



Republic & 3 others v Titus Yoma & 18 others; Independent Medico-Legal Unit & 2 others (Interested Parties) (Criminal Case E074 of 2022 & Miscellaneous Criminal Application E033 of 2023 (Consolidated)) [2024] KEHC 151 (KLR) (Crim) (18 January 2024) (Ruling)

Neutral citation: [2024] KEHC 151 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E074 OF 2022 & MISCELLANEOUS
CRIMINAL APPLICATION E033 OF 2023 (CONSOLIDATED)
K KIMONDO, J
JANUARY 18, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

TITUS YOMA & 11 OTHERS SUSPECT

AS CONSOLIDATED WITH

MISCELLANEOUS CRIMINAL APPLICATION E033 OF 2023

BETWEEN

VOLKER EDAMBO & 2 OTHERS APPLICANT

AND

THE INDEPENDENT POLICING & OVERSIGHT AUTHORITY & 6 OTHERS RESPONDENT

AND

INDEPENDENT MEDICO-LEGAL UNIT & 2 OTHERS ... INTERESTED PARTY

RULING

1. The 2nd suspect (Titus Mutune) lodged a notice of motion dated December 20, 2022 praying for, among other reliefs, postponement of the plea pending the hearing of a constitutional petition; and,



- that the matter be certified as raising substantial questions of law to be heard by an uneven number of judges, being not less than three, to be assigned by the Chief Justice pursuant to article 165 (4) of the Constitution.
2. A similar application by the 1st suspect (Titus Yoma) through a separate notice of motion dated January 26, 2023 was withdrawn on July 31, 2023.
 3. The background and history of the litigation is material. The Director of Public Prosecutions (hereafter the DPP) brought information to the High Court dated October 26, 2022 charging the above suspects with various counts of murder, rape and torture as crimes against humanity contrary to sections 6 (3) (a) & (b) and 7 (1) (f) of the International Crimes Act and article 28 (b) of the Rome Statute of the International Criminal Court (hereafter the Rome Statute).
 4. Prior to the filing of the Information, the DPP had applied *ex parte* to the High Court in Miscellaneous Criminal Application No. E310 of 2022 for leave to redact the identities of the victims or prospective witnesses. The leave was granted on October 26, 2022.
 5. The offences are alleged to have taken place on diverse dates in the month of August 2017 at Nyalenda, Kisumu East Sub-County, Kisumu County. To put the matter into perspective, following the disputed results of the general election of 2017, violence spread out to the informal settlements in Nyalenda, Kisumu. The suspects are all police officers and are accused of being the commanders or in effective responsibility for police officers under their control in the region.
 6. The information charges them for the murder of Baby Samantha Pendo, and failing to submit the matter to competent authorities for investigation. They are also charged for “widespread acts of sexual violence against civilian women” and various acts of torture against civilians in an operation dubbed Operation Post-Election Mipango.
 7. It is also worth of note that an inquest had been carried out in Chief Magistrates Court Kisumu Inquest No. 6 of 2017. The learned magistrate, B.M.A Omollo, returned a finding that the named police officers “were liable for the death of Baby Samantha Pendo” and forwarded the file to the DPP “to deal with the findings in accordance with the law”. I must point out that not all the suspects now before me were parties to the inquest at Kisumu.
 8. On October 31, 2022, I issued directions in chambers that the summons be served upon the suspects to take plea on November 4, 2022. Some of the suspects later appeared before Ogembo J on November 14, 2022 and were granted personal bonds of Kshs 200,000. The plea was deferred to November 21, 2022 with further summons to the 4th, 10th and 11th suspects.
 9. On the latter date, the 4th and 10th suspects appeared and were granted personal bonds on similar terms. The 11th suspect (Mohamed Baa) failed to appear and a warrant of arrest was issued.
 10. Before proceeding any further, it is important to point out that there are two other related filings. The first is a constitutional petition dated November 9, 2022 by the firm of Nzaku & Nzaku Advocates filed at the Constitutional and Human Rights Division as Petition Number E499 of 2022 Volker Edambo & 2 others v Independent Policing & Oversight Authority & 6 others.
 11. The original applicants in that petition were the 7th, 9th and 12th suspects. In the course of the proceedings, and by a further motion dated November 16, 2022, the 1st suspect was enjoined into the petition. The petition sought various declarations and orders, primarily to prohibit the respondents from arresting or prosecuting them. Contemporaneously with the petition, the applicants filed a notice of motion seeking conservatory orders to bar the respondents from acting on the decision to charge or arresting the suspects.



