



**Ndiku v Inspector General of Police, National Police Service & 2 others (Petition E469 of 2023)  
[2025] KEHC 8277 (KLR) (Constitutional and Human Rights) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8277 (KLR)

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

**PETITION E469 OF 2023**

**EC MWITA, J**

**JUNE 11, 2025**

**BETWEEN**

**MILCAH MUTHENI NDIKU ..... PETITIONER**

**AND**

**THE INSPECTOR GENERAL OF POLICE, NATIONAL POLICE  
SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner filed this petition against the respondents, claiming violation of her rights and fundamental freedoms guaranteed under Articles 28, 35, 47 and 48 of *the Constitution*. The petitioner sought declarations to that effect, an order for compensation and costs of the petition. The petition was supported by affidavits and written submissions with oral highlights.
2. The petitioner's case is that she went to Radhesyam Transporters Ltd offices at Donholm to collect her money. When she got to the office, the director, Mr. Ranjam, called the receptionist, Ms. Catherine Mwangi, (Ms. Mwangi) and lied to Ms. Mwangi that the petitioner had informed him that she (Ms. Mwangi) was stealing company money. An altercation ensued and, in the process, Ms. Mwangi and a security guard assaulted the petitioner.
3. The petitioner reported the matter to Donholm Police Post on 30<sup>th</sup> September 2021, (OB No.08/30/09/21). Dissatisfied that no action was being take, the petitioner again reported the matter at Buruburu Police Station on 1<sup>st</sup> October 2021. She and her witness(es) recorded their statements and she was issued with a P3 form.



4. The petitioner stated that even after recording statements, police officers at Buruburu police station and the Office of Director of Public Prosecutions (ODPP) Makadara refused to issue a comprehensive report on the complaint against the manager, Ms. Mwangi and the Security guard. They also failed to produce the CCTV footage on the events of that day.
5. The petitioner subsequently reported the matter to the Internal Affairs of the Police Unit, office of the Deputy Inspector General of Police and the National Police Service Commission. It was after this report that the Principal Prosecution Counsel at Makadara Law Courts, (Mr. Joseph Mburugu), wrote a letter to a Mr. Katana of the office of the Deputy Inspector General at the Police Headquarters.
6. The petitioner averred that owing to the frustrations by those officers, she reported the matter at the ODPP's Headquarters on 20<sup>th</sup> December 2021. The matter was later transferred to the ODPP offices at NSSF Building and placed under Mr. Kitonga and Ms. Dorcus who have, however, not made any findings.
7. The petitioner denied bypassing the receptionist; using abusive language or assaulting Ms. Mwangi. The petitioner also denied being contacted by the investigating officer, or receiving any documents from the officer after recording her statement. It was the petitioner's case, that the 2<sup>nd</sup> respondent (the ODPP) violated Article 157(4), (6), (10) and (11) of *the Constitution* while carrying out his mandate. According to the petitioner, the ODPP also lied to court that an out of court settlement was ongoing.
8. The petitioner maintained that on 26<sup>th</sup> September 2023, she filed a case (No. SCCCCOMM/ E7435 of 2023) in the small claims court claiming her money which is still pending. She also approached the office of the Attorney General to intervene and despite a notice dated 21<sup>st</sup> March 2023, no response had been received.

