



**Mutisya v Director of Public Prosecution & 2 others; Mutual (Interested Party) (Judicial Review Criminal Application E002 of 2023) [2025] KEHC 4733 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4733 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
JUDICIAL REVIEW CRIMINAL APPLICATION E002 OF 2023**

**LW GITARI, J**

**APRIL 8, 2025**

**IN THE MATTER OF ARTICLES 23, 25, 27, 47, 50,  
157 & 165 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM ACT**

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF THE APPLICATION FOR  
ORDERS FOR CERTIORARI AND PROHIBITION**

**BETWEEN**

**URBANUS WAMBUA MUTISYA ..... APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 1<sup>ST</sup> RESPONDENT**

**THE OCPD, KITUI POLICE STATION ..... 2<sup>ND</sup> RESPONDENT**

**THE CCIO, KITUI COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JOHN MUTUAL ..... INTERESTED PARTY**

**JUDGMENT**

1. The matter pending before this court is the Chamber Summons dated 15/08/2023 under leave granted on 14/6/2023. The applicant seeks orders that:



- a. An order of certiorari to remove into this Honorable Court and quash the decision of the first and second Respondents to charge and prosecute the applicant in the 4<sup>th</sup> Respondent with the offences of Assault, Malicious damage to property and Threatening to kill.
  - b. An order of Prohibition directed to the respondents from arresting, arraigning and prosecuting the applicant or instituting any future charges against the ex parte applicant in respect to the subject matter of this application.
2. The application is based on the following grounds.
1. The 1<sup>st</sup> respondent has preferred charges of Assault, Malicious damage to property and Threatening to kill against the applicant.
  2. The applicant is said to have assaulted the Interested Party and maliciously damaged the Interested Party's car on 01/12/2023.
  3. On the said date, it is actually the Interested Party who deliberately hit the applicant with his Car Reg. Number KCG 660N.
  4. The Interested Party was actually charged over the same in Traffic Case No. E071/23 with the offence of driving motor vehicle without care and attention c/s 49(1) of the Traffic Act. He pleaded guilty and was fined Kshs. 40,000/= or 1 year imprisonment.
  5. The applicant is The Human Resource Manager at Kitwasco Ltd where the wife to the Interested Party, one Esther Syombua Simon was fired due to misappropriation of company funds.
  6. Since then, the Interested Party declared war on the Managing Director, The Human Resource Manager and the Commercial Manager accusing them of high handedness in handling the disciplinary hearing concerning his wife.
  7. The Interested Party has been harassing Applicant and he other staff of the Company in a bid to get them to reinstate his wife.
  8. There is a pending in Court being ELRC Case Number 005 of 2021 where the Interested Party's wife sued Kitwasco Ltd for unfair dismissal.
  9. The applicant is the key witness in that case and the Interested Party is doing everything within his power to ensure that the applicant does not testify in that case.
  10. The intended prosecution of the applicant is an affront to justice as it is made to arm-twist and intimidate the applicant is that he steps down as a witness in ELRC Case Number 005 of 2021, which is an ulterior motive that taints the process.
3. It is supported by the applicant's affidavit sworn on 4/7/2023. The 1<sup>st</sup> respondent opposed the application and filed a replying affidavit sworn by Pauline Karimi Mwaniki a Principal Prosecution Counsel in the office of the Director of Public Prosecutions. He submits that Article 157(6)(a) (*sic*) mandates the Director of Public Prosecution to institute and undertake criminal proceedings against any person (other than a court martial) in respect of any offence alleged to have been committed. That the Director of Public Prosecution acts independently and does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions shall not be under the direct control of any person or authority. The first respondent further avers that the averments by the applicant are unsubstantiated and are based on half truths and solely aimed to subvert the course of justice.