12. On November 10, 2022, the Court ordered that the petition be transferred to the Criminal Division. The learned judge (Ong’udi J), found that the petition primarily related to pending criminal charges; and, that a date for plea had already been set for November 14, 2022. The petition was registered and re-numbered as Miscellaneous Criminal Application No. E033 of 2023.
13. That application and the original petition are contested by all the 7 respondents and interested parties either by grounds of opposition or replying affidavits. In particular, the 6th and 7th respondents (Noordin M. Haji and Jacinta Nyamosi) who being (or were) officers in the Office of the Director of Public Prosecutions, plead misjoinder or mootness of the action.
14. By a considered ruling dated November 21, 2022, the learned judge (Bwonwonga J) found that the prayers for a conservatory order to restrain the respondents from arresting or charging the applicants on the Information dated October 26, 2022 had “been overtaken by events by virtue of the order of Ogembo J” earlier mentioned and that the matter had now become “moot or academic”.
15. In view of the above order, I find that prayers 2 and 3 of the notice of motion dated November 9, 2022 by the 7th, 9th and 12th suspects to be completely spent.
16. The other filing I referred to is a notice of motion dated 26th January 2023 brought by the firm of Andrew Makundi Advocates on behalf of the 1st suspect, Titus Yoma. He seeks to be supplied in advance with the evidence the prosecution intends to rely on; and, for a declaration that the charges “do not meet the threshold of crimes against humanity”. He also prays for a finding that the [International Crimes Act](#) as well as article 28 (b) of the [Rome Statute](#) violate article 245 of the [Constitution](#).
17. I will now return to the prayer by the 2nd suspect for empanelment of a bench. He relied on the affidavit sworn on 20th December 2022 and a further deposition sworn on 3rd January 2023. His case is that the issues in the criminal trial are novel and weighty. Learned counsel, Mr. Munoko, submitted that this case raises substantial issues of law. For instance, there will be need to resolve conflicts between the [International Crimes Act](#), which pre-dates the [Constitution](#), and the Rome Statute; and, to define the applicable Regulations or procedures for a trial before the High Court.
18. He also contended that the charges disclosed in the Information do not meet the threshold of international crimes based on “command structure”; and that both the local statute and the Rome Statute are in conflict with article 245 of the [Constitution](#).
19. He argued further that the [International Crimes Act](#) needs to be aligned with sections 8 and 8A of the [National Police Service Act](#). In his view, the entire prosecution is driven by “civil society organizations to coin crimes that can be prosecuted under municipal laws to be crimes against humanity...in order to attract donor funding...in the name of justice for Baby Pendo and other victims”
20. The applicant relied on detailed submissions dated August 14, 2023 and a list of authorities. Reliance was also placed on, among other decisions, David [Ndiu & 4 others v AG & others](#), High Court, Nairobi, Pet. E282 of 2020 [2020] eKLR and [Kiriro wa Ngugi & 19 others v AG & others](#), High Court, Nairobi, Pet. 254 of 2019 [2020] eKLR.
21. At the hearing of the notice of motion, all the other suspects except the 11th suspect (who is still at large) supported the prayer for empanelment of a bench. I should add that the 1st suspect relied on the submissions dated August 14, 2022 while the 7th, 9th and 12th suspects relied on submissions dated May 7, 2023 together with a list of authorities and case digest.
22. The motion was however vehemently opposed by the 1st respondent, the Independent Policing & Oversight Authority (hereafter the IPOA) *vide* grounds of opposition dated November 16, 2022, a