#### **1<sup>st</sup> respondent's case**

9. The 1<sup>st</sup> respondent opposed the petition through a replying affidavit sworn by No. 66658 CPL. Elisha Kunani (CPL Kunani). CPL Kunani stated that Buruburu Police Station was investigating complaints made by the petitioner and Ms. Mwangi over an incident that took place at the offices of Radhesyam Transporter Ltd in Donholm.
10. According to CPL Kunani, the petitioner went to the company offices to demand her commission for services she had rendered to the company. The petitioner went directly to the manager's office without passing through the receptionist, Ms. Mwangi. The manager called the receptionist and asked her to respond to the petitioner's concerns. However, after the receptionist's response, the petitioner started using offensive language against both Ms. Mwangi and the manager leading to a fight between the petitioner and Ms. Mwangi which resulted in both parties sustaining injuries. The manager and other members of staff tried to intervene and separate them. A security guard was called in to escort the petitioner out of the company premises.
11. According to CPL Kunani, the petitioner made a complaint of assault through OB. No. 08 of 30<sup>th</sup> September 2021 and investigations commenced. During investigations, it was established that Ms. Mwangi, the person against whom the complaint had been made, had visible injuries said to have been inflicted by the petitioner. She had treatment notes and had reported the assault through OB. NO. 37 of 15<sup>th</sup> October 2021. Both complaints were investigated and he recommended that both the petitioner and Ms. Mwangi be charged with the offence of affray contrary to section 92 of the *Penal Code*. He forwarded the investigation file to the ODPP, Makadara Law Courts on 25<sup>th</sup> October 2021 for directions.



12. The ODPP recommended that parties resolve the matter out of court, in default, the petitioner be charged with the offences of creating disturbance contrary to section 95(1) of the *Penal Code* and assault causing actual bodily harm contrary to section 251 of the *Penal Code*.
13. CPL Kunani asserted that on receiving the directions from the ODPP, the petitioner and Ms. Mwangi were directed to report to the investigating officer to be informed of the DPP's recommendation. Only Ms. Mwangi turned up on 22<sup>nd</sup> November 2021 and efforts to reach the petitioner were futile. CPL Kunani maintained that while the file was at the ODPP's office (Makadara Law Courts), the petitioner made a formal complaint through letter dated 28<sup>th</sup> October 2021 to the OCPD Buruburu alleging that investigations had been compromised. The OCS replied to the petitioner through letter dated 30<sup>th</sup> November 2021.
14. The petitioner made another complaint against the ODPP's officer at Makadara, (Mr. Joseph Mburugu), to the ODPP Headquarters over the recommendations he had made. After a series of complaints by the petitioner, the duplicate police file was forwarded to the ODPP, Nairobi Region. There were several communications over the matter, the final communication being letter dated 22<sup>nd</sup> February 2023 directing that both the petitioner and Ms. Mwangi be charged with the offence of assault causing actual harm contrary to section 251 of the penal code.
15. It was CPL Kunani's position, that there were concerted efforts by the investigating agencies and the ODPP to ensure that the matter was expedited as guided by the law. He urged that the petitioner be ordered to report to the OCS Buruburu Police Station for execution of the directives from the ODPP.

#### **2<sup>nd</sup> respondent's response (DPP)**

16. The DPP opposed the petition through grounds of opposition and a replying affidavit sworn by Maatwa Thomas Kerongo. However, the replying affidavit does not have the paragraphs 1-9.
17. In the grounds of opposition, the DPP contended that the petitioner did not adduce evidence to demonstrate that the DPP failed to discharge his mandate under Article 157 of *the Constitution*. The petitioner did not also demonstrate any irregularities committed in failing to avail CCTV footage from the company and the provisions of the law violated.
18. The DPP asserted that in exercising his mandate, under Article 157(10), he was not under the direction or control of the petitioner, any other person or authority. The DPP contended that the petitioner did not demonstrate that the decision not to charge the people she complained against was illegal, unfair or irrational and, therefore, unconstitutional.
19. The DPP stated that the decision was made with regard to public interest, interest of administration of justice and the need to avoid abuse of the legal process as required by Articles 47, 48 and 157(11) of *the Constitution*. It was the DPP's position that the alternative dispute resolution mechanisms are constitutionally underpinned by Article 159(2) (c) of *the Constitution*.