4. The respondents submits that it is in the public interests that all complaints made to the police are investigated and if found that an offence has been committed the person is arrested, and a charge sheet prepared. He contends that a complaint was made by the Interested Party and was booked vide OB No. 40/1/02/2023 on allegations of malicious damage to property, assault causing actual bodily harm and threats to kill. Police conducted inquiries and opened a file which was forwarded to the first respondent. That upon perusal, the 1<sup>st</sup> respondent was satisfied that the evidence on record was sufficient and a decision was made to charge the applicant. That the first respondent directed that the applicant be charged with offences of:
  1. Threatening to kill contrary to Section 223(1) of the [Penal Code](#).
  2. Assault causing actual bodily harm contrary to Section 251 of the [Penal Code](#).
  3. Malicious damage to property contrary to Section 339(1) of the [Penal Code](#).
5. That it is within her knowledge that the same day a complaint was made by the applicant against the Interested Party vide OB No. 46/1/02/2023 on allegation that an Interested Party had knocked him down with his vehicle and caused him slight injuries. Inquiries were done and the file was forwarded to the 1<sup>st</sup> respondent who recommended that the Interested Party be charged with a traffic offence of driving a motor vehicle without due care and attention. The Interested Party was duly charged, pleaded guilty and was fined Kshs. 40,000/= or in default one (1) year imprisonment.
6. The respondent contends that it acted without bias or any influence. That the offences are separate and distinct and were committed at the same place and time. the respondent contends that he is not aware of complaints lodged by the applicant at the Police Station, no reports were annexed and no witnesses' statements are annexed. He contends that the applicant has not raised any issues for the court to determine. That they intend to exercise their constitutional mandate within the law and no procedural impropriety, illegality or irrationality has been shown against the 1<sup>st</sup> respondent. That the applicant has not demonstrated that he will suffer any injustice if he is charged as cases are determined on merits. That the applicant has failed to demonstrate that the 1<sup>st</sup> respondent departed from the principles of natural justice to warrant a judicial review of the exercise of his discretion.
7. The 2<sup>nd</sup> respondent opposed the application and filed a replying affidavit sworn by the Senior Superintendent of Police Peter Karanja and has reiterated the averments that the interested party was charged with a traffic offence and he pleaded guilty and was fined Kshs. 40,000/=. The application was canvassed by way of written submission.
8. I have considered the submissions. The issue which arises for determination is whether the application has merits. In considering this issue, the court has to determine whether the applicant had committed a criminal offence. The contention by he applicant is that the interested party knocked him down with his vehicle and was charged with a traffic offence. The Interested Party reported a case of assault and malicious damage. According to the 1<sup>st</sup> respondent the allegations were investigated and a decision was reached to charge the applicant.
9. In these proceedings, the court is not supposed to determine whether the guilt or otherwise of the applicant. The issue that this court has to determine is whether the respondents have abused their constitutional and statutory powers in any way to warrant the intervention by this Honourable court.



10. *Joram Mwenda Guantai v The Chief magistrate*, Nairobi Civil appeal No. 228 of 2003 [2007] 2 EA 170 the Court of Appeal held that:

“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess or jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

11. It is the duty of the police to investigate any complaint that is made to them in the exercise of their Constitutional mandate to detect and prevent crime. Article 245(4) of the *Constitution* give the Inspector General to investigate any particular offence or offences. In the exercise of those power it is expected to act within its powers and not act in excess of its jurisdiction or in contravention of the laws of the land. The question which this court has to determine is whether the applicant had committed the criminal offences which the 1<sup>st</sup> respondent preferred against him.
12. The contention by the applicant is that it is the Interested Party who deliberately hit him with his car and as result he was charged with a traffic offence and was fined. The circumstances of the accident are that the applicant was knocked down by the said motor vehicle, was rushed to hospital and was treated. He then went to the police statin and reported vide OB 46/1/2/2023. Investigations were conducted and the Interested Party was charged. According to the 1<sup>st</sup> respondent the fact that the Interested party pleaded guilty to the traffic charge, is not tantamount to an acquittal on any other charges emanating from the same incident. It is further deponed that the 1<sup>st</sup> respondent was not aware that there was ELRC Case No. E005/2021.
13. The replying affidavit by the 2<sup>nd</sup> respondent “sworn by Senior Superintendent of Police Mr. Peter Karanja at paragraph 2 states that the vehicle was inspected on 2<sup>nd</sup> February 2023 which is a day after the accident.” He further avers: that there were no damages noted on the wind breaker as the E1 (Interested Party) alleges (emphasis added). That there were no pre-accident mechanical defects on the motor vehicle in question that may have contributed to the accident. The accident was caused by human error and poor judgment. That E1 was entirely to blame for causing the accident. This means that the allegation by interested party was not true. The police are required to conduct clear and un biased investigations. The plea of guilty and the finding by the investigating officer that the allegation of malicious damage by the interested party was not true shows clearly that had police conducted independent investigations they would have come to realize the allegation by the interested party was not true. The applicant has shown that there were contradictory reports arising from the same transaction. One was confirmed as the Interested Party pleaded guilty to the allegation of deliberately knocking down the applicant. The police have a duty to conduct through investigations. The criminal justice system is there to protect the society from harm. Nobody should be charged without the police conducting proper investigations.



14. In *Attorney General & 4 Others* (2020) eKL the court held that:

“In a democratic society like ours no one should be charged without the authorities conducting thorough investigations.”

The High Court exercises power to prohibit a tribunal or body from acting in excess of its jurisdiction and in contravention of the law of the land.

15. Although the first respondent has the mandate to charge and prosecute those who have committed crimes, he is expected to act in a manner that upholds the human rights but not to act capriciously and recklessly. In the case of *Thuita Mwangi & 2 Others v Ethics and Anti-Corruption Commission & 3 Others* cited by the applicant it was held that:

“The discretionary power vested in the DPP is not an open cheque and such discretion must be exercised within the four corners of the *Constitution*. It must be exercised reasonably within the law and to promote the policies and objects of the law, which are set out in Section 4 of the *Office of Director of Public Prosecution Act*. These objects are... the rules of natural justice, promotion of public confidence in the integrity of the office, the need to serve the cause of justice; prevent abuse of legal process and public interest and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.”

