



**Ngugi v Republic (Constitutional Petition E645 of 2024) [2025] KEHC 12544 (KLR)  
(Constitutional and Human Rights) (10 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12544 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E645 OF 2024**

**AB MWAMUYE, J**

**SEPTEMBER 10, 2025**

**IN THE MATTER OF ARTICLES 22, 23, 27, 28, 29, 50  
AND 165 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE PENAL CODE CAP 63 LAWS OF KENYA**

**BETWEEN**

**HEZRON NGUGI ..... PETITIONER**

**AND**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Vide Petition dated 18<sup>th</sup> November 2024, the Petitioner seeks protection of his rights under *the Constitution* of Kenya 2010, after he was charged with conspiracy to commit a felony contrary to section 393 of the Penal Code.
2. The Petitioner contends that the current charge violates his constitutional rights, and urges this Honourable Court to quash the current criminal proceedings on the grounds that they relate to a matter of civil obligation and that they are an abuse of legal process and infringe on his constitutional rights.
3. The Petitioner is therefore seeking the following orders:
  - a. A declaration that the criminal proceedings against the Petitioner constitute an abuse of legal process and infringe on his constitutional rights.



- b. An order staying and quashing the current criminal proceedings on the grounds that they relate to a matter of civil obligation.
  - c. Any other relief this Honourable Court may deem just and fit.
4. The Petitioner also filed an affidavit in support of the Petition dated 18<sup>th</sup> November 2024 sworn by Hezron Ngugi, the Petitioner herein, and averred that the charge against him infringes on his right to a fair trial under Article 50 and his right to access to justice under Article 48 of the Constitution of Kenya, 2010.
  5. The Petitioner further avers that he stands to suffer irreparable damage to his reputation and livelihood should the current proceedings continue unjustly.
  6. In response and in opposition of the Petition, the Respondent filed Grounds of Opposition dated 14<sup>th</sup> February 2025 on the grounds that the Respondent acted within the confines of the Constitution particularly Article 157 of the Constitution and all other laws incidental thereto. Further, that the Petitioner has not demonstrated that the Respondent has not acted independently or has acted capriciously, in bad faith or has abused the process in a manner to trigger the High Court's intervention.
  7. The Respondent asserts that the prayers sought for by the Petitioner should not be granted as the same would curtail the Respondent's statutory and constitutional mandate to investigate and prosecute a criminal matter to its logical conclusion. They posit that the Petitioner has not demonstrated that the Respondent acted without or in excess of the powers conferred by the law or has infringed, violated, contravened or in any other manner failed to comply with or respect the provisions of the Constitution of Kenya 2010 or any other provision thereof.
  8. According to the Respondent, Article 245(4) of the Constitution and Section 14 of the Police Act Cap 84 Laws of Kenya mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed. They further stated that Section 193(A) of the Criminal Procedure Act Cap 75 Laws of Kenya provides that notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any civil proceedings shall not be a ground for any stay, prohibition or delay in criminal cases.
  9. They contend that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court where the applicant is assured of fair trial and protection of the law and which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of any intended charges. They further stated that the Petitioner has not demonstrated a prima facie arguable case on breach of Constitutional provision and should therefore be dismissed.
  10. The Petition was canvassed by way of written submissions, and in compliance all parties filed their submissions.

#### **Petitioner's Submissions;**

11. The Petitioner filed written submissions dated 25<sup>th</sup> July 2025 where he submitted that his continued prosecution serves no public interest and undermines the rule of law under Article 10 (2)(b) of the Constitution resulting to an abuse of the legal process. Reliance was placed on the Supreme Court case Petition No. 36 of 2014, Joseph Ndung'u Kagiri v Republic where the Court held that the criminal process must not be invoked for ulterior purposes. He also relied on the case of William Ruto & Another v Attorney General [2010] eKLR where the Court emphasized that the criminal process must



not be invoked for ulterior purposes. The Petitioner prayed that this Court should intervene and halt proceedings instituted for a collateral purpose as stated in *Patrick Kariuki v DPP* [2016] eKLR.

