



**Republic v Inspector General Of Police & 2 others; Njeru (Exparte) (Application E074 of 2023) [2024] KEHC 6271 (KLR) (Judicial Review) (1 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6271 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E074 OF 2023**

**J NGAAH, J**

**JUNE 1, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> RESPONDENT**

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

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**MICHAEL NJERU ..... EXPARTE**

**JUDGMENT**

1. The application before court is a motion dated 20 June 2023 filed under Order 53 rule 3 of the Civil Procedure Rules and sections 8(1) and 9 of the Law Reform Act, cap. 26. It seeks the following orders:

- “ 1. This Honourable Court be please (sic) to grant an Order Of Certiorari against the Directorate of Criminal Investigations, the Office of the Director of Public Prosecutions to (sic) quashing and or stopping any or continuing the criminal proceedings against the Ex-Parte Applicant as far as the dispute is concerned.
- 2. This Honourable Court be please (sic) to grant an Order Of Prohibition against the Directorate of Criminal Investigations, the Office of the Director of Public Prosecutions forbidding any commencement of criminal proceedings against the Ex parte Applicant.



3. This Honourable Court be please (sic) to grant an Order Of Mandamus Compelling the Directorate of Criminal Investigations, the Office of the Director of Public Prosecutions to reinstate the Assault Charge as against the interested party Billy Indence as it were
  4. Such further orders and reliefs that this Honourable Court may deem just and expedient to grant.”
2. The application is based on a statutory statement dated 12 June 2023 and an affidavit verifying the facts relied upon sworn on even date by Michael Njeru.
  3. According to Njeru, the interested party attacked and assaulted him at a social event. The events prior to the attack, during the attack and immediately after the attack were captured on a closed-circuit television (CCTV). The applicant reported the incident to Parklands Police station where he was given a medical examination report (P3) form and later got treated in hospital of the injuries he sustained during the attack. The interested party was then charged with the offence of assault.
  4. The applicant was later informed that the assault charges had been dropped and, instead, he and the interested party would be charged with the offence of affray. Accordingly, the applicant has been invited to take plea. The applicant swears that charges against him are for collateral purposes and that, in charging the applicant, the Director of Public Prosecutions is misusing his powers to prosecute.
  5. None of the respondents filed any response to the application. However, the interested party filed a replying affidavit opposing the application. The interested party has sworn that he and the applicant have been friends for “a very long time.” However, during an event to raise funds for one on their friends who was proceeding to India for medical treatment, a physical confrontation ensued between them as a result of which both of them were injured.
  6. According to the interested party, it is the applicant who confronted him first and, in self defence, he shoved the applicant off. He too lodged a complaint against the applicant at Parklands police station. Like the applicant, he also obtained a P3 form from the police and was treated of head injuries he sustained during the confrontation. He admitted that he was initially charged with the offence of assault but later, the Director of Public Prosecutions charged both of them with affray after evaluation of the interested party’s complaint.
  7. I have considered the applicant’s application and the response thereto. I have also considered the written submissions filed by both the applicant and the interested party.
  8. In his submissions, the applicant has cited Julius Meme v Republic & another (2004) eKLR, for the argument that an abuse of the Court’s process would generally arise where the court is being misused for improper purposes, as a means of vexation and oppression or, otherwise, for ulterior motives.
  9. As much as Director of Public Prosecutions has, under Article 157 of the Constitution, the mandate to exercise state powers of prosecution and, in doing so, he may 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, and that under the same provision of the law and section 6 of the Office of the Director of Public Prosecutions Act, 2013, he does not require the consent of any person or authority for the commencement of criminal proceedings and, further, in the exercise of his powers or functions he is not subject to the direction of any person or authority, he must adhere to the constitutional values and principles. These constitutional values and principles include the need to act in the public interest and the need to avoid abuse of the legal process.



10. It follows that if the Director of Public Prosecutions acts ultra vires or unreasonably or in contravention of the values and principles of the Constitution and natural justice, the courts as the bastions of justice must intervene and stop him in his tracks. In this regard, the applicant cited *Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others* (2013) eKLR where this Honourable Court (Majanja, J.) is said to have held that the Director of Public Prosecution's discretionary power must be exercised within the four corners of the Constitution and that the court may intervene where it is shown that the impugned criminal proceedings are instituted for other means than the honest enforcement of criminal law, or are otherwise an abuse of the court process.
11. Based on these submissions, it is the applicant's case that the 2<sup>nd</sup> respondent's decision to institute criminal proceedings against the applicant on offence of affray on the same set of circumstances out of which the interested party was charged with the offence of assault is an abuse of the court's process.
12. Like the applicant, the interested party also cited Article 157(10) of the Constitution and section 6 of the Office of the Director of Public Prosecutions Act for the argument that the Director of Public Prosecutions has the discretion to prosecute or not to prosecute any offence independent of any person or authority. The interested party cited the decision of Majanja, J. in High Court Petition No. 528 of 2012, *Douglas Maina Mwangi Vs Dpp & Another*: in support of the submission that when considering whether or not to prosecute, the office of the Director of Public Prosecutions exercises independent judgment which this Honourable Court cannot interfere with unless it is shown that the exercise of the discretion is contrary to the Constitution or it is in bad faith or it amounts to an abuse of the process. In the same breath, the interested party cited the decision of Korir, J., (as he then was) in *Republic Vs DPP & Royal Media ex parte; Communications Commission of Kenya*, JR case No. 221 of 2013.
13. Two observations I have made with respect to the applicant's application are first, the decision or proceedings he has complained about and which he seeks this Honourable Court to impeach by way of the order of certiorari have not exhibited to the affidavit verifying facts relied upon. Neither did the applicant make any attempt to introduce the proceedings before the hearing of the motion. Prayer 1 of the motion which specifically seeks the order of certiorari reads:

“ 1. This Honourable Court be please (sic) to grant an Order Of Certiorari against the Directorate of Criminal Investigations, the Office of the Director of Public Prosecutions to (sic) quashing and or stopping any or continuing the criminal proceedings against the Ex-Parte Applicant as far as the dispute is concerned.”

