Nyaga alias Kioi & another (Judicial Review E001 of 2024)
[2025] KEHC 6611 (KLR) (21 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6611 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

JUDICIAL REVIEW E001 OF 2024

JN NJAGI, J

MAY 21, 2025

IN THE MATTER OF

PERMINUS MUCHANGI NYAGA ALIAS KIOI ..... 1ST EXPARTE APPLICANT

SHADRACK JUMA LONDO ..... 2ND EXPARTE APPLICANT

JUDGMENT

1. The Ex parte Applicants herein have filed a Judicial Review application dated 17th April 2024 seeking for orders that:

    1. That Orders of Prohibition do issue to prohibit the 1st, 2nd and 3rd Respondents from summoning or issuing summons requiring attendance of the Ex-parte Applicants Perminus Muchangi Nyaga Alias Kioi and Shadrack Juma Londo from attending the Lamu Resident Magistrate's Court to answer to charges of abuse of office contrary to Section 101 (1) as read with Section 36 of the *Penal Code* pursuant to the registered charge sheet of Lamu Principal Magistrate's Court, Criminal Case No. E113 of 2024 – Republic –Versus- Perminus Kioi & Shadrack Juma Londo.

    2. That Orders of Certiorari do issue to remove to the High Court the investigations and decision of the Independent Oversight Authority (IPOA) to prosecute the Ex-parte Applicants Perminus Muchangi Nyaga alias Kioi and shadrack juma londo vide IPOA Case No. IPOA/ INV/570/2019, the drawing and preparation of the charge sheet registered at the Lamu Principal Magistrate's Court under Court File No.E113 of 2024 Republic versus Permisnus KIoi & Shadrack Juma Londo and summons dated 9th April 2024 requiring attendance of the Ex-parte Applicants before the Lamu Principal Magistrate's Court on 23rd April, 2024 to answer to charges of abuse of office contrary to Section 101 (1) as read with Section 36 of the *Penal Code* for the purposes of reviewing and quashing the same.

2. The application was supported by a statement dated 17th April 2024 and by the verifying affidavit 1st Ex parte Applicant sworn on the 16th April 2024.

3. It is the case of the Applicants that the 1st Ex parte Applicant was in the 2019, County Police Commander of Lamu County whereas the 2nd Ex parte Applicant was a senior police officer in Lamu. That on the 11th April 2019, the 5th Respondent who was the Regional Police Coordinator, Coast Region called the 1st Ex parte Applicant and informed him that he had received a complaint through the 6th Respondent from the 8th Respondent that one Chief Inspector Shadrack Mumo, the 4th Respondent herein who was then OCS Kizingitini had released a suspect who had been arrested for drug trafficking after receiving a bribe of Ksh.50,000/=. That the 5th Respondent directed the 1st Exparte Applicant to call the 2nd Exparte Applicant and direct him to proceed to Kizingitini police station to arrest the 2nd Respondent and place him in custody. That he instructed the 2nd ex parte Applicant to arrest Chief Inspector Mumo who was arrested on the following day. That he was booked and detained at Lamu police station.

4. It was the contention of the 1st Ex parte Applicant that the 6th Respondent, the Regional Police Commander, then called him and informed him that he had directed the County Commander Tana River, Mr. Ochieng, to proceed to Lamu and conduct Room Proceedings against the 4th Respondent. That Mr. Ochieng arrived at Lamu and conducted the room proceedings and cleared the 4th Respondent of the charges of taking a bribe. That the 8th and 9th Respondents who were the origin of the allegations of bribery did not record their statements and did not appear as witnesses during the Order Room Proceedings.

5. The 1st Ex parte Applicant says that they were on the 11th and 15th April 2024 served with summons from the 1st Respondent, IPOA, for them to attend Lamu court on the 23rd April 2024 to answer to charges of abuse of office contrary to section 101 as read with section 36 of the *Penal Code*.

6. It is the contention of the Ex parte Applicants that the 1st Respondent, IPOA, conducted inquiries and proceedings and came up with recommendations to charge and prosecute them without giving them a chance or opportunity to be heard as required by the law under the cardinal principles of natural justice. They asked the court to grant the prayers sought herein.