#### **Submissions**

20. This petition was disposed of through written submissions with oral highlights.

#### **Petitioner's submissions**

21. The petitioner filed written submissions which she relied on and urged the court to allow the petition.



22. In the written submissions, the petitioner argued that the petition was brought in good faith and was not an abuse of the court process. She relied on the decision in *Feisal Hassan v Public Service Board of Marsabit County* and another [2016] eKLR.
23. The petitioner submitted that the respondents' failure to investigate and charge the culprits grossly violated the statutory provisions governing the conduct of the National Police Service and the ODPP. The petitioner relied on the decisions in *Cyprian Andama v Director of Public Prosecution & another*; *Article 19 East Africa (Interested Party)* [2019] eKLR and *R v Oakes* [1986] 1. SCR. 103
24. It was the petitioners' argument, that the investigating officer and the DPP were biased and acted with prejudice in handling her complaint and infringed her dignity contrary to the provisions of section 95(3) of the *National Police Service Act*. The petitioner relied on the decision in *M W K v another v Attorney General & 3 others* [2017] eKLR to support this position.
25. The petitioner again relied on the decision in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of offenders (NICRO) and Others (CCT 03/04)* [2004] ZACC 10 to argue that the 3<sup>rd</sup> respondent's allegations against her petitioner were hearsay and misplaced because the 3<sup>rd</sup> respondent did not substantiate the allegations that she bypassed the receptionist; was offensive and used abusive language.
26. According to counsel, the 3<sup>rd</sup> respondent did not state whether the receptionist, security guard and director had obtained any OB from Buruburu police station and a such no assault or incidence of creating disturbance by the petitioner was reported to the police by any of the suspects.
27. Learned counsel submitted that the letters dated 16<sup>th</sup> December 2021, 30<sup>th</sup> November 2021, 10<sup>th</sup> June 2022, 28<sup>th</sup> June 2022, 22<sup>nd</sup> February 2023, 7<sup>th</sup> March 2023, 28<sup>th</sup> February 2023, 20<sup>th</sup> September 2022, 2<sup>nd</sup> August 2022, 9<sup>th</sup> August 2022, 2<sup>nd</sup> September 2022, 11<sup>th</sup> September 2022, 6<sup>th</sup> July 2022, 29<sup>th</sup> June 2022, 11<sup>th</sup> April 2022 and the list of witnesses filed by the investigating officer did not originate from the petitioner and her witness because the petitioner's statement and that of her witness were hand written. Further, OB No. 37/15/10/2021 for Catherine Mwangi and typed witnesses' statements filed by the investigating officer were an afterthought; were tainted with illegalities and are an abuse of the court processes. Reliance was placed on section 107 of the *Evidence Act*.
28. The petitioner cited article 50(2) (b) of *the Constitution* and the decision in *Space Geo Enterprises Ltd v Kenya National Highways Authority* [2019] KEHC 3417 (KLR) for the argument that her letter to the OCPD dated 28<sup>th</sup> October 2021 rebutted the investigating officer's accusation and allegation that she was not cooperating. The petitioner maintained that the respondents' actions violated Articles 10, 157(11) and 244 of *the Constitution*.
29. The petitioner further relied on the decision in *Cyprian Nyakundi & another v Director of Criminal Investigations & 2 others*; *Victoria Commercial Bank (Interested Parties)* [2021] KEHC 12701 (KLR) to asserted that the police and the DPP failed to demonstrate why the intended prosecution against those the people she complained against was not commenced.
30. It was the petitioner's position, that her rights guaranteed under article 47 of *the Constitution* were violated because the actions by the police and the DPP were unlawful. No reasons were given for the refusal to allow the intended prosecution. Reliance was placed on section 4 of the *Fair Administrative Action Act*, 2015 and the decisions in *Boniface Mwangi v Inspector General of Police & 5 others* [2017] eKLR and *George Kingi Bamba v National Police Service Commission* [2019] eKLR. Counsel urged the court to allowed the petition with costs.



