



REPUBLIC OF KENYA



Kiboinett v Office of the Director of Public Prosecutions & 5 others (Constitutional Petition 001 of 2023) [2024] KEHC 5751 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CONSTITUTIONAL PETITION 001 OF 2023**

JRA WANANDA, J

MAY 15, 2024

BETWEEN

HILLARY KIPKOSGEI KIBOINETT PETITIONER

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF THE KENYA POLICE 2ND RESPONDENT

STATION KAPSOYA POLICE STATION 3RD RESPONDENT

STATION NAIBERI POLICE STATION 4TH RESPONDENT

RISPER CHEMUTAI KIBOINET 5TH RESPONDENT

ELDORET CHIEF MAGISTRATES' COURT 6TH RESPONDENT

JUDGMENT

1. By my Ruling delivered in this matter on 8/12/2023, I determined the Petitioner's Application seeking conservatory orders staying or suspending the prosecution of the Petitioner in the criminal case ongoing before the Chief Magistrates at Eldoret.
2. As I stated in the said Ruling, the Petitioner and the 5th Respondent are a couple. The two appear to have had some altercations which ended up into the Petitioner being arraigned and charged in Eldoret Chief Magistrate's Court Case No 1173 of 2020 with the offence of causing grievous harm to the 5th Respondent contrary to Section 234 of the *Penal Code*. Pursuant thereto, the Petitioner, through Messrs Kutto & Ngaira Nabasenge Advocates filed this Petition alleging violation of his constitutional rights. In the Petition dated 26/01/2023, the Petitioner has sought orders as follows:
 - i. A declaration that continued selective prosecution of the Petitioner in Eldoret Chief Magistrates Court, vide Criminal Case No 1173 of 2020; Republic vs Hillary Kipkosgei



Kiboinet at the exclusion of the 5th Respondent, Risper Chemutai Kiboinet is unconstitutional and therefore null and void.

- ii. A declaration that the Respondent's action of arresting, charging and consequently selectively prosecuting the Petitioner in criminal court and excluding the 5th Respondent from the said charges and prosecution following the domestic brawl that resulted into a fight between the Petitioner and the 5th Respondent is unconstitutional and therefore null and void.
 - iii. A declaration that the Respondent's action of arresting, charging and consequently selectively prosecuting the Petitioner in criminal court and excluding the 5th Respondent from the said charges and prosecution following the domestic brawl that resulted into a fight between the Petitioner and the 5th Respondent is unconstitutional and therefore null and void.
 - iv. A declaration that the Respondent's action of arresting, charging and consequently selectively prosecuting the Petitioner in criminal court and excluding the 5th Respondent from the said charges and prosecution following the domestic brawl that resulted into a fight between the Petitioner and the 5th Respondent without giving the Petitioner and the 5th Respondent who are husband and wife respectively an opportunity to reconcile is unconstitutional and therefore null and void.
 - v. That in the Alternative and without prejudice to the foregoing prayers 1-4, the Honourable Court may issue a mandatory injunction compelling the 1st and 6th Respondents to give the Petitioner and the 5th Respondent being the husband and wife respectively an opportunity to reconcile pursuant to Article 159(2)(a) of the Constitution of Kenya 2010.
 - vi. That in the Alternative and without prejudice to the foregoing prayers 1-5, the Honourable Court may issue a mandatory injunction compelling the 1st, 2nd, 3rd, 4th and 6th Respondents to charge and prosecute the 5th Respondent following the complaint lodged by the Petitioner at the Kapsoya Police Station, on 27th October 2020 vide OB No 30.
 - vii. An order for compensation/damages: general damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya 2010 for injuries suffered due to the unlawful arrest, subsequent detention and prosecution and for the unconstitutional conduct of the Respondents.
 - viii. Any other Relief and or further orders, writs, declarations as this Honourable Court may deem appropriate, fair, just and fit to grant.
 - ix. Costs be in the Cause.
3. The Petition is expressed to be brought pursuant to various provisions of the Constitution of Kenya 2010, and specifically, Articles 2(1), 3(1), 2, 10, 19(1) and (2), 20(1) and (2), 22, 23(1) and (3), 165(6) and 259(1). It is then supported by the Affidavit sworn by the Petitioner, Hillary Kipkosgei Kiboinet.
 4. The Petitioner has then pleaded that on 1/07/2020, the couple were involved in a brawl that resulted into a fight whereby the Petitioner suffered injuries while in the process of defending himself, the 5th Respondent also sustained injuries, the Petitioner reported the matter at Kapsoya Police Station and was issued with a P3 Form, that on her part, the 5th Respondent who alleged to have also been assaulted by the Petitioner also reported the matter at Naiberi Police Station, that pursuant to the complaints made by the respective parties, the 1st, 2nd, 3rd, 4th and 6th Respondents admitted and prosecuted the complaint reported by the 5th Respondent but declined to do the same for the Petitioner's complaint, that the said Respondents have continued to selectively charge and prosecute the Petitioner and refused



