



**Kundu & another v Office of the Director of Public Prosecutions & 2 others (Constitutional Petition E002 of 2024) [2025] KEHC 10952 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10952 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CONSTITUTIONAL PETITION E002 OF 2024**

**S MBUNGI, J**

**JULY 18, 2025**

**BETWEEN**

**NIGEL WESUTSA KUNDU ..... 1<sup>ST</sup> PETITIONER**

**POLYNE JOY WANYONI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1<sup>ST</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. This is a judgment of a petition dated 14<sup>th</sup> June 2024, filed by the Petitioners who are advocates of the High Court of Kenya ordinarily practicing within Kakamega Town, in the County of Kakamega. The petition is supported by two affidavits of Nigel Kundu Wesutsa and a further affidavit sworn by himself on 31<sup>st</sup> January, 2025.
2. The Petitioners pray for the following
  - i. A declaration that the arrest and removal of the Petitioners from the jurisdiction of this Honourable Court to the City of Nairobi was arbitrary, unlawful and unconstitutional and without any lawful justification given that the alleged offences arose within this Honourable Court's Jurisdiction.
  - ii. A declaration to the effect that there is no law under the Republic of Kenya which limits trials of persons arrested over investigated by the BFU to criminal courts located in the city of Nairobi.



- iii. An order that the alleged offence of conspiracy to defraud which is intended to be preferred against the Petitioners ought to be tried by courts within the Jurisdiction of the High Court of Kenya sitting at Kakamega.
  - iv. Any other order or relief that this Honourable Court may deem fit to grant in the interests of justice.
3. The petition was accompanied with a notice of motion dated 21<sup>st</sup> June, 2024, the notice of motion was compromised by consent of the 1<sup>st</sup> respondent and the 1<sup>st</sup> and 2<sup>nd</sup> petitioner counsels on 24<sup>th</sup> June, 2024 and the counsels agreed to file written submissions to dispose of the main Petition.
  4. At the time of writing this Judgment it is only the petitioners who had filed the submissions. For upon looking at the CTS and the court record file I did not see any submissions filed by the respondent nor ground of opposition though the counsel of the 1<sup>st</sup> respondent had indicated having filed grounds of opposition. What is on the record is only the replying affidavit sworn by Nicholas Mayaka Subano on 24<sup>th</sup> October, 2024 which was in respect to the notice of motion which was compromised. Therefore the Petition is not opposed.
  5. Despite the petition being unopposed this court is obligated to determine the issues raised by the Petitioners in the petition.
  6. The crux of the petition is that the petitioners aver that they were arrested within Kakamega town on 12<sup>th</sup> June 2024 by persons who identified themselves as officers from the Banking Fraud Unit and transported to Nairobi Kileleshwa police station.
  7. While there they were informed that they were to be charged with the offence of conspiracy to defraud in respect of matters arising out of Kakamega High Court Civil Cause No. E005 of 2023, which had been appealed in Kisumu Civil Appeal Cause No E.018, and E106 of 2024 before Milimani Criminal Court in Nairobi.
  8. The petitioner contends that the respondents violated their rights under Article 27, 28,29 and 49 of *the constitution*.
  9. In part C of their petition they set out the particulars of alleged violation in terms of the principle of legality as follows

C. Particulars Of Violation In Terms Of The Principle Of Legality

Article 27 of *the Constitution* of Kenya, 2010, enshrines the right to equality and freedom from discrimination by stating that 'every person is equal before the law and has the right to equal protection and equal benefit of the law', and to put it into perspective, the Petitioners have been subjected to discriminatory treatment by the Respondents by being informed that their intended prosecution within the city of Nairobi is ostensibly on grounds that cases investigated by the BFU by law, have to be tried in the city of Nairobi, while in reality, there exists cases by BFU proceeding before courts under the jurisdiction of the High Court sitting at Kakamega and other benches of the High Court within the

2. That the removal of the Petitioners from the jurisdiction of the High Court sitting in Kakamega, where the alleged conspiracy is said to have taken place, to the city of Nairobi, upon the reasons proffered by the Respondents as narrated above, disregards the clear legal provisions regarding the geographical jurisdiction of the courts, which stipulate that matters should be heard within the jurisdiction where the alleged offence took place as provided under Section 71 of the *Criminal Procedure Code* and therefore,



the action by the Respondents was deliberately calculated and undertaken to impose undue hardship upon the.