### 1<sup>st</sup> and 3<sup>rd</sup> respondents' submissions

31. The 1<sup>st</sup> and 3<sup>rd</sup> filed written submissions. They relied on Article 245 (2) (b) and (4); section 24 of the *National Police Service Act* and the decisions in Mohammed Edin Adan v Director of public Prosecutions & another [2022] eKLR and Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR to submit that the police discharged their duties as prescribed by law. The 1<sup>st</sup> and 3<sup>rd</sup> respondents referred to the replying affidavit by the investigating officer, CPL Kunani, to demonstrate how the petitioner's complaint was processed and handled.
32. The 1<sup>st</sup> and 3<sup>rd</sup> respondents relied on the decisions in Anarita Karimi Njeru v Republic [1979] eKLR; Mumo Matemo v Trusted Society of Human Rights Alliance [2013] eKLR and John Mbau Mburu v County Government of Mombasa; Robinson Onyango Malombo (Interested Party) [2019] eKLR to argue that the petitioner had failed to establish with reasonable precision how the 1<sup>st</sup> and 3<sup>rd</sup> respondents acted with procedural impropriety or failed to perform their duties and responsibilities as required by *the Constitution* or the law.
33. The 1<sup>st</sup> and 3<sup>rd</sup> respondents maintained that the petitioner did not come to court with clean hands; had refused to cooperate with investigating agencies and continued to write letters to tarnish the same agencies. The petitioner's behaviour, they argued, amounted to misuse of resources and abuse of the court process. Reliance was placed on the decisions in Muchanga Investments Ltd v Safaris Unlimited (Africa)Ltd & 2others [2009] eKLR and Julius Meme v Republic & another [2004] eKLR, in urging the court to dismiss the petition with costs.

### 2<sup>nd</sup> respondent's submissions

34. The DPP also filed written submissions which Mr. Achochi relied on in support of the DPP's position against the petition. It was submitted that the DPP acted on the petitioner's complaint as required by article 157(4) of *the Constitution*. According to DPP, criminal proceedings are not a better option than alternative forms of dispute resolution, including reconciliation and or mediation as per the ODPP's diversion policy.
35. The DPP further relied on article 157(6) and (10) of *the Constitution*, section 6 of the *Office of the Director of Public Prosecutions Act* and the decisions in Communications of Kenya v Office of the Director of Public Prosecutions & another [2018] eKLR; Charles Okello Mwanda v Ethics and Anti-Corruption Commission & 3 others [2014] eKLR; Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR on the DPP's mandate to prosecute.
36. Further reliance was placed on articles 157 (6) & (11) and 159(2) of *the Constitution* to argue that the DPP did not violate the petitioner's rights and urged the court to dismiss the petition with costs.

### Determination

37. I have considered the petition, responses and arguments by parties. The issue for determination is whether the petitioner's rights and fundamental freedoms were violated. The petitioner's case is that she was assaulted at the offices of Radhesyam Transporters Ltd and although she reported the matter at Donholm police post and Buruburu police station, the respondents did not act as required by *the Constitution* and the law thus, her rights and fundamental freedoms were violated.
38. The respondents denied violating the petitioner's rights and fundamental freedoms. According to the respondents the petitioner filed a complaint and so did Ms. Mwangi, a receptionist at Radhesyam Transporters Ltd. The complaints were investigated and the investigation file was sent to the ODPP