to charge the 5th Respondent who assaulted the Petitioner, that the said Respondents have continued to prosecute the Petitioner without giving the couple the opportunity to reconcile despite the provisions of Article 159(2)(c) of the Constitution of Kenya, that as a result of the foregoing violations of the Petitioner's constitutional rights and fundamental freedoms, the Petitioner is facing criminal charges whereby he is charged with causing grievous harm contrary to Section 234 of the Penal Code, that in view thereof, it is clear that the charges are selective, biased, discriminative and brought in bad faith, and that the Petitioner's rights as guaranteed under the Constitution have been violated/infringed and or threatened.

5. According to the Petitioner, his constitutional rights that have been violated pursuant to the "selective prosecution" includes Article 25(c) on the right to a fair trial, Article 27 on equal protection and benefit of the law, Article 47 on the right to administrative action that is expeditious, lawful, reasonable and procedurally fair, Article 28 on inherent dignity that must be respected and protected, Article 39(1) on the right to freedom of movement, Article 45 on protection of the social fabric of the family, Article 50(2) on the right to a fair trial that includes, inter alia, right to be presumed innocent until the contrary is proved, and Article 159(2)(c) on alternative dispute resolution.

1st, 3rd & 4th Respondents' Replying Affidavit

6. In opposition to the Application referred to (now determined), 1st, 3rd and 4th Respondents had relied on the Replying Affidavit sworn by one Police Constable (PC) Jackline Wesonga filed on 21/03/2020 through the Office of the Directorate of Public Prosecutions (ODPP). Prosecution Counsel appearing for the Respondent, Ms. Okok stated that she will adopt the same Affidavit in responding to the Petition as well.
7. In the Affidavit, PC Wesonga deponed that she is an Officer attached to Naiberi Police Station and she is the Investigating Officer in the matter, that the 3rd and 4th Respondents are a body corporate under the mandate of the National Police Service and whose functions includes collecting and providing criminal intelligence, undertaking investigations of crimes, maintenance of law and order and apprehension of offenders among others. She deponed that the Petitioner is the accused person in the said criminal case and the 5th Respondent is the complainant, that on 1/07/2020 at around 2.30 am, one Corporal Oundo who was on night duty received a report vide a phone call from one Purity Chepkoech who claimed that her father (the Petitioner) was assaulting her mother, (the 5th Respondent), that after they received the phone call, officers visited the scene where they established that the Petitioner had arrived home from a nearby bar and began assaulting the 5th Respondent (his wife) claiming that she had sent people to attack him, that the officers noted that the 5th Respondent had sustained serious injuries and part of her ear had been bitten off, that she was rushed to hospital and admitted, that the Petitioner was also treated as he, too, had sustained injuries and that he was later arrested and detained in custody.
8. PC Wesonga deponed further that investigations were commenced whereby the 5th Respondent was visited by the officers in hospital where she had been admitted, she was found to be very weak with human bite wounds on both sides of the eyes near her cheeks, part of her right ear had been bitten off, she had also sustained injuries on other parts of the body and was complaining of chest and leg pains as well, that the officers recorded the 5th Respondent's statement while at the hospital where she alleged that on the material night, she was asleep when the Petitioner came home at around 1 am, went to their bedroom and started accusing the 5th Respondent of conspiring with other people to assault him and threatened to kill her, that the Petitioner started assaulting her and bit her on the right side of the eye, that they struggled for a while then the Petitioner bit off part of her ear and she started bleeding heavily, that the police also recorded the Petitioner's statement where he admitted having confronted



and assaulted the 5th Respondent and that during the confrontation, the 5th Respondent bit his finger, and that he too was treated at the same hospital and discharged.