- replying affidavit by the investigating officer, George Ayuo, of even date and submissions dated July 17, 2023.
23. The application is also fervently opposed by the DPP and on behalf of the 3rd to 7th respondents. The relevant grounds of opposition are dated February 13, 2023, a replying affidavit sworn by Jecinta Nyamosi on 7th February 2023 as well as submissions dated 27th July 2023.
 24. In a synopsis, the DPP contends that the issues raised can be determined by a single judge in line with article 165 of the Constitution; and, that a majority of the arguments by the applicant can be addressed during the trial. It was submitted that the applicant has misapprehended the distinct procedures between a trial at the International Criminal Court (ICC) and a local trial before the High Court.
 25. It was further submitted that the issues in this case are not new at all. Reliance was made on Walter Osapiri Barasa v CS Ministry of Interior & National Co-ordination & 6 others, High Court, Nairobi, Pet. 488 of 2013 [2014] eKLR.
 26. The application is equally opposed by the 2nd respondent, the Kenya National Commission on Human Rights (hereafter the KNHCR) through a replying affidavit sworn on 4th April 2023 by Dr. Bernard Mogesa, the CEO of KNHCR and submissions of even date.
 27. The motion is also contested by the Independent Medico-Legal Unit (1st interested party) through submissions dated April 3, 2023. It is equally opposed by the International Justice Mission (3rd interested party) through an affidavit sworn on 3rd April 2023 on behalf of the victims by Benson Shamala, the Country Director, as well as submissions dated 4th April 2023.
 28. In summary, it was contended that the constitution of a bench is unmerited and will only engender further delay of justice. Learned counsel, Mr. Mbanya, relied on the replying affidavit dated 4th April 2023. He submitted that section 8 of the International Crimes Act bestows jurisdiction on the High Court and not a panel of judges. Referring to sections 6, 7 and 37, he argued that there are no internal conflicts within the statute or between it and Article 245 of the Constitution.
 29. On December 8, 2023, I heard further arguments from learned counsel for the disputants.
 30. I take the following view of the matter. The remainder of the petition and the criminal trial are still pending. It would be premature to decide whether the Information dated October 26, 2022 is lawful. For similar reasons, I resist the temptation to delve too deep into the objections to prosecution of the suspects under the International Crimes Act instead of the Penal Code. In the event that the trial takes off, some of those issues may as well form lines of defences. The less I say about it the better.
 31. The key question for determination at this stage is whether the petition raises raising a substantial question of law calling for empanelment of an uneven number of judges. I will commence with article 165 (4) of the Constitution which provides:

Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
 32. In Adrian Kamotho Njenga v Murang'a County Government, High court, Murang'a, Constitutional Petition 2 of 2021 [2022] eKLR, I was confronted with a similar question. I observed that "there is no demarcation of what comprises a substantial question of law". Paraphrased, each case must turn on its own facts.



33. The Supreme Court has however given clear guidance in *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* [2013] eKLR. In *Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others*, Nairobi Civil Appeal 4 of 2015 [2017] eKLR, the Court of Appeal, relying on the Hermanus Steyn Case [supra], adopted with modification the following four principles:
- (i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
 - (ii) The applicant must show that there is a state of uncertainty in the law;
 - (iii) The matter to be certified must fall within the terms of article 165 (3) (b) or (d) of the *Constitution*;
 - (iv) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.
34. Having expounded the principles, the Court of Appeal finally held:
- (43) It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of article 165(4) of the *Constitution* is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed. [Underlining added]
35. It is true as urged by the applicant that the criminal trial under the framework of the *International Crimes Act* may be ground-breaking. But it is by no means the first such litigation before the High Court. A case in point is the decision by Mwongo J, in *Walter Osapiri Barasa v CS Ministry of Interior & National Co-ordination & 6 others* [supra]. Novelty of a question before the court; or, the mere fact that the trial will spur great public interest does not necessarily raise a substantial point of law.
36. The *International Crimes Act* dates back to the year 2008. Its enactment was informed by the post-election violence that engulfed the Nation earlier that year. I agree with the applicant that the statute may not have undergone necessary amendments to align it fully with the *Constitution*; and, that Regulations under the Act may not have been enacted. That is a matter that can conveniently be addressed by the single judge and guided by section 7 (1) of the sixth schedule to the *Constitution*.
37. I have also kept in mind that the alleged offences occurred in Kenya. The DPP has opted to conduct the trial before the High Court. A close reading of the *International Crimes Act* shows that the procedures to be applied in a trial before the ICC and one before the High Court are markedly different.
38. Again, the single judge will have to determine whether the High Court's jurisdiction in the criminal matter has been properly invoked; whether sections 6, 7, 8 and 37 of the Act or Article 28 (b) the Rome Statute provide sufficient foundation for the charges and the trial; whether the Act is inconsistent with article 245 of the *Constitution* or any other provision; and, whether the Act conflicts with other laws including the *National Police Service Act*.
39. The Information charges the suspects with offences of murder, rape and torture contrary to the *International Crimes Act*. Some of the key questions will be whether the allegations meet the threshold of international crimes and whether the suspects were commanders or in effective responsibility of police officers under their control. I have no doubt that the issues are not easy. But they do not raise