12. The Petitioner further submitted that criminal proceedings should not be permitted to run where they are oppressive, vexatious or in violation of constitutional rights since prosecuting a matter devoid of criminality collapses the very framework within which a fair hearing can occur. Reliance was placed on the case of *Kuria & 3 Others v Attorney General* [2002] 2KLR 69.
13. According to the Petitioner, the High Court can intervene where prosecutorial discretion is exercised for improper purpose and that since this Petition discloses a credible threat to constitutional rights that will persist if the criminal trial continues, it is in the interest of justice that the proceedings be halted to prevent further prejudice and to preserve the constitutional separation between civil and criminal jurisdictions. Reliance was placed in the following cases: *Meixner & Another v Attorney General* [2005] 2 KLR 189, *Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General* [2011] eKLR, *Republic v Chief Magistrate's Court at Mombasa ex parte Ganijee & Another* [2002] 2 KLR 703 and *Republic v Attorney General & Another ex parte Kipngeno Arap Ngeny* [2001] eKLR.
14. The Petitioner filed further submissions dated 23<sup>rd</sup> May 2025 in response to the Grounds of Opposition filed by the Respondent and submitted that he has demonstrated that his constitutional rights are being threatened at the hands of the Respondent due to improper exercise of discretion by the office of the Director of Public Prosecution.
15. He contends that the grounds of opposition are general assertions and fail to adequately address the specific constitutional violations outlined in the Petition and that this Court has jurisdiction to intervene at any stage where fundamental rights are at risk of being violated as stipulated under Article 22 of *the Constitution*.

#### **Respondent's Submissions;**

16. The Respondent filed submissions dated 28<sup>th</sup> May 2025 and submitted that the Directorate of Criminal Investigations (DCI) was undertaking a lawful duty by investigating the complaint that had been lodged by the Interested Party and further that the Petitioner has failed to demonstrate that the DCI undertook investigations whimsically and without due regard to the standing orders. The Respondent argues that in the absence of proof that the principles of natural justice were not adhered to, this court should be reluctant to interfere with the mandate of the Respondent. Reliance was placed in *Pauline Raget Adhiambo Agot v DPP and 5 Others* (2010) Petition No. 446 of 2015, *Republic v The Commissioner of Police & the Director of Public Prosecution Ex Parte Michael Monari & Another* Misc. Application No. 68 of 2011, *R vs Chancellor Clt Cambridge*, (1723) 1 Stra.577 Led Raynn 1334 8 Mod 145 *Cascade Company Limited vs Kenya Association of Music Production (KAMP) & Others*, Petition No. 7 of 2014.
17. The Respondent contends that the Petitioner has failed to demonstrate how the Office of the Director of Public Prosecutions (ODPP) acted contrary to the public interest, the interests of the administration of justice, or permitted an abuse of the legal process. While the Petitioner has a right not to be subjected to unlawful or unwarranted criminal proceedings, the Director of Public Prosecutions equally bears a constitutional and statutory duty to prosecute offences and ensure that individuals reasonably suspected of criminal conduct are brought before the law. The Respondent asserts that the law seeks to maintain a delicate balance between the rights of an individual and the public interest in the enforcement of justice a balance which this Court is now called upon to preserve. In this regard, reliance is placed on the decision in *Maina & 4 Others v Director of Public Prosecutions & 4*



Others, Constitutional Petition Nos. E106 & 160 of 2021 (Consolidated); [2022] KEHC 15 (KLR) (Constitutional and Human Rights).

18. According to the Respondent, independence of the Judiciary is a key tenet in the administration of justice thus the Court is independent and impartial and the Petitioner will enjoy the right to equal protection and a fair administrative process since the matter will be decided on merit. Reliance is placed in the case of *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR.
19. They further contend that there is no evidence that the Respondent exceeded jurisdiction, breached rules of natural justice or considered extraneous matters that were actuated by malice in undertaking the investigations against the Petitioner and that he is merely inviting the court to analyze the evidence and make a conclusion as to whether there is a case or not, which role lies with the trial court.

