners' constitutional rights under Articles 27, 28, 29, 31, 36, 37, 38(1)(c), 39(1), 43, 47, 48, 49, and 50 of the [Constitution](#).



- ii. Whether the criminal proceedings against the Petitioners constitute an abuse of prosecutorial power and should be terminated.
- iii. Whether the DPP acted within the constitutional limits of prosecutorial discretion.

Violation of Constitutional Rights

22. The Petitioners argue that their arrest and prolonged detention contravened Articles 27, 28, 29, 39, 47, 48, 49, and 50 of the Constitution of Kenya, 2010. The Respondents contend that the arrests were lawful as the Petitioners were found engaging in suspicious activities and were linked to offensive items allegedly recovered from a motor vehicle (KDC 883R).
23. Petitioners documented physical abuse (beatings, denial of food and water) and unsanitary detention conditions. Medical care was delayed despite court orders. This was against Article 28 and 43(1)(a)(c) (d) of the Constitution.
24. Under Article 49(1)(a) of the Constitution, an arrested person must be informed of the reason for their arrest promptly. Further, Article 49(1)(f) requires that a person be brought before a court within 24 hours of arrest.
25. The 1st and 2nd Petitioners were presented in court on 9th August 2024, and the 3rd and 4th Petitioners on 12th August 2024. This delay contravenes Article 49(1)(f), which mandates arraignment within 24 hours. The Respondents have not demonstrated compelling reasons for the prolonged detention.
26. The DPP sought custodial orders without preferring charges immediately, which is a violation of the principle that detention must not be used as punishment before trial. In *Githunguri v Republic* [1985] KLR 3090, the court held that prolonged detention without justification amounts to a violation of the Constitution.
27. The police claim offensive items (smoke grenades, walkie-talkies) were recovered from motor vehicle KDC 883R. However, the Petitioners were not present during the alleged search, and no inventory of recovered items from the vehicle exists, raising suspicion of planted evidence.
28. The Court of Appeal in *Commissioner of Police & Director of Criminal Investigation Department & Hon. Attorney-General v Kenya Commercial Bank Limited & Others* [2013] KECA 182 held that courts must intervene where prosecution is used as a tool for harassment or political persecution. The Petitioners have provided evidence suggesting that the charges against them were fabricated, as there are contradictions in the nature of the alleged recovered items (i.e., shifting descriptions from grenades to smoke canisters).
29. Similarly, in *Cyrus Shakhlanga Khwa Jirongo v Soy Developers Ltd & Others* (Petition 38 of 2019) [2021] KESC 32 (KLR), the Supreme Court emphasized that prosecutorial discretion should not be exercised to achieve ulterior motives or to suppress political dissent. The Respondents have failed to rebut the claim that the Petitioners were arrested due to their political activism, raising concerns about selective prosecution.
30. Given the inconsistencies in the Respondents' evidence and the political context of the Petitioners' activities, it is arguable that their rights under Articles 27 (equality before the law), 28 (human dignity), and 37 (freedom of assembly) have been violated.
31. The Petitioners submit that the case against them should be terminated as it constitutes an abuse of the legal process. They rely on *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018]



- eKLR, where the Court of Appeal held that the High Court has jurisdiction to review prosecutorial decisions if they result in an abuse of power.
32. The Respondents, on the other hand, urge that the DPP's independence should be respected, citing *Republic v Commissioner of Police & Another ex-parte Michael Monari & Another* [2012] eKLR, which held that investigations should not be interfered with unless constitutional rights are violated.
 33. The Supreme Court in *Jirongo* (supra) outlined circumstances where courts can interfere with criminal prosecutions, including:
 - a. Where the prosecution is an abuse of the process of the court;
 - b. Where the allegations do not constitute an offence;
 - c. Where the prosecution is based on fabricated evidence or is actuated by ulterior motives.
 34. A prosecution based on fabricated or unclear evidence is an abuse of legal process. In *Bernard Mwikya Mulinge v Director of Public Prosecutions & Others* [2019] KLR, the Court held that where there is a prima facie case of prosecutorial abuse, the burden shifts to the DPP to justify the decision to prosecute. In this case, the Respondents have failed to convincingly justify the charges against the Petitioners.
 35. Article 157(10) of the *Constitution* guarantees the independence of the DPP but mandates that the power to prosecute must be exercised in the interest of justice and to prevent abuse of the legal process (Article 157(11)).
 36. In *Diamond Hasham Lalji* (supra), the Court of Appeal held that while prosecutorial discretion is broad, it is subject to judicial review if exercised in bad faith. Similarly, in *Republic v Grace Wangari Bunyi & Others* [2018] eKLR, it was emphasized that courts must not interfere unless there is clear evidence of abuse of discretion.
 37. The Petitioners have provided sufficient evidence indicating that the DPP may have acted under political influence rather than on objective evidence. The absence of a proper inventory of the allegedly recovered items and inconsistencies in the police reports suggest that the decision to prosecute was not based on sound legal grounds but rather on extraneous.
 38. The Respondents failed to reconcile discrepancies in their accounts of recovered items, undermining credibility. The timing of arrests during protests and focus on politically active petitioners suggest ulterior motives. No warrants, absence of defense counsel during searches, and delayed medical care indicate systemic disregard for due process.
 39. The DPP's discretion, while respected, is not absolute. In light of the questionable circumstances of the Petitioners' arrest, there is a compelling case for the Court to intervene.
 40. The Respondents argue that the Court should not interfere with the DPP's prosecutorial discretion unless there is clear evidence of constitutional violations. However, the Supreme Court in *Cyrus Jirongo* (supra) affirmed that where a prosecution is based on ulterior motives or results in injustice, the High Court has an obligation to review and, where necessary, halt the proceedings.
 41. Given the violations outlined above, the Court would be justified in intervening to avert a miscarriage of justice

Conclusion

42. Having considered the petition, the responses and arguments by the parties and the decisions relied upon, I come to the following conclusion.



- a. The Petitioners' constitutional rights under Articles 27, 28, 29,31,37, 38(1) (c),39(1),43,47,48,49 and 50 were violated.
 - b. The prosecution of the Petitioners is tainted with illegality and constitutes an abuse of process under Article 157(11).
 - c. The DPP's prosecutorial discretion has been exercised in a manner inconsistent with constitutional principles.
 - d. The Court has jurisdiction to intervene and should do so to prevent further injustice
37. Accordingly, this Court issues the following orders:
- a. A declaration be and is hereby issued that the arrest, detention, and prosecution of the Petitioners violated their constitutional rights.
 - b. An order is issued terminating the impugned criminal proceedings against the Petitioners.
 - c. The Respondents are prohibited from instituting further criminal charges against the Petitioners based on the same facts.
 - d. The Respondents shall bear the costs of this Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY 2025.

BAHATI MWAMUYE

JUDGE

In the presence of:-

Counsel for the Petitioners – Dr. Owiso Owiso & Mr. Willis Otieno

Counsel for the Respondents – No Appearance

Court Assistant – Mr. Guyo