9. PC Wesonga further deponed that they visited the home and recorded statements from the couple's children who had witnessed the assault, that they obtained the 5th Respondent's treatment documents which indicated that the 5th Respondent had been admitted in hospital for 7 days, they issued her with a P3 Form that was then filled at the County hospital and her injuries classified as grievous harm, that from their investigations they formed the opinion that there was enough evidence to sustain and charge the Petitioner, they therefore forwarded the police file to the 1st Respondent who directed that the Petitioner be charged and which was done, that the Petitioner later filed a report at Kapsoya Police Station on 27/10/2020 alleging that he was also assaulted by the 5th Respondent on the material night. She however observed that it is worth noting that this complaint was filed 3 months after the incident after investigations had already revealed that the Petitioner was the aggressor and that if the Petitioner sustained any injuries then it was because the 5th Respondent was defending herself and was therefore not at fault, that the said Respondents are not opposed to reconciliation between the couple however this had to be at the instance of the 5th Respondent who is the complainant, if the 5th Respondent is not agreeable then the matter should proceed to its logical conclusion as the 5th Respondent had a right to seek justice through the Courts.
10. She termed the instant Petition as misconceived and an afterthought and deponed that the Petitioner has not demonstrated how his rights as guaranteed in the Constitution have been violated. It was also her contention that the criminal proceedings were instituted in the public interest, the issues raised by the Petitioner would best be determined by the trial Court as the Petitioner is raising matters touching on evidence, that this litigation is a delaying tactic as the matter has proceeded with 2 witnesses having already testified, that the orders sought will occasion great prejudice to the Respondents and wider public interest if allowed since the Respondents will not have the opportunity to prove their case and the powers of the 1st Respondent to institute criminal proceedings under Article 157(6) of the Constitution will be greatly interfered with and undermined.

5th Respondents' Replying Affidavit

11. Counsel for the 5th Respondent was not in Court on 8/12/2023 when directions were taken on canvassing of the Petition and no fresh Affidavit from the 5th Respondent has been presented to the Court as specifically responding to the Petition. In the circumstances, I will presume that the 5th Respondent, too, relies on her Replying Affidavit already on record and filed earlier herein in response to the Application for conservatory orders. That Replying Affidavit was filed on 9/03/2023 through Messrs Oduor, Munyua & Gerald Attorneys LLG. The date of swearing is not however disclosed. Since however no objection has been raised on that issue, I will excuse the omission.
12. In the Affidavit, the 5th Respondent confirmed that she is married to the Petitioner and they are blessed with 4 children. She then deponed that there was no brawl and it is the Petitioner who attacked her injuring her severely, that after investigations were conducted, it came out clearly that the Petitioner is the one who attacked the 5th Respondent injuring her severely to the extent of biting off a piece of her ear, that she was summoned to Kapsoya Police Station over allegations that she had assaulted the Petitioner on 1/07/2020 and was released on a cash bail of Kshs 5,000/- pending conclusion of investigations, that the Officer Commanding Kapsoya Police Station was summoned before the Eldoret Magistrates' Court at the behest of the Petitioner to explain and give reasons as to why the 5th Respondent was not charged and he informed the Court that upon conducting investigations they



concluded that the 5th Respondent did not assault the Petitioner, and that she was therefore discharged and allowed to collect her cash bail since investigations had been concluded.

13. She deponed further that she was the victim of domestic violence and that the instant litigation is an affront to justice and threatens her fundamental rights and freedoms, that prior to commencement of the criminal trial, they were granted time to reconcile but the same collapsed, that Article 25 of the Constitution has not been breached since the Petitioner has hidden material facts, Article 27(1) and 28 have not been infringed since the Petitioner has not explained to what extent the same has been infringed, Article 39 has not been infringed since the Petitioner has not demonstrated the extent to which his right to freedom and movement has been curtailed yet he has admitted that he was granted bond and has been attending Court as and when required, Article 50 has not been infringed since the process that is ongoing is the normal procedure for all criminal cases which procedure guarantees fair hearing to all parties, and that the Petitioner has not demonstrated how the continuation of the criminal case is impeding his right to fair trial.