### **Analysis And Determination;**

20. I have considered the pleadings, arguments by parties and the decisions relied on. The issue that arises for determination is whether the Petitioner's constitutional rights have been infringed upon that warrants this court to halt criminal proceedings before the trial court.
21. The threshold of a constitutional petition was clearly formulated in the case of *Anarita Karimi Njeru vs the Republic* (1976-1980) KLR 1272. It should be noted that the aforesaid case has been relied upon from time to time again to demonstrate the said threshold.
22. Let me begin by reiterating that this is a constitutional petition in which the Petitioner alleges violation of his constitutional rights. The underlying issue is the Petitioner's challenge to the exercise of the powers of the Director of Public Prosecutions (DPP) and the DCI and the contention that their actions have resulted to the infringement of his rights under *the Constitution*.
23. The legal basis for the exercise of prosecutorial powers in Kenya is *the Constitution* of Kenya, 2010. Article 157 of *the Constitution* establishes the Office of the Director of Public Prosecutions (ODPP). The *Office of the Director of Public Prosecutions Act* No. 2 of 2013 (the ODPP Act) was also enacted to give effect to Articles 157 and 158 of *the Constitution*, other relevant provisions of the law and for connected purposes.
24. Section 4 of the ODPP Act provides for the fundamental principles which guides the DPP in prosecution of cases. The principles include; impartiality and gender equity; diversity of the people of Kenya; rules of Natural Justice, promotion of public confidence in the integrity of the office, the need to serve the cause of justice; prevention of abuse of the legal process and public interest; and, promotion of constitutionalism. The ODPP Act, among other statutes, variously provides for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers of the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed.
25. The DPP has constitutional mandate and discretion to initiate, continue and, or terminate criminal prosecutions. In doing so, the DPP does not require consent or permission from any person or authority. The DPP must, however, exercise his powers in a manner that has regard to public interest, interest of administration of justice and the need to prevent and avoid abuse of the legal process.
26. For the Petitioner to succeed, he has to show that the DPP, in deciding to mount the prosecution against him, the decision was not made in public interest and interest in the administration of justice, but that the decision is an abuse of the legal process.
27. The Petitioner's case is clear from the depositions in his affidavits and submissions is that his rights under Articles 22, 23, 25, 27, 28, 29 and 50 of *the Constitution* were violated since he was charged with



- conspiracy to commit a felony contrary to section 393 of the Penal Code, a charge that arises from a civil transaction involving a loan agreement. According to the Petitioner, the decision of the Respondent to charge him without discovery of any new evidence or circumstances is unlawful and constitutes an abuse of prosecutorial powers and an improper use of the criminal process.
28. I am not persuaded that the Petitioner has demonstrated that the decision to prosecute him is contrary to the public interest, inimical to the interests of the administration of justice, or amounts to an abuse of the legal process. What emerges from the Petitioner's arguments is, rather, the assertion that the criminal charges preferred against him stem from a civil dispute, and as such, the matter ought to be adjudicated before a civil court rather than through criminal proceedings.
  29. It is my considered view that the concerns raised by the Petitioner do not fall within the exceptions contemplated under Article 157(11) of *the Constitution*. The Petitioner has not established that the decision to prosecute him is contrary to the public interest, does not promote the interests of the administration of justice, or constitutes an abuse of the legal process. The contention that the dispute is, in the Petitioner's view, purely civil in nature cannot, on its own, justify the halting of criminal proceedings, as the true nature of the matter is a question that can only be determined upon evaluation of the evidence presented at trial.
  30. Similarly, on whether or not there is evidence propelling the criminal charges against him or not can only be answered by stating that sufficiency of evidence or otherwise to be led during trial, is a matter for the trial court and not this court.
  31. In this regard, the decision of the Court of Appeal in *Director of Public Prosecutions v Martin Mina & 4 Others* [2017] eKLR is persuasive. The Court held that it is not the role of the High Court, particularly in judicial review proceedings, to evaluate the sufficiency of the evidence underlying contemplated criminal charges. That responsibility lies with the trial court, or the High Court sitting on appeal in a criminal matter. The Court emphasized that a judicial review court should not assume the functions of a trial court, except in the clearest of cases. It therefore follows that the question of whether the evidence is sufficient to support the prosecution of the Petitioner is a matter to be determined by the trial court, not this Court.
  32. In my view, it is the DPP's mandate, if he is satisfied that there is sufficient evidence to sustain criminal prosecution, to initiate and continue such prosecution. The court would only interfere if the Petitioner demonstrated to the satisfaction of this Court, that the DPP was exercising his discretion contrary to Article 157(11) of *the Constitution*.
  33. In the present petition, the Petitioner has not pointed out how the DPP has abused his discretion in making the decision to prosecute him, in violation of Article 157(11) to call on this court's review jurisdiction to halt the prosecution.
  34. It was on that respect that the Court of Appeal held in *Meixner & Another v Attorney General* [2005] 2 KLR 189, that judicial review is concerned with the decision-making process and not with the merits of the decision itself. From the material placed before the court, the Petitioner has not satisfied the threshold to persuade this court exercise its jurisdiction and halt the criminal proceedings in the magistrate's court.
  35. The National Police Service on the other hand is a creature of *the Constitution* of Kenya, 2010. Article 239 (1) (a), (b) and (c) of *the Constitution* of Kenya provides that: -  