7. The application was opposed by the 1st Respondent vide grounds of opposition dated 9th July 2024 and replying affidavit of the Investigating Officer of the 1st Respondent, Geoffrey Ogolla. The 1st Respondent contends that the application is intended to curtail the statutory obligations and duties of 1st Respondent and that of the 2nd Respondent by trying to ventilate a defence for the intended criminal charge. That the facts relied on in the application are matters of evidence which can be canvassed and will form the basis of the applicant`s defence in the intended criminal trial. That the applicants will be subjected to a judicial process and hence have an opportunity to demonstrate their innocence. That the applicants have not demonstrated how the 1st respondent has carried out its investigations with alleged elements of biasness and discrimination with intention to humiliate and intimidate them to the detriment of their rights being infringed and or threatened. That the application lacks merit, is misconceived and is an abuse of the due process of the court.

8. Mr. Ogolla in his replying affidavit says that the functions of the 1st respondent are spelt out under section 6 of the Independent Police Oversight Authority which include investigating any complains related to disciplinary or criminal offences committed by any member of the police service. That in carrying out investigations he recorded statements of witnesses and obtained corroborating documentary evidence. That he accorded the Applicants the requisite opportunity to give their versions of the events under inquiry by inviting them to do so through correspondent dated 8th January, 2020 addressed to the Deputy Inspector General as required seeking to summon both Applicants to the Authority for an interview and statement recording on 20th January 2020 at 0900 hours at the 1st

Respondent`s offices Mombasa Regional offices. That the Applicants failed to appear as summoned. That he proceeded with the investigations with the other available evidence. That averment by the Applicants that they were not given an opportunity to be heard is false.

9. It was the averment of the1st Respondent`s investigating officer that he gathered sufficient evidence to form the basis of the charge against the appellants for the offence of abuse of office. That the evidence was reviewed independently by the 2nd respondent, ODPP, who concurred with the 1st Respondent`s recommendations and directed that the charges be instituted. That the reliefs sought in the application would be in total contravention to the provisions of Article 157 of *the Constitution*, the ODPP Act CAP.68, the IPOA Act CAP.86 and the *Penal Code*. That the Applicants are through these proceedings asking the court to usurp the role of the trial court. That the Applicants have not demonstrated infringement of any of their rights and the application ought to be dismissed.

Submissions

10. The Applicants submitted that an arrest is an invasive curtailment of a person`s freedom and it therefore must not be carried out without due cause or in furtherance of ulterior motives. The applicants referred to the scope of judicial review and cited the case of Municipal Council of Mombasa v Republic & another, Nairobi Civil Appeal No.185 of 2001, (2002) eKLR where it was held that:

> Judicial review is concerned with the decision -making process, not with the merits of the decision itself....The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters?

11. It was submitted that in this case there is no reasonable justification for the intended arrest of the applicants as they were never invited for investigations nor heard on their defence as to what led to the arrest of the 4th Respondent. That the applicants only acted in furtherance of an order from above and conducted due process to ascertain the criminal culpability of the 4th respondent.

12. The Applicants submitted that the prosecutorial power of the state vests upon the office of the Director of Public prosecutions as provided for under Article 157 (6) of *the constitution* of Kenya 2010. However, that the power must be exercised legally and not arbitrarily. The Applicants referred the court to the Guidelines on the decision to charge of 2019 where the test to charge set out as key evidence test, public interest test and the threshold test. That the instant charges fail the laid down test. That the same are actuated by malice and are not in the interest of justice. That the orders sought by the applicants are therefore merited.

13. The 1st Respondent on the other hand submitted that due process was followed and the investigations were conducted as mandated by the law. Therefore, that there was no violation of rights by the 1st respondent. Reliance was placed in the case of Philemona Mbete Mwilu v Director of Public Prosecutions & 3 others: Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (aAmicu curiae) (2019) eKLR where the court held that:

> In our view, it would be within the mandate of an investigative body to receive complaints and to investigate them. Such bodies or entities cannot be faulted for acting on the complaints as in so doing, they would be acting within their constitutional and statutory duty. It was stated in Josephat Koli Nanok & another v Ethics and Anti-Corruption Commission (2018) eKLR, that by undertaking investigations an investigating entity does not violate any constitutional rights, and that violation of rights may only occur in the manner in which the investigative

mandate is executed. In that event, the Petitioner would be under an obligation to demonstrate that his or her rights have been violated by the manner of investigation and attendant processes.