Petitioner's Further Affidavit

14. The Petitioner filed a Further Affidavit on 28/03/2023 although, like the 5th Respondent's Replying Affidavit, the date of its swearing is also not disclosed. Again, since no objection has been taken over this omission, I will excuse it.
15. In the Affidavit, the Petitioner deponed that the PC Wesonga who swore the Replying Affidavit on behalf of the 1st, 3rd and 4th Respondents had no capacity to do so since the other Respondents are separate entities and independent from one another, that as per the charge sheet, the deponent has no role to play in the investigations since the officers involved are one Corporal Oundo and PC Beth, it is not true that he admitted having confronted the 5th Respondent, in fact it is the 5th Respondent who attacked him when he tried to defend himself, that what he stated at the Naibori Police Station is not what is recorded, that for instance, at no point did he state that he bit the 5th Respondent on the eyes, that if at all he did, there would be medical documents to support the injuries and that the charges are fabricated, that there is no time within which a criminal offence should be reported, that PC Wesonga is not privy to many facts regarding the Petitioner's complaint reported at Kapsoya Plice Station since she is not attached there and neither is she the Investigating Officer.
16. According to him, the Investigating Officer completed investigations and forwarded the file to the 1st Respondent for action but the 1st Respondent declined to prosecute the 5th Respondent, that it is therefore the 1st Respondent who is the one to blame for carrying out selective prosecution, that powers to prosecute granted to the 1st Respondent should not be abused, the reason why the 3rd Respondent was summoned by the trial Court was not to give an explanation as why the 5th Respondent was not charged but to clarify the reason for arresting 5th Respondent, and that it is not true that the 3rd Respondent had discharged the 5th Respondent.

Hearing of the Appeal

17. It was then agreed, and I directed, that the Petition be canvassed by way of written Submissions. However, up to the time of concluding this Judgment, I had not come across Submissions filed by any of the parties relating to the Petition. I therefore again presume that the Petitioner and the Respondents rely on the same Submissions already on record and which they had filed in relation to the now determined Application for conservatory orders.



18. I may also mention that during the taking of directions in relation to the now determined Application, the 5th Respondent's Counsel did not file Submission of his own but opted to support the Submissions filed by Counsel for the other Respondents.
19. In recounting the respective Submissions, I will try as much as possible to only pick out those portions relating to the Petition and leave out those that dealt with the now determined Application.

Petitioner's Submissions

20. The Counsel for the Petitioner submitted that in regard to the reason given by the ODPP as to why it chose not to prosecute the 5th Respondent, the ODPP is not a court of law, and therefore it has no mandate, power, capacity authority or jurisdiction to make conclusions on criminal culpabilities, that jurisdiction is a preserve of a court of law, and that it is therefore in the interest of justice that the ODPP be put on task to explain its biased and selective prosecution.
21. The rest of the Submissions relate to the Application for conservatory orders which, as aforesaid, is now determined. I will therefore not recount the same.

1st, 3rd and 4th Respondent's Submissions

22. On her part, on behalf of the said Respondents, Senior Prosecution Counsel, Ms Emma Okok, submitted that the 1st Respondent, though an independent office, does not act independent of the offices of the 3rd and 4th Respondents, that there is a mutual working relationship among the three arms, that the 3rd and 4th Respondents conduct investigations and the 1st Respondent screens the files and approves the charges, that the 1st Respondent also has the mandate of directing the offices of the 3rd and 4th Respondents in their investigations, the decision to charge rests with the 1st Respondent, PC Wesonga has stated that she is the current Investigating Officer in the matter and is therefore well versed with the facts of the case, a police file does not belong to an individual police officer, once an officer is transferred, becomes deceased or sacked from service, another officer is handed over the matter to continue dealing, and that PC Wesonga is therefore competent to swear the Affidavit on behalf of the 1st, 3rd and 4th Respondents.
23. Counsel submitted that PC Wesonga is an officer under the Kenya Police Service and cited the provisions of Section 24 of the [National Police Service Act](#) to illustrate the functions of the Service, that in her Affidavit, PC Wesonga, though not the original Investigating Officer, has clearly detailed how investigations were conducted from when they received the report and what informed the decision to charge the Petitioner and not the 5th Respondent, that the investigations were conducted in accordance with the law and the Petitioner's rights were not violated in any way.
24. Further, Counsel cited Article 157(6), (10) and (11) of the [Constitution](#) and submitted that the same provide the guiding principles that the 1st Respondent and/or prosecutors acting under his instructions must put in consideration while performing their duties, that the police file was forwarded to the 1st Respondent's office by the investigating officers upon conclusion of the investigations, upon thorough investigation of the complaints, the 1st Respondent was satisfied that a criminal offence had been committed and as a result, criminal proceedings were instituted against the Petitioner who was therefore charged with the offence of grievous harm, that the 1st Respondent noted that the 5th Respondent was not culpable of any offence and it was therefore not in the interest of justice to institute criminal proceedings against her, that this is evident from the 1st Respondent's letter dated 29/12/2020, the 1st Respondent thoroughly analysed the evidence available, established that the same was admissible and sufficient and that public interest required institution of criminal proceedings



