



Katei v Director of Criminal Investigations & 2 others (Petition E061 of 2022) [2024] KEHC 5233 (KLR) (20 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E061 OF 2022**

OA SEWE, J

MAY 20, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF ARTICLES 10(C), 20(3)(B), 22(1), 23(1)
(F), 28, 47(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF INTENDED CHARGE AND PROSECUTION
OF THE PETITIONER HEREIN**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
27, 29, 48 & 50 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

BETWEEN

BENSON MUTHIANI KATEI PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT



JUDGMENT

1. The petitioner filed this Petition on the 2nd December 2022 to challenge the decision by the respondents to arrest and prosecute him for an alleged offence of obtaining by false pretences. He described himself as an adult male working for gain in Changamwe within Mombasa County. He averred that he is apprehensive that the stage is set for his arrest and imminent prosecution in that he had been summoned to Nyali Police Station with a view of arraignment and plea taking; yet the intended arrest and prosecution is without any proper factual basis or foundation.
2. Accordingly, the petitioner contended that the intended prosecution is a violation of Articles 10(c), 20(3), 23(1), 28 and 47 of the Constitution. In particular, he averred that the infringement is in the form of failure by the 1st and 2nd respondents to act in a manner that contributes to good governance. He further alleged that the decision by the 1st and 2nd respondents was taken in the absence of proper factual basis or foundation. In the premises, the petitioner prayed for the following reliefs:
 - (a) A declaration that Article 47(1) of the Constitution has been violated by the 1st and 2nd respondents;
 - (b) An order of compensation by way of damages to be assessed by the Court;
 - (c) Any further order or relief that the Court deems fit, just and expedient to grant to uphold the rule of law and to protect the constitutional rights and freedoms of the petitioner.
 - (d) Costs of the Petition.
3. The Petition was supported by the affidavit of the petitioner, sworn on 2nd December 2022 to which he annexed several documents in proof of his allegations of violations. In particular, the petitioner deposed that on diverse dates in October 2022, he received money from the sales representative of Luxury Vehicle Imports Limited with instructions to pay taxes for certain imported motor vehicles. He further stated that, since he did not have a registered clearing agent company, he contacted one Susan Mulwa to execute the transaction on his behalf. He therefore transferred the sum of Kshs 953,000 to the account of Susan Mulwa with KCB Bank on the 31st October 2022 and was thereafter given the log books.
4. The petitioner further deposed that, a few days later, his client received a letter from the Kenya Revenue Authority purporting to be a notice issued under Sections 235 and 236 of the East African Customs Management Act, 2004. The letter indicated that payment had not been made for the particular transaction in issue. In the circumstances, he proceeded to file a suit at Mombasa Small Claims Court, being Mombasa SCCCOM No E282 of 2022 and SCCCOMM/284/2022 for the recovery of the monies that he paid to Susan Mulwa.
5. In the meantime, he was summoned to Nyali Police Station by the 1st respondent over the same incident, yet the police station with jurisdiction is Changamwe Police Station. He further contended that, since Susan Mulwa had not denied having received money from him, his impending arrest and prosecution had no factual basis. At paragraph 13 of his Supporting Affidavit, he deposed that he stands to suffer immense prejudice if the intended arrest, arraignment and prosecution take place as he will have the stigma of having been charged with a criminal case hanging over his head.