- with recommendations that both the petitioner and Ms. Mwangi be prosecuted for affray. The DPP however, directed that the two resolve the matter amicably and, in default, the petitioner be prosecuted for the offences of creating disturbance contrary to section 95(1) of the *Penal Code* and assault causing actual bodily harm contrary to section 251 of the *Penal Code*.
39. Upon the petitioner's further complaint against the ODPP's officer at Makadara, the regional office directed that both the petitioner and Ms. Mwangi be charged with the offence of assault causing actual harm contrary to section 251 of the penal code. The police were waiting for the petitioner to visit their offices so that she could be informed about the DPP's directive.
  40. Section 24 of the Police Service Act provides for the functions of the Police Service. They include; investigating crimes, maintenance of law and order and protection of life and property. That is, the police have statutory mandate to discharge in the performance of those functions, namely; to investigate complaints made on commission of crimes. This is a statutory obligation the law has placed on the police which they have to discharge.
  41. In that regard, the police are required to exercise their powers and discharge their functions subject to the constitutional safeguards of human rights and fundamental freedoms in article 244 of *the Constitution*. The police can investigate any complaints of a criminal nature to ascertain whether or not a crime has been committed. Once investigations are concluded and the police form the opinion that a crime has been committed, the investigation file is forwarded to the DPP to make a decision on whether or not to charge and prosecute the person involved. If investigations, however, conclude that no offence was committed, the file is closed and that is the end of the matter, the police having discharged their obligations.
  42. On the other hand, article 157(6) of *the Constitution* confers on the DPP constitutional mandate and discretion to initiate, continue and or terminate criminal prosecutions. When exercising this discretion, the DPP does not require permission or consent from any person, body or authority. Article 157(11), however, demands that when the DPP is exercising his powers, he should do so in a manner that has regard to public interest, interests of administration of justice and prevents and avoids abuse of the legal process. (See *Director of Public Prosecutions v Martin Mina & 4others* [2017] eKLR).
  43. In that regard, the law is settled that where the police are investigating a crime, or the DPP is exercising the constitutional mandate and discretion conferred on that office, courts should rarely interfere with the mandate of those offices. (See *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another* [2015] eKLR and *Paul Ng'ang'a Nyaga v Attorney General & 3 others* (2013) eKLR).
  44. From the constitutional text, article 157(10) is clear that the intention of *the Constitution* was to enable the DPP carry out his constitutional mandate without interference from anybody or authority. The Court should not therefore direct the DPP how to exercise his constitutional powers or interfere with exercise of the mandate unless there is clear evidence of violation of *the Constitution*, the law or a party's rights and fundamental freedoms. (*Francis Anyango Juma v The Director of Public Prosecutions and another* [2012] eKLR).
  45. The police have an obligation to investigate a complaint reported to them. On the other hand, the decision by the DPP whether to prefer charges and prosecute or not, is at the discretion of the DPP and courts will only come in where there is evidence of abuse, malice or ulterior motive in exercising their respective mandate. That is, only investigation and or institution of criminal prosecution which exhibits abuse of discretion or undermines the essence of criminal justice system, will be interfered with by the court.