against the Petitioner, that the decision to charge the Petitioner was within the law and was not malicious, and the 1st Respondent has the ultimate discretion in determining which complaint should lead to a criminal prosecution. She cited the case of *Republic v Chief Magistrate, Milimani Criminal Division & 4 others Ex-Parte John Wachira Wambugu & another* [2018] eKLR Misc. Application 620 of 2017 and submitted that the Petitioner has not demonstrated that while making the decision to charge, the 1st Respondent abused this power, acted with bias or acted maliciously, that this Court should therefore not be quick to entertain the complaint which is aimed at interfering with the constitutional mandate of the 1st Respondent. She also cited the case of *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR.

25. Counsel submitted further that the prayers sought, if granted, has the effect of undermining the criminal justice process. She cited the case of *Goddy Mwakio & another v Republic* [2011] eKLR and submitted that the prosecution has clearly demonstrated how the investigations were carried out and how the decision to charge was arrived at, that the Petitioner is charged with an offence known in law and particulars of the offence as contained in the charge sheet supported the charge, the prosecution has also availed sufficient evidence to support the charge and should therefore be given an opportunity to adduce the evidence during trial, this litigation is a delaying tactic as the criminal proceedings have already commenced, the complainant who is the 5th Respondent has a right to expeditious trial, reconciliation has to be done freely without coercion, and that this litigation has been filed to frustrate the criminal justice process by delaying the trial so that the 5th Respondent is forced to agree to reconciliation and eventually withdraw her complaint.
26. In conclusion, Counsel submitted that the Petitioner has failed to demonstrate how the prosecution is an infringement on his rights, that the decision to charge the Petitioner was based on sufficiency of evidence and not motivated by malice or bias, the decision not to charge the 5th Respondent was made after consideration of the available evidence and to avoid abuse of the legal process, the prosecution is in the public interest and the trial Court is best placed to try the alleged offence, and that this litigation is an affront to the independence of the offices of the 1st 3rd and 4th Respondents.
27. As I commented in the Ruling referred to, I also came across a second set of Submissions filed on 25/07/2023 on behalf of the Respondents through Principal State Counsel Winnie Cheruiyot. As I further stated, I am not certain whether this second set was filed as complementary, or in addition, to the earlier set filed by Ms. Okok, or in substitution thereof or whether it was filed without the knowledge that an earlier set had already been filed.
28. Be that as it may, it is argued in this second set of Submissions that the Petitioner has not disclosed any professional misconduct by the Magistrate's Court, that there is no reason at all as why any issue as to discontinuance of the matter was not raised before that Court, that the Petitioner has not been prevented by anybody from pursuing an out of Court settlement, that the Petitioner has admitted that a crime was committed in the name of what he refers to as "a brawl between husband and wife", the Petitioner's main contention is that the charges were selectively preferred against him but he has not tendered any evidence, that during their investigations, the police uncovered sufficient information to prefer charges against the Petitioner and that the Petitioner has not provided any information that warrants this Court to exercise its supervisory jurisdiction or interfere with the criminal proceedings.

Determination

29. The issue for determination herein is "whether the ongoing criminal prosecution of the Petitioner is in violation of his constitutional rights and whether the same should be terminated".