6. The petitioner was also apprehensive that he would be arrested and given stiff bail terms. He feared the financial implications that his arrest and confinement portend. He consequently filed this Petition for the vindication of his constitutional rights and to preempt any precipitate action against him.
7. The respondents opposed the Petition. They relied on the affidavit of Cpl Fredrick Oduor Ochido, sworn on 8th March 2023. The respondents disclosed that, on the 17th November 2022, one Stanley Makobe, a Zimbabwean national and director of Luxury Vehicle Imports Limited made a report to the effect that he had contracted Ramsford Freight Forwarders Limited through their employee, Benson Muthiani Katei (the petitioner), to clear three used motor vehicles which had been imported from Japan. Cpl Ochido further averred that complainant reported that he had transferred funds for their clearance to the petitioner's account; yet the Kenya Revenue Authority later denied having received any payment for duty for the three motor vehicles.
8. Upon being advised by Kenya Revenue Authority of non-payment of duty, the complainant reported the matter to the 1st respondent for investigations. Cpl Ochido further confirmed that on the 7th December 2022 the petitioner was arrested in Changamwe and had his statement recorded at Nyali Police Station after which he was released on cash bail of Kshs 30,000 pending completion of investigations. He exhibited a copy of that statement as an annexure to his affidavit along with other documents. Cpl Ochido concluded his affidavit by stating that the investigations are ongoing and that the file is yet to be forwarded to the 2nd respondent for review under Article 157 of the Constitution.
9. In the petitioner's written submissions dated 23rd February 2023 and the Further Submissions dated 16th November 2023, his Advocate, Mr. Anaya, reiterated the assertion that the petitioner engaged Susan Mulwa to undertake the transaction on his behalf; and that when he got to learn of the demand for duty by Kenya Revenue Authority, he promptly filed three suits against the said Susan Mulwa at the Mombasa Small Claims Court. Counsel appears to have limited his arguments to the interlocutory application dated 2nd December 2022, while acknowledging that the same was abandoned by consent on 20th December 2022 to pave way for the expeditious hearing and determination of the Petition.
10. On his part, Mr. Makuto, counsel for the 1st and 3rd respondents, relied on his written submissions dated 15th November 2023. He essentially relied on the Replying Affidavit of Cpl Ochido and urged the Court to find that, what the petitioner seeks is to stop not only the investigations being conducted by the 1st respondent, but also any intended prosecution by the 2nd respondent. Counsel made reference to Article 157(10) of the Constitution and submitted that the 2nd respondent is an independent office and cannot therefore be the subject of control in the exercise of its functions.
11. Reference was also made to Section 24 of the National Police Service Act, which vests the role of investigation of crime on the Kenya Police Service. Hence, the 1st and 3rd respondents were of the posturing that it would be anomalous for the Court to curtail the exercise of what is not only their constitutional mandate but also a statutory duty. Counsel relied on Total Kenya Limited & 9 others v Director of Criminal Investigations Department & 3 others, Republic v Commissioner of Police & another, Ex Parte Michael Monari & another [2012] eKLR and Law Society of Kenya v Office of the Attorney General & another, Judicial Service Commission (Interested Party) [2020] eKLR to buttress his arguments.
12. From there foregoing, the parties are in agreement that the petitioner received funds from one of its clients, Luxury Vehicle Imports Ltd, for the clearance of three used imported motor vehicles. He in turn engaged one Susan Mulwa to undertake the transaction on his behalf. His explanation for this was that he did not have a registered clearing company. It is also undisputed that Susan Mulwa did not



pay the duty due to Kenya Revenue Authority. Hence, Kenya Revenue Authority demanded for the same vide its letter dated 7th November 2022.

13. The client promptly filed a complaint with the 1st respondent for investigations to be undertaken; whereupon the petitioner was called upon to record a statement to assist the 1st respondent with its investigations. In the circumstances, the single issue for determination is whether the petitioner has demonstrated any infringement or threatened violation of his constitutional rights as alleged. He urged the Court to find, on the basis of the foregoing evidence, that there is no basis for his arrest, arraignment or prosecution.
14. There is no gainsaying that the 2nd respondent is vested with the prosecutorial function under Article 157 of the Constitution. However, the said discretion is not absolute; for Article 157(11) of the Constitution dictates that it be exercised with due regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process. Moreover, Section 4 of the Office of the Director of Public Prosecutions Act No 2 of 2013, is explicit that the Office of the Director of Public Prosecutions shall be guided by the Constitution as well as the guiding principles set out therein in fulfillment of their mandate. It is noteworthy that Section 4(f) of the aforementioned Act reiterates the need to serve the cause of justice, prevent abuse of the legal process and public interest.
15. It is therefore plain that, a constitutional court has the jurisdiction to question the exercise of the 1st respondent's prosecutorial discretion if it is shown that the decision to prosecute was made in disregard of public interest or the cause of justice. Hence, in Jirongo v Soy Developers Ltd & 9 others (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) (Judgment), the Supreme Court held: -

81. Under article 157(6) of the Constitution, the DPP is mandated to institute and undertake criminal proceedings against any person before any court. Article 157(6) provides as follows:

- (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 (other than a court martial) in respect of any offence alleged to have been committed.”