16. The 1<sup>st</sup> respondent preferred the charges against the Interested Party and also preferred charges against the applicant arising from same transaction. The prosecution by preferring charges against the applicant after the interested party had pleaded guilty to a charge of driving without due care and attention would be perceived as counter productive by bringing the law into disrepute. The office of the 1<sup>st</sup> respondent is vested with the state powers to prosecute under Article 15 of the *Constitution* and the *Office of the Director of Public Prosecution Act* (Cap 2 of the Laws of Kenya) Article 157 6(a) & (b) of the *Constitution* provides that:

- “(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...”

17. On the other hand, Section 5 of the *Office of the Director of Public Prosecutions Act* provides for the powers and functions of the Director. The Section provides for the guiding principles which includes among others impartiality and rules of natural justice. In the case of *Peter Ngunjiri Maina v Director of Public Prosecutions & 2 Others* (2017) eKLR. The Judge held that:

“The law and practice then are quite clear, while the discretion of the DPP is unfettered it is not unaccountable. While authority to prosecute is entirely in the hands of the DPP, it is not absolute. In *Republic v the DPP, Ex parte Victory Welding Works Limited & Another* High



Court Misc Civil Application No. 249/2012 the court stated that ‘the DPP is only subject to the control of the court on the aforesaid principles of illegality, irrationality and procedural impropriety.’ The DPP should exercise his powers with due regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of legal process.”

18. The question is whether the decision by the DPP to charge the applicant was whimsical or was actuated by other motives other than public interest to prosecute a crime, oppressive or abuse of its Constitutional mandate. It is expected that in deciding whether or not to institute criminal proceedings against an accused person the prosecutors must assess the evidence to see whether there is sufficient admissible evidence to ensure a successful prosecution that will end up in a conviction.
19. In this case the Interested Party had intentionally knocked down the applicant with his motor vehicle. It is not clear at what stage the applicant caused malicious damage and threatened to kill the Interested Party. The 1<sup>st</sup> respondent concluded that the Interested Party was the aggressor. The Interested Party was at home with that decision as he pleaded guilty and promptly paid the fine. There does not seem to have been any evidence to charge the applicant. This fact raises the suspicion of some ulterior motive. The applicant contends that the charge was meant to settle scores on matters deponed by the applicant in his affidavit and that the DPP, acted capriciously in preferring the charges against the applicant with full knowledge that he was the victim. In *Republic v Director of Public Prosecutions ex parte Kamani* while quoting *R v Attorney General ex parte Kipngeno Arap Ngeny* the Court of Appeal held that,

“A criminal Prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper.....there must in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable. The prosecutor is under a duty to consider both incriminating and exculpatory evidence.”
20. It is trite law that the process of the court should not be abused and acts that amount to abuse of court process are a nullity. The process of the court must be used properly, honestly and in good faith and must not be abused. See *Peter George Anthony Costa v Attorney General* Nairobi Petition No. 83/2020 cited by the counsel for the applicant, the court stated that where there is an abuse of court process, there is a breach of the petitioner’s fundamental rights as the petitioner will not receive a fair trial. That it is the duty of the court to stop such abuse.
21. In *Rosemary Wanja Mwangiru & 2 Others v Attorney General & 2 Others*. Mumbi J (as she then was) stated that the process of the court must not be misused or otherwise used as an avenue to settle personal scores.
22. In this matter the applicant has demonstrated that the case is intended to achieve an ulterior motive as the genesis of the dispute between the applicant and the Interested Party is dismissal of the Interested Party’s wife and the ongoing employment case in which the applicant is the star witness. The respondent denied knowledge of the case but did not dispute the facts.
23. I have considered the documents annexed. The affidavit by the Chief Inspector Peter Karanja states that he investigated the allegation of malicious damage and found that it was not true and he charged the Interested Party with a traffic offence. Given that averment by a witness of 2<sup>nd</sup> respondent, was there any basis of charging the applicant could the police turn around and prefer a charge of malicious damage against the applicant. I am of the view that if the police had conducted thorough, independent



and unbiased investigations they would not have preferred the charges. The report by the Interested Party was a cover up. The charges were whimsical and capricious and this court has a duty to step in and stop such shenanigans by prohibiting the prosecution of the applicant.

**Conclusion**

24. For the reasons stated, I find that the application has merits. I order that an order of certiorari and prohibition do issue as prayed. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 8<sup>TH</sup> DAY OF APRIL 2025**

**HON. LADY JUSTICE L. GITARI**

**JUDGE**