30. Before I delve into determining the said issue, I reiterate that the Petitioner took the position that the said PC Wesonga who swore the Replying Affidavit on behalf of the 1st, 3rd and 4th Respondents had no capacity to do so. However, in my Ruling referred to above, I already made a determination on that issue by making the finding that PC Wesonga had sufficiently demonstrated that she is competent and authorized to swear the Affidavit on behalf of the 1st, 3rd and 4th Respondents. I accordingly admitted the Affidavit.
31. Regarding whether the ongoing criminal prosecution infringes the Petitioner's constitutional rights, as I stated in the said Ruling, although the 1st Respondent - Office of the Director of Public Prosecution (ODPP) - is not subject to the control of any person or authority in exercising its mandate as conferred by the Constitution, the exercise of that power and discretion must be exercised in accordance with the law. Where it is demonstrated that the DPP has overstepped his mandate by misusing the powers, the High Court is empowered to, and should intervene. Abuse of such discretionary powers would include, for instance, the employment of extraneous factors to achieve ulterior goals separate from ends of justice. On this point, as I did in the said Ruling, I again cite the case of *Kuria v Attorney General* [2002], where the Court stated as follows:
- “The court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is the duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform a stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles which underlie the society's sense of fair play and decency and/or where the proceedings are oppressive or vexatious"
32. Similarly, in *Joram Mwenda Guantai v The Chief Magistrate*, Nairobi Civil Appeal No 228 of 2003 [2007] 2 EA 170, the Court of Appeal held as follows:
- “...the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”
33. Applying the above principles to the facts of this matter, I note that the Petitioner's complaint is the 1st Respondents' decision to charge the Petitioner and leave out the 5th Respondent. He terms this as amounting to “selective prosecution”. The mandate to prosecute rests with the 1st Respondent, Office of the Director of Public Prosecutions (ODPP) as enshrined under Article 157 of the Constitution. In exercising this mandate, the Director of Public Prosecutions (DPP) is required to review and determine the “prosecutability” of cases forwarded for his action. As aforesaid, the 1st Respondent is under obligation to exercise this discretion judiciously.
34. The procedure is that prosecution is preceded by an investigation which answers the question as to whether there was an offence committed and the Constitution and the National Police Service Act give the Police the mandate to conduct the investigations. On this aspect, I refer to the remarks of Warsame



J (as he then was) made in the case of *Republic v Commissioner of Police and another ex-parte Michael Monari & another* [2012] eKLR, as follows:

“The Police have a duty to investigate 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 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.”

35. In my view, the Petitioner has not provided sufficient evidence to demonstrate that there was any malice or impropriety in the decision to charge him. In *Douglas Maina Mwangi v KRA & another*, 213 eKLR, Majanja J addressed the issue as follows:

“15. The office of the Director of Public Prosecution under Article 157 of the *Constitution* is an independent office under the *Constitution* like its predecessor office, the office of the Attorney General under section 26 of the former Constitution. When dealing with the decision as to whether or not to prosecute, the office exercises independent judgment and this court cannot interfere unless it is shown that the exercise is contrary to the *Constitution*, in bad faith or amounts to an abuse of process. This has been the holding of this court in several decided cases

36. Applying the principles enunciated in the authorities cited above, it is my considered view that the Petitioner has failed to satisfy this Court that the 1st Respondent acted in bad faith or that it has abused the process in exercising its prosecutorial powers. From my assessment of the facts, I am satisfied that it has been sufficiently demonstrated that the criminal charges were preferred after the conducting of proper investigations.

37. As already stated, it is not doubt that this Court has the constitutional mandate and power to stop any criminal prosecution which has been demonstrated to have been preferred maliciously, with ulterior or selfish reasons. That is not in doubt. However, in exercising that power, the Court must also be cautious and careful not to overstep or exceed its mandate by usurping or unduly interfering with the prosecutorial powers of the Director of Public Prosecutions similarly donated by the same Constitution. For the need for such caution, I again refer to the case of *Republic v Commissioner of Police and another ex-parte Michael Monari* (*supra*) where Warsame J (as he then was), expressed himself as follows:

“Under Article 157(4) of the *Constitution*, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any directions or instructions given by the Director of Public Prosecution. Under article 157(10) the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person.

It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this



court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”