46. Article 23(3) of *the Constitution* confers on this Court jurisdiction to grant appropriate relief to redress denial, violation or infringement of, or threat to, a right or fundamental freedom. The essence of such relief is to ensure that the rights enshrined in, and guaranteed by, *the Constitution* are protected and enforced. (*Fose v Minister of safety and Security* (CCT 14/1996) [1997] ZACC 6.
47. In this respect, for the court to act towards enforcing the rights, a petitioner has to satisfactorily demonstrate the violation of his rights and fundamental freedoms. If the court finds violation, it then invokes article 23(3) of *the Constitution* to grant appropriate relief. This is so, because as the Constitutional Court of Uganda stated in *Tinyefuze v Attorney General of Uganda* (Constitutional Petition No. 1 of 1996) [1997] UGCC 3, “if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course.”
48. I have considered the petition, responses and arguments by parties on this matter. The petitioner’s grievance is that her complaint to the police against those who allegedly assaulted her was not acted upon thus, the respondents violated her rights and fundamental freedoms. The respondents on their part, argued that they acted in accordance with *the Constitution* and the law and that petitioner had not demonstrated that they had violated her rights and fundamental freedoms and, if so, how.
49. A claim for violation of rights and fundamental freedoms is first, a matter of fact, and once facts establish violation, it then becomes a question of law that a petitioner has to prove to the satisfaction of the Court that indeed, there was violation of his/her rights in contravention of *the Constitution* and the law.
50. In *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the Supreme Court emphasised (at para 349) the importance of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement, which plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
51. What the Supreme Court said was simple; that a party claiming violation of rights and fundamental freedoms should plead with precision, the constitutional rights violated, the provisions infringed and demonstrate the manner of violation so that there is a link between the alleged violation, the rights infringed and the constitutional provisions violated in order to put the respondent on notice over the petitioner’s claim so as to respond appropriately.
52. In this petition, the petitioner’s complaint to the police was in exercise of her right to report a complaint if she thought a crime had been committed. Similarly, Ms. Mwangi against whom the petitioner had complained, filed her own complaint against the petitioner. This meant there were two complaints reported to the police. The police on their part, had an obligation to investigate the two complaints to determine the veracity of the allegations and whether they had any basis. The investigations were in discharge of their statutory mandate.
53. The respondents argued that investigations were conducted, and the file forwarded to the DPP with recommendations for his for directions. That means the police discharged their constitutional and statutory mandate.
54. Further, the record shows that upon receiving the investigations file, the DPP, exercising his mandate, directed the police on how the matter was to be handled. The DPP’s directive was made in exercise of his constitutional mandate and discretion. That directive is yet to be implemented. The DPP having given directions on how the matters was to proceed, discharged his constitutional mandate.



55. The record again shows that the petitioner made several complaints to higher offices of the ODPP from which, according to the petitioner, a response was yet to be received. However, according to the investigating officer, the DPP reviewed the earlier directive on amicable settlement of the matter and directed that both the petitioner and Ms. Mwangi be prosecuted, a directive that is yet to be implemented. In other words, there cannot be allegation of violation of rights and fundamental freedoms when the police and the DPP have discharged their mandate without showing that the decisions violated *the constitution* and the law and how. The petitioner's complaints to other administrative offices is not issues before this court.
56. This court must point out at the risk of repeating, that the facts in this petition point out clearly that both the police and the DPP discharged their constitutional and statutory mandate. The petitioner may not HAVE BEEN INFORMED OF the decisions. She has a right to complain to other organs of State and indeed, she did complain to the ODPP's office which has an obligation to deal with such a complaint. To this end, this court is not satisfied that the petitioner demonstrated that the respondents violated any of the rights or fundamental freedoms enshrined in *the Constitution*. The police investigated the complaints by both the petitioner and Ms. Mwangi and made recommendations which the DPP acted on. I am unable to see violation of any of the petitioner's rights and fundamental freedoms, in this regard.
57. The petitioner did not challenge the directive by the DPP to the police that both Ms. Mwangi and her be prosecuted. That was a decision made in exercise of the DPP's constitutional mandate and discretion. This court can only interfere where there is proof that in acting as he did, the DPP violated *the Constitution* or the law, which has not been demonstrated here.
58. The petitioner did not also demonstrate that in conducting investigations, the police did not exercise their powers and discharge their functions in accordance with the law or the constitutional safeguards of human rights and fundamental freedoms in article 244 of *the Constitution*.
59. The position in law is clear that a party who claims that his/her rights and fundamental freedoms have been violated, must discharge the burden placed on him/her to show that there was violation and the manner of such violation. It is not enough for the petitioner to argue that her rights were violated. Violation would be demonstrated if the petitioner showed that the respondents acted contrary to constitutional provisions that protect rights and fundamental freedom or failed to act as required by *the Constitution* or the law. Without this demonstration, there cannot be a finding of violation of rights and fundamental freedoms.
60. The petitioner having failed to prove that the respondents violated any of the constitutional safeguards on rights and fundamental freedoms, the conclusion the court comes to, is that the petition has no merit. It is declined and dismissed. Each party will bear their own costs.

**DATED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JUNE 2025**

**E C MWITA**

**JUDGE**