novel or substantial questions of law that cannot be conveniently determined by a single judge of the High Court. See *Okiya Omtatah Okioti & another v Anne Waiguru* [supra].

40. I say all that very carefully and without trying to limit the issues for determination in the remainder of the of the petition. But I have gone to that length to demonstrate that this trial raises difficult issues. But that difficulty cannot be resolved merely by constituting a bench of the same court. It is true that a panel of judges brings more minds to bear on an issue. But the panel's decision does not rank any higher than that of a single judge.
41. In *Murang'a County Government v KTDA* [2020], Murang'a High Court Pet. 36 of 2019 [2020] eKLR, I was again confronted by that dilemma. I then held as follows-
- (11) It is worth noting that an uneven number of judges are not a magic wand: Their decision does not rank any higher than that of a single judge. It is not even binding on any other judge. Any appeal from such a bench ends up before a three-judge panel of the Court of Appeal. See *Gilbert Mwangi Njuguna v Attorney General* Nairobi Petition No. 267 of 2009 [2012] eKLR.
- (12) The futility is demonstrated by the five-judge bench of the High Court that I was privileged to sit in: *International Centre for Policy & Conflict and 4 others v Uburu Kenyatta & others*, Nairobi, High Court Consolidated Petition 552 of 2012 [2013] eKLR. The decision on the issue of costs was overturned by a three-judge bench of the Court of Appeal in *Kenya Human Rights & another v AG & 6 others*, Nairobi Civil Appeal 147 of 2015 [2019] eKLR. [Emphasis added]
42. I also concur with Majanja J in J. *Harrison Kinyanjui v AG & another*, Nairobi High Court Petition 74 of 2011 [2012] eKLR, that reference to the Chief Justice should be "the exception rather than the rule and a higher burden is cast on the party who applies to the court to certify the matter"
43. For all those reasons, I am disinclined to certify this matter as raising substantial questions of law to be heard by an uneven number of judges under article 165 (4) of the *Constitution*. The upshot is that prayer number 2 in the applicant's notice of motion dated December 20, 2022 is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY 2024.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of-

All the suspects except the 11th suspect.

Mr. Munoko for the 2nd suspect/applicant.

Mr. Kiluva holding brief for Mr Makundi for the 1st suspect.

Ms. Jerono for the 4th & 6th suspects.

Ms. Kiget holding brief for Mr. Arusei for the 5th suspect.

Mr. Muriithi holding brief for Mr. Nzaku for the 7th, 9th & 12th suspects.

Ms. Achieng holding brief for Mr. Miyale for the 8th suspect.

Ms. Wafula for the Republic & the 3rd to 7th respondents instructed by the office of the Director of Public prosecutions.

Mrs. Nzwii & Mr. Kinoti for the 1st respondent.



Mr. Osman for the 2nd respondent.

Mr. Sewe & Ms. Luther for the 1st interested party.

Mr. Mbanya for the 3rd interested party.

Mr. E. Ombuna, Court Assistant.