14. It was submitted that a court can only interfere with the mandate of an investigative agency where it is shown that the agency has acted unlawfully or in bad faith. Reliance was placed in the case of Ezekiel A. Omollo v Director of Public Prosecutions & 2 others (2021) eKLR where it was held that:

> When faced with a petition seeking to arrest a criminal prosecution, the factors which a court ought to account for are well settled. For a start, the court ought to be extremely cautious in making its determination so as to avoid prejudicing the intended or pending criminal proceedings. The court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions and neither should it curtail with the investigatory mandate accorded to IPOA. However, the court may intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence.

15. The 1st Respondent submitted that their recommendations were independently reviewed by the 2nd respondent, pursuant to the provisions of Article 157 of *the constitution*, who concurred with the recommendation to charge the Applicants. The 1st respondent cited the Court of Appeal decision in the case of Patrick Masaghwe Mukasa v Director of Public Prosecutions & 3 others (2016) eKLR where it was held that:

> " 157 (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 (othe r 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 clauses (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)*.
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> (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 s1the direction or control of any person or authority.
>
> 45. The salient provisions of Article 157 of *the Constitution* underscore the powers of the DPP and the manner in which such powers may be exercised. The said provisions further underscore the independence of the office of the DPP by providing that in the exercise of its powers or functions shall not be under the direction or control of any person or authority... We observe that the recommendations of the 4th respondent calling for the prosecution of the appellant were not necessarily binding on the 1st respondent. In exercise of its constitutional and statutory duty, the 1st respondent was duty bound to consider the same and exercise its discretion whether or not to institute criminal charges against the appellant based on the evidence presented. That in our view is exactly what the 1st respondent did. It was within the

1st respondent's mandate to consider the recommendation and make an independent decision whether to charge the appellant or not.

16. It was submitted that judicial review is only concerned with the decision-making process so as not to usurp the powers of the trial court. That scrutiny of the evidence can only be done in the course of the trial. The case of Uwe Meixner & another v Attorney General (2005) was cited where it was held that:

    a. As the learned Judge correctly stated, judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power...

    b. The criminal trial process is regulated by statutes, particularly, the *Criminal Procedure Code* and the *Evidence Act*. There are also constitutional safeguards stipulated in section 77 of *the Constitution* to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.

17. The 1st Respondent submitted that the application is unmerited.

Analysis and determination

18. I have considered the grounds in support of the application and the grounds in opposition thereto. The issue for determination is whether the Judicial review in form of the prerogative orders of Certiorari and Prohibition are available to the Ex-parte Applicants.

19. The principles for Judicial Review were set out in the case of Republic Vs *Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No.266 of 1996*, where the Court of Appeal stated:

> ''...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.''

20. In the case of Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd (2002) eKLR, the same court held that: -

> Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.''

21. The scope of judicial review orders was stated in Zachariah Wagunza &Another v Office of the Registrar, Academic Kenyatta University & 2 others (2013) eKLR where the court reiterated the broad grounds on which the court exercises its judicial review jurisdiction as was stated in the Uganda case of Pastoli vs Kabale District Local Government council and Other (2008) 2 EA 300, where it was observed that:

> "In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of law or its principles are instances of illegality...
>
> Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision is usually in defiance of logic and acceptable moral standards.
>
> Procedural Impropriety, is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice act or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision."

22. Similarly, in the case of Republic v Director of Immigration Services &2 others Exparte Olamilekan Gbenga Fasuyi & 2 others (2018) e KLR it was held that:

> ''...It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of judicial review orders do apply. Judicial Review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the High court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction- reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of Law. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision-maker are proper, and the decision is within the confines of the Law, a Court will not interfere."

23. Thus, an application for judicial review can be brought up on the basis of illegality, irrationality and procedural impropriety. The ex parte applicants have based their application on the ground that they were not given an opportunity to be heard as required by the law under the cardinal principals of natural justice in that they were not served with summons to appear before the officers of the 1st respondent to give their side of the story. Further that the intended prosecution is a witch hunt with malicious hidden agendas by the Respondents to satisfy their own interest.

24. The investigating officer of the 1st Respondent says that he served the summons for the applicants to appear for an interview and statement recording through the Kenya Police Headquarters Vigilance House who stamped the correspondence. Therefore, that it is deemed that the respondents were served with the summons.