“The National Security organs are the Kenya Defence Forces, the National Intelligence Service and the National Police Service.”



36. Section 28 of the *National Police Service Act* No. 11 of 2011 stipulates that: -
- “There is established the Directorate of Criminal Investigations which shall be under the direction, command and control of the Inspector General.”
37. Article 245 (2) (b) of *the Constitution* of Kenya further provides that: -
- “The Inspector General shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.”
38. Notably, investigations are a mandate of the National Police Service (NPS). They are legal processes aimed at fact finding of commission of crime in our justice system and do not amount to infringement in the rights or fundamental freedoms of any person who is under investigations per se. It is an independent function that is to be carried out by the Inspector General without direction from any other person.
39. Section 51 of the *National Police Service Act* empowers a police officer to among others: collect and communicate intelligence affecting law and order, to detect offenders, and to bring them to justice in addition to investigating crime.
40. This Court cannot purport to direct the Respondent on the manner in which investigations should be conducted or when criminal proceedings ought to be instituted. To do so would amount to an encroachment upon the constitutional mandate vested in the investigative and prosecutorial agencies. The mere fact that the Petitioner may feel inconvenienced by the investigative process does not, without more, constitute sufficient grounds for judicial intervention. The Court will only interfere where there is a clear, demonstrable violation, breach, or infringement of *the Constitution* or the law, warranting its intervention to safeguard constitutional rights and uphold the rule of law.
41. As long as the investigations are carried out in accordance with the law and rules, the processes thereto must be allowed to run their course for proper administration of justice. Proof of violation, infringement or threat or contravention of a person’s right under *the Constitution* of Kenya required.
42. The courts have similarly addressed their mind to the powers and functions of the National Police Service. The Court in *Republic v Commissioner of Police & another ex-parte Michael Monari & another* [2012] eKLR where the court held thus:
- “It is also clear in my mind that the police have a duty to investigate on any complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in responsible manner, the High Court would be reluctant to intervene.”
43. In light of the foregoing having considered the circumstances of this case, the Court finds that the Petitioner has not demonstrated any violation or infringement of their rights under the cited constitutional provisions. The Petitioner failed to establish how their fundamental rights were breached, denied, or threatened in a manner that would justify the invocation of this Court’s protective jurisdiction. In the absence of clear and substantiated claims of infringement, contravention, or violation of constitutional rights, no basis has been laid for the Court’s intervention.



44. This Court is firmly of the view that the Petitioner seeks to restrain the Respondent from exercising its investigative and prosecutorial functions as mandated by *the Constitution* of Kenya. Consequently, this Court cannot act ultra vires *the Constitution*, and the Petitioner is therefore not entitled to the reliefs sought in this Petition.
45. The Petition is hereby found to be without merit. The declarations sought, as well as the orders to stay and quash the ongoing criminal proceedings against the Petitioner, are accordingly declined and dismissed. Petition dismissed with no orders as to costs.

Orders accordingly. File closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**BAHATI MWAMUYE**

**JUDGE**

In the presence of: -

Counsel for the Petitioner – Ms. Swaka

Counsel for the Respondent – Mr. Mulati h/b Ms. Ntabo

Court Assistant – Ms. Lwambia