Article 157(4) provides that:

- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.”

However, Article 157(11) stipulates that:

- (11) In exercising the powers conferred by this article, the Director of Public Prosecutions shall have



regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

82. Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.”

16. In the same vein, it is the duty of the police to investigate the commission of crimes. Accordingly, unless it is demonstrated that there is clear abuse of process for ulterior motives, the Court ought to be reluctant to intervene in the exercise of lawful duty imposed on the 1st respondent not only by dint of Articles 244 and 245 of the Constitution but also by Sections 24(e) and 35 of the National Police Service Act.

17. Indeed, in Republic v Commissioner of Police & another, Ex Parte Michael Monari & another (*supra*), it was emphasized that:

The police have a duty to investigate on any complaint once a 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 decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

18. That said, the question to pose is whether the investigations were initiated without reasonable or probable cause. In the case of Anthony Murimi Waigwe v Attorney General & 4 others [2020] eKLR, the court held: -

48. It is no doubt clear that under Article 157 (1) of the Constitution the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article 159(2) of the Constitution is crying loudly everyday, every hour that “justice shall be done to all, irrespective of status”. Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.

49. The Petitioner in support of interest of administration of justice Dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In



other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?

50. In the case of *Republic v Director of Public Prosecution & another ex parte Kamani*, Nairobi Judicial Review Application No 78 of 2015 while quoting the case of *R v Attorney general ex Kipngeno Arap Ngeny* High Court Civil Application No 406 of 2001; the Court held;

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”

19. Similarly, in the *Jirongo Case* (*supra*) the Supreme Court relied on a decision rendered by the Supreme Court of India, namely *RP Kapur v State of Punjab* AIR 1960 SC 866 in which the applicable factors to be considered by the court in similar circumstances were discussed. Hence, it was held that the Court can intervene:
- (a) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or
 - (b) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or
 - (c) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or
 - (d) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.
20. Although the petitioner alleged that the decision to arrest and prosecute him amounts to abuse of the process of the court, the fact of the matter is that the investigations had just commenced when he filed this Petition; and therefore a decision to charge and prosecute him was yet to be taken. In fact, no action has been taken so far in furtherance of the complaint; and therefore it is impossible to tell at this point in time whether or not there is sufficient evidence to back up that decision. Indeed, authorities abound to show that the best forum for testing the validity of a charge including the sufficiency of evidence is the trial court itself. For instance, in *Erick Kibiwott & 2 others v Director of Public Prosecution & 2 others* [2014] eKLR it was held that:

...In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. In dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the *Constitution*. There mere fact that the intended or ongoing criminal proceedings are



in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings...”

21. Additionally, and more importantly, Article 50(1) of the Constitution provides that:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

22. Needless to mention that the essence of Article 50(1) of the Constitution is the concept of a fair hearing; and that it envisages the context of the fair hearing to be a public hearing before “...a court or, if appropriate, another independent and impartial tribunal or body...” in which the accused is afforded all the safeguards set out in Article 50(2) of the Constitution. It is for the foregoing reasons that it is always preferable that disputes about facts, such as those raised herein by the petitioner, be ventilated before the trial court, which is itself a creature of the Constitution pursuant to Article 162 and 169 of the Constitution.

23. Lastly, it cannot be validly argued that simply because a matter presents itself as a civil claim no criminal investigations ought to be carried out in respect of the same facts with a view of prosecution. Section 193A of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, is explicit 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 pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

24. In the premises, I would follow Michael Sistu Kamau & 12 others v Ethics and Anti-Corruption Commission & 4 others [2016] eKLR, wherein a three-judge bench held that:

The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... “

25. It is also significant that the decision of the respondents to charge and prosecute cannot be said to be a final decision. In Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74 the opinion is expressed, which I find apt, to the effect that:

The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in



which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available.”

26. For the foregoing reasons, it is my considered view that the Petition dated 2nd December 2022 is devoid of merit. The same is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF MAY 2024.

OLGA SEWE

JUDGE