3. Article 28 of *the Constitution* of Kenya, 2010, unequivocally states that 'every person has inherent dignity and the right to have that dignity respected and protected' so much so that the removal of the Petitioners from this Honourable Court's jurisdiction to the city of Nairobi has unfortunately impacted on the inherent dignity of the Petitioners, to wit:
  - a. Not being accorded an opportunity to instruct colleagues and/or their staff on how to handle matters which were due in court in their absence leading to unfounded speculations on the Petitioners standing within the eyes of their peers and clients, who both unfortunately had no knowledge of the history informing the Petitioners' ordeal;
  - b. Not being permitted to reasonably communicate with their families who were left in distress and anguish for the duration of their journey to Nairobi, especially when from the beginning, even the Petitioners themselves had no clue as to their final destination;  
  
Declining to have the Petitioners access warm clothing to protect them from the cold and adverse weather throughout the laborious journey, a situation that has resulted in the 1st Petitioner suffering bouts of fever which has required professional medical attention and attendant expenses;  
  
Exposing the Petitioners to financial embarrassment as they were without notice, unexpectedly spirited from the jurisdiction of this Honourable Court into a location where it has been difficult to easily access finances to cater for basic needs, compelling them to rather reluctantly solicit for funds from friends and family in order to be able to afford fresh unnecessarily to 3d Parties; clothing, accommodation and food thus having them indebted
  - e. Compelling the Petitioners to undergo the humiliation of robustly lobbying their friends and family to raise cash on emergency basis in order to secure their freedom on f. police cash bail at midnight so as to avoid spending the night under detention;
  - f. Creating an atmosphere where the Petitioners have to literally spend a week in the city of Nairobi from their loved ones before being arraigned in a court of law, a situation that could have been seamlessly handled had the Respondents simply summoned the Petitioners, who are officers of the court, thus averting the current turmoil and inconveniences facing them;
  - g. Not affording the Petitioners, as officers of the court, the courtesy of notifying them of an intention to arrest and transport them to the city of Nairobi, so that they could have been able to properly prepare for the arduous journey to Nairobi given that no claim has been made of them being flight risks, as evidenced by the fact that they have been released on police cash bail.
4. Article 29 of *the Constitution* of Kenya, 2010, more so Article 29(a) & (b) affirms that 'every individual has the right to freedom and security of the person', which encompasses the right not to be arbitrarily deprived of freedom or detained without



just cause or trial, and the manner in which the Petitioners ended up in the city of Nairobi was a clear violation of this Article, leading to unwarranted restriction of their personal liberty, especially in the light of the excuse furnished for their removal to the city of Nairobi.

14. Article 49 of *the Constitution* of Kenya, 2010, specifically Article 49(I) (a) demands that an arrested person, inter alia, be 'promptly informed in a language that he understands of the reasons for his arrest', a right which the Respondents blatantly disregarded as it was only at midnight in the city of Nairobi that they were finally given reasons for their arrest and removal from the jurisdiction of this Honourable Court.
15. This Honourable Court is charged with the fundamental duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights" in terms of Article 21 (1) of *the Constitution* of the Republic of Kenya, 2010 and to this end, the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights" in terms of Article 23 (1) of *the Constitution* and in doing so, the High Court also has the jurisdiction to interpret *the Constitution* including the question as to whether any law is consistent with or in contravention of *the Constitution* in terms of Article 165 (3) (d).

### **Submissions By The Petitioners**

10. The petitioners submitted contrary to the sentiments of Chief Inspector Nicholas Makaya Subano, who claims that the petitioners seek to evade prosecution, the petitioners deny the claim that they are immune to prosecution and pray that the prosecution be conducted per *the constitution* and relevant laws governing criminal trials.
11. It was their submission that the inspector had admitted to arresting the petitioners in Kakamega town on 12<sup>th</sup> June 2024 and charging them at Milimani Law Courts in Miscellaneous Criminal Application No. E206 of 2024.
12. They submitted that they, as accused persons they are entitled to a fair trial as per Article 50 (1) and under section 72 of the *Criminal Procedure Code*, they ought to be tried in the geographical area where the offence was committed.
13. They faulted the chief inspector's allegations that the judicial officers I Kakamega might have been compromised in the case as mere allegations unsupported by evidence and cited the case of Rep. Vs Chief Magistrates Court & 2 others Ex-Parte Patrick Gichohi & Another. "the independence of the Judiciary is a constitutional guarantee. Allegations of bias or improper conduct against a judicial officer must be supported by a cogent evidence"
14. They aver that the chief inspector was wrong in limiting the jurisdiction of Kakamega Law courts, as the jurisdiction of the High Court extends to all courts, considering most witnesses and evidence are in Kakamega, and those outside the jurisdiction can join the proceedings virtually.

### **Analysis And Determination**

15. I have analyzed the petition and submission before me as well as the authorities cited by the parties herein.



16. What the petitioner seeks from this court is a declaration that their rights have been violated; they claim that they were arbitrarily arrested and taken outside their jurisdiction and charged in Nairobi, which is outside the place where the offence allegedly occurred.
17. It was up to the petitioners to satisfy the evidential burden that a specific right exists and which right has been violated or restricted, besides pleading the same with reasonable particularity and precision:
18. Was the arrest of the Petitioners by the 2<sup>nd</sup> Petitioners agents unlawful thus arbitrary.
19. The police have the powers to arrest as conferred by various statutes but when exercising the powers bestowed on them they are expected to observe the rights of the person they are arresting.
20. Article 49 protects the interests of the arrested person. The said article embodies rules which have always been regarded as vital and fundamental for safeguarding personal liberty in almost all legal systems where the Rule of Law prevails. The abovementioned article provides as following:

“ 49. Rights Of Arrested Persons

- (1) An arrested person has the right—
  - (a) to be informed promptly, in language that the person understands, of
    - (i) the reason for the arrest;
    - (ii) the right to remain silent; and
    - (iii) the consequences of not remaining silent;
  - (b) to remain silent;
  - (c) to communicate with an advocate, and other persons whose assistance is necessary;
  - (d) not to be compelled to make any confession or admission that could be used in evidence against the person;
  - (e) to be held separately from persons who are serving a sentence;
  - (f) to be brought before a court as soon as reasonably possible, but not later than—
    - (i) twenty-four hours after being arrested; or
    - (ii) if the twenty-four hours' end outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
  - (g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and



(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

(2) A person shall not be remanded in custody for an offence if the offence”

21. The rights are also protected under Article 9 of the International Covenant on Civil and Political Rights. It states as follows:

“ Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and by such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

22. Section 58 of the [National Police Service Act](#) gives a police officer the power to arrest in these terms:

“ 58. Power to arrest without a warrant

Subject to Article 49 of [the Constitution](#), a police officer may, without a warrant, arrest a person—

- (a) ...
- (b) ...
- (c) whom the police officer suspects on reasonable grounds of having committed a cognizable offence;

23. As a general rule, an arrest of a suspect should not be made unless and until his or her case has been investigated with sufficient evidence requiring an answer to the complaint.

24. The Petitioners aver that the police disregarded the provisions of article 49 at the time of the arrest for they were only informed of the reason of the arrest at mid night in Nairobi all that they had not been even allowed to communicate with anyone.



25. The respondents never opposed the petition therefore the petitioners allegation on this remains unchallenged .
26. The arrest was lawful for the police have powers to arrest but failure to adhere to the provisions of article 49 of *the constitution* made the arrest arbitrary thus unconstitutional for it was in contradiction of article 49,29 and 28.
27. Was the act of the 2<sup>nd</sup> respondent removing the petitioners from the Jurisdiction of this court and charging them before Milimani Law Courts in Nairobi procedural.
28. Section 71 of the criminal procedure code state “ Subject to the provisions of section 69, and to the powers of transfer conferred by sections 79 and 81, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence.
29. Section 72 of the *Criminal Procedure Code* Part IV of the Code sets out the law on place of trial It provides:-
 

When a person is accused of the commission of an offence by reason of anything which has been done or of any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued.
30. The import of section 72 of the Code is clear: a person should be tried in a court which has the local geographical jurisdiction of the place where the act was done or the consequences of the act felt.
31. Nicholas Mayaka Subano the investigating officer in his affidavit in reply to the notice of motion in Paragraph 23 he affirmed that offences were committed partly in Mombasa and partly in Kakamega. Therefore in line with section 74(b) of the criminal procedure code the petitioners should be tried either in Kakamega or in Mombasa but not in Nairobi.
32. Section74(b) provides “trial where place of offence is uncertain when an offence is committed partly in one local area and partly in another, it may be tried by a court having the Jurisdiction over any of those local areas”.
33. From the above provisions it is clear that the respondents were wrong to remove the petitioners from this courts jurisdiction to Nairobi, the other alternate jurisdiction should have been Mombasa.
34. The act of taking the Petitioners and decide to charge them in Milimani Law Courts Nairobi infringed petitioners rights to fair trial as enshrined in Article 50 of *the Constitution*, access to justice article 48 and Article 47 on fair administrative action , it will mean that they would have to spend a lot to defend themselves in Nairobi.
35. According to the respondent reason why they prefer the trial being in Nairobi is that there is likelihood the trial wont be fair if held in Kakamega Law Courts for the Petitioners practice within Kakamega town implying that the Judicial officers in Kakamega will be partial or biased.
36. To me this is a baseless allegation for it is not supported by any evidence. The doctrine of presumption of impartiality of a judicial officer is cardinal principle in rule of law.
37. It is the view of this Court that it is both expedient for the ends of justice as well as appropriate for the convenience of the parties and their witnesses that this case be heard within the Jurisdiction of this Court.



38. The upshot of the above is that , the petition has merit it is hereby allowed and I give the following orders:-

- i. A declaration that the arrest and removal of the Petitioners from the jurisdiction of this Honourable Court to the City of Nairobi was arbitrary, unlawful and unconstitutional and without any lawful justification given that the alleged offences arose within this Honourable Court's Jurisdiction is hereby issued.
- ii. A declaration to the effect that there is no law under the Republic of Kenya which limits trials of persons arrested over complaints investigated by the Banking Fund Unit of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to criminal courts located in the city of Nairobi is hereby issued.
- iii. An order that the alleged offence of conspiracy to defraud or any other offence related to this Petition which is intended to be preferred against the Petitioners ought to be tried by courts within the Jurisdiction of the High Court of Kenya sitting at Kakamega is hereby issued.
- iv. No orders as to costs for the Respondents did not file any response to the Petition.

39. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18<sup>th</sup> DAY OF JULY, 2025.**

**S. MBUNGI**

**JUDGE.**

In the presence of:-

Elizabeth Angong'a-Court Assistant

Ms Ikumbi holding brief for Ms Mukwana for the Petitioners present online.

Parties absent.