25. The Ex parte Applicants aver not to have been served with any summons. The duty then fell on the 1st respondent to proof service. The 1st Respondent seems not to have made a follow up from Vigilance House to ensure that summons were served on the Applicants before taking any further action in the matter. They did not obtain any statement from an officer from Vigilance House stating that the summons were actually served. It is clear that the investigating officer of the 1st respondent assumed that there was service by the mere fact of delivery of summons to police headquarters. There was no basis to assume service when no evidence was laid out that Vigilance House delivered the summons to the Ex parte Applicants. I therefore find that there was no service of summons upon the Applicants. The Applicants were therefore not given an opportunity to be heard.

26. It is a cardinal principal of natural justice that a person to be affected by a decision of a public body ought to be heard in his defence before a decision is taken. This rule was explained in the case of Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553 it was held:

> " The Court observes firstly that the rules of natural justice "audi alteram partem" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

27. In Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] eKLR the Court referred to The Management of Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc Application No.18 of 2010, where the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

> " It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that

contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

28. In Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR, the court held that:

> " Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of *the Constitution* encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body."

29. It is therefore my finding that the decision to charge the Applicants without giving them an opportunity to hear their side of the story contravened the natural law rule that a person should not be condemned unheard.

30. As observed above, judicial review is concerned with procedural fairness and not merits of the case. The court in Commissioner of Lands vs Kunste Hotel Limited (1997) eKLR with authority reiterated Lord Bright man's view and observed:

> "...it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision- making process. Its purpose is to ensure that the individuals is given fair treatment by the authority to which he has been subjected."

31. The Ex parte Applicants in addition make allegations of malice and bias on the part of the Respondents. I however find no clear case of such. It would require the court to consider evidence so as to determine the issues. This, in my view, is not within the purview of judicial review. To delve into those issues would amount to usurping the role of the trial court. I therefore decline to consider those issues.

32. Having considered the issues raised herein and in view of the fact that the decision to charge the Applicants was made without giving them an opportunity to be heard against the rules of natural justice, I find sufficient reason for me to interfere with the decision and acts of the 1st Respondent.

33. The Ex parte Applicants are seeking for orders of certiorari and prohibition. An order of certiorari is an order to quash a decision already made whereas 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 for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. I find the order for prohibition to be deserved until the Ex parte Applicants are properly served with summons and are given an opportunity to give their defence.

34. In view of the foregoing, this court makes the following orders:

    1. An order of Certiorari is hereby issued removing into this court for purposes of quashing the investigations and decision of the Independent Oversight Authority (IPOA) to prosecute the Ex-parte Applicants, Perminus Muchangi Nyaga alias Kioi and Shadrack Juma Londo, vide IPOA Case No. IPOA/INV/570/2019, the drawing and preparation of the charge sheet

registered at the Lamu Principal Magistrate's Court under Court File No.E113 of 2024 Republic versus Permisnus Kioi & Shadrack Juma Londo and summons dated 9th April 2024 requiring attendance of the Ex-parte Applicants before the Lamu Principal Magistrate's Court on 23rd April, 2024 to answer to charges of abuse of office contrary to Section 101 (1) as read with Section 36 of the *Penal Code*, which investigations and decisions are hereby quashed.

2. That an order of prohibition do hereby issue to prohibit the 1st, 2nd and 3rd Respondents from summoning or issuing summons requiring attendance of the Ex-parte Applicants, Perminus Muchangi Nyaga Alias Kioi and Shadrack Juma Londo, from attending the Lamu Resident Magistrate's Court to answer to charges of abuse of office contrary to Section 101 (1) as read with Section 36 of the *Penal Code* pursuant to the registered charge sheet of Lamu Principal Magistrate's Court, Criminal Case No. E113 of 2024 – Republic –Versus- Perminus Kioi & Shadrack Juma Londo until the two are served with summons to appear before the officers of the 1st Respondent, the Independent Oversight Authority (IPOA), for purposes of being interviewed and statement recording and given an opportunity to give their defence (if they wish to give such).

Orders accordingly.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 21ST DAY OF MAY 2025.

J. N. NJAGI

JUDGE

In the Presence of:

Mr. Omwancha and Mr. Soita for Ex-parte Applicants

Miss Mutegi holding brief for Miss Owino for 1st Respondent

Court Assistant: Ndonye