38. In this case, in his own Affidavit, the Petitioner discloses that the couple were involved in a brawl that resulted into a fight as a result of which the Petitioner suffered injuries. His comment on the injuries suffered by the 5th Respondent’s is that she sustained the same while the Appellant was in the process of defending himself. It is therefore evident that the Petitioner expressly concedes that he got involved in a fight, which is itself a criminal act.
39. On her part, PC Wesonga deponed that on 1/07/2020 at around 2.30 am, the police received a phone call from the couple’s daughter reporting that her father, the Petitioner, was assaulting her mother, (5th Respondent) that officers visited the scene and established that the Petitioner had arrived home from a bar and began assaulting the 5th Respondent (his wife) claiming that she had sent people to attack him, that the officers noted that the 5th Respondent had sustained injuries and part of her ear had been bitten off and that she was rushed to hospital and admitted, that the Petitioner was also treated as he, too, had sustained injuries. PC Wesonga deponed further that the 5th Respondent was visited by officers in hospital and was found to have human bite wounds on both sides of the eyes near her cheeks, part of her right ear had been bitten off, she had also sustained injuries on other parts of the body and was also complaining of chest and leg pains, and that the officers recorded the 5th Respondent’s statement while at the hospital. According to PC Wesonga, the 5th Respondent stated that on the material night, she was asleep when the Petitioner came home late at night and started accusing the 5th Respondent of conspiring with other people to assault him and he threatened to kill her, that the Petitioner then started assaulting her, they struggled for a while during which the Petitioner bit off part of her ear and she started bleeding heavily. PC Wesonga further deponed that the police also recorded the Petitioner’s statement and in which the Appellant admitted having confronted and assaulted the 5th Respondent and that during the confrontation, the 5th Respondent bit his finger, and that he, too, was treated at the same hospital and discharged.
40. PC Wesonga further deponed that they visited the home and recorded statements of the couple’s children who had witnessed the assault. She stated that out of their investigations, they concluded that there was enough evidence to sustain and charge the Petitioner, that they then forwarded the police file to the 1st Respondent (DPP) who consented to the prosecution of the Petitioner. She conceded that the Petitioner also later, on 27/10/2020, filed his own report at a different Police Station alleging that he was also assaulted by the 5th Respondent on the material night. She however observed that this report by the Petitioner was made 3 months after the incident and after investigations had already revealed that the Petitioner was the aggressor and that if the Petitioner sustained injuries, then it was because the 5th Respondent was defending herself. According to PC Wesonga therefore, the 5th Respondent was not at fault.
41. As aforesaid, the police only need to establish that there was reasonable suspicion justifying preferring of the criminal charges. As long as the Police and the DPP act in a reasonable manner, the High Court will have no basis to intervene. Having considered all the material placed before me and the exhaustive account given by PC Wesonga, I am satisfied that the police and the DPP had reasonable grounds on why they found it fit to exclude the 5th Respondent from prosecution and to only charge the Petitioner. The material presented by the Respondents discloses prima facie evidence of possible



criminal acts allegedly committed by the Petitioner which, having been investigated by the relevant authorities mandated to do so, and found to meet the required threshold, merit to be interrogated and the truth thereof determined in criminal proceedings. At the hearing, the Petitioner will have the opportunity to test the veracity of the conclusion that the Petitioner was the aggressor and that the 5th Respondent was only defending herself.

42. The nature of the complaints raised by the Petitioner is that he is inviting this Court to stray into the realm of deeply dissecting the merits and demerits of the charges preferred against him. For this Court to agree to do so will be to usurp the function of the trial Court before which the charge has been placed and which is the one conducting the trial. It is not the function of this Court, hearing a constitutional Petition, to determine the veracity or the merits of any evidence to be tendered against an accused person. It is therefore my finding that it is not appropriate for this Court to intervene at all.
43. The Petitioner has also asked this Court to issue an order compelling the 1st, 2nd, 3rd, 4th and 6th Respondents to charge and prosecute the 5th Respondent following the complaint lodged by the Petitioner before the Police. For the reasons stated, doing so will be to usurp the constitutional mandate of the DPP and the National Police Service to investigate and prosecute. Considering the lack of evidence of any wrongdoing on the part of the said agencies, issuing such an order will be, by itself unconstitutional.
44. The Petitioner has also asked this Court to issue an order compelling the 1st and 6th Respondents to give the Petitioner and the 5th Respondent, being husband and wife, an opportunity to reconcile pursuant to the spirit of Article 159(2)(a) of the *Constitution*. My question is how does this prayer amount to a constitutional issue that has to be brought to this Court by way of a constitutional Petition? Clearly, grant of opportunity to try to reconcile is a request that ought to be made before the trial Court which, I have no doubt, is fully alive to the current jurisprudence encouraging Courts to give room and facilitate attempts by parties to explore alternative dispute resolution. The Petitioner, in the event that he has not already done so, is therefore at liberty to place that request before the trial Court.
45. In the circumstances, I do not find any evidence of selective or biased prosecution of the Petitioner and neither do I find any exceptional circumstances that would warrant grant of the orders sought in the Petition.

Final Orders

46. In the premises, the Petition dated 26/01/2023 is hereby dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF MAY 2024.

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WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