14. As much as I can gather from this prayer, there are criminal proceedings which have been commenced against the applicant at the instance of the Directorate of Criminal Investigations and the Office of the Director of Public Prosecutions. These are the proceedings that the applicant would want quashed and to which, by its very nature, an order of certiorari would apply.

According to Order 53 rule 7(1) of the Civil Procedure Rules, these proceedings would ordinarily be included in the applicant's application by way of an affidavit. This rule reads as follows:

7.

- (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by



affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

15. It is not clear from the applicant's application whether the criminal proceedings are pending before a trial court. The only suggestion that this might be the case is the applicant's deposition that he has been "invited" to take plea on a charge of affray. If this is true, it means that a charge of a criminal offence has been registered in court and if that is the case the applicant would have done well to include the charge sheet in his application and state unambiguously such particulars as the case number and the court seized of the proceedings.
16. Ordinarily, where it is not in dispute that a decision sought to be quashed has been made and parties are in agreement as to the nature of the decision, failure to include it in the proceedings may not be fatal to the application. This has been so held by the Court of Appeal in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* (2017) eKLR. At paragraph 105 of its judgment, the court held as follows:

“ 105. In the present appeal, the record shows that the 1st Respondent neither attached the decision to be quashed nor applied for leave to attach the same. The trial judges observed that it was not in dispute that a decision had been made by the Appellant to adopt direct procurement method. It is our considered view, that the learned judges did not err in observing that a decision had in fact been made by the Appellant and the court did not err in failing to strike out the Application as incompetent for failure to attach the decision to be quashed. The record shows that there was no dispute that a decision had been made and that the decision existed; there was no dispute as to the nature of the decision. In our view, depending on the peculiar circumstances of each case where it is clear, uncontested and definite that a decision has been made and the nature of the decision is not disputed, a court can either take judicial notice of the decision or the parties can by consent record the nature of the decision. In such cases, the need to attach or produce the decision to be quashed can be waived. We are of this view cognizant of the provisions of Article 159 (2) (d) of the Constitution which enjoins courts to administer justice without undue regard to technicalities.”
17. In the instant application, the prayer for certiorari is aimed at some proceedings and not at a decision as such. In the absence of a charge sheet, the particulars of the case constituting the court proceedings and the court proceedings themselves and, in the absence of the particulars of the court seized of these proceedings, the court is left to speculate the nature of proceedings that the applicant has made reference to in his application. If the order of certiorari was to be of any consequence, the applicant is enjoined to have provided this information and, most importantly included, at the very least, the charge sheet that set off the criminal proceedings against him.
18. The applicant's application is one such case where Order 53 Rule 7(1) would apply to the letter and in which, in my humble view, the applicant would not be entitled to "question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar." In the alternative, he ought to have accounted for his failure to lodge the impugned proceedings to the satisfaction of this Honourable Court.



19. It is worth noting that even in the Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others case (supra), the Court of Appeal did not say that it is in every case that an applicant would be excused from complying with Order 53 Rule 7(1) of the Civil Procedure Rules and exhibit the impugned decision in a judicial review application. The court was categorical that:

“depending on the peculiar circumstances of each case where it is clear, uncontested and definite that a decision has been made and the nature of the decision is not disputed, a court can either take judicial notice of the decision or the parties can by consent record the nature of the decision.” (Emphasis added).

20. The circumstances of the applicant’s case are such that the applicant ought to have exhibited the proceedings sought to be impeached in order for the court to appreciate the nature of the criminal proceedings sought to be impeached. As things stand now, if the order of certiorari was to be granted in terms sought by the applicant, it would be rendered futile for the reason that that the particulars of the so-called criminal proceedings, including the court in which they have been instituted, assuming they are before court, have not been provided.

21. My second observation is that the prayer for the order of prohibition is rather intriguing, to say the least. Perhaps, to understand my point I need reproduce it again here. It reads as follows:

“This Honourable Court be please (sic) to grant an ORDER OF PROHIBITION against the Directorate of Criminal Investigations, the Office of the Director of Public Prosecutions forbidding any commencement of criminal proceedings against the Ex parte Applicant.”

22. The prayer is intriguing because it is inconsistent with the first prayer in the application which, as noted, is the prayer for certiorari. If the applicant was to be taken at his own word, the prayer for certiorari was made on the basis that criminal proceedings against him had either commenced or had been concluded to the extent that the applicant had been summoned to answer to some charge. That being the case, neither the Directorate of Criminal Investigations nor the Director of Public Prosecutions can be stopped from commencing what they have, in fact, concluded.

23. The Court of Appeal discussed when this order can be granted in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR. Citing Halsbury’s Law Of England, 4th Edition, Vol.1 at pg.37 paragraph 128, the Court held that:

“It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law Of England, 4th Edition, Vol.1 at pg.37 paragraph 128.”

24. The court also noted:

“...prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation



of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision. (Emphasis added).

To the extent that the applicant is seeking an order to prohibit commencement of proceedings that have either been commenced or concluded, the application is misconceived.

25. The final order which the applicant seeks is for mandamus “compelling the Directorate of Criminal Investigations, the Office of the Director of Public Prosecutions to reinstate the Assault Charge as against the interested party Billy Indence as it were.”
26. All I gather from the applicant with respect to this particular prayer is that the interested party was initially charged with the offence of assault but for what the applicant thinks are ulterior motives and abuse of prosecutorial powers, the Director of Public Prosecutions withdrew the charge of assault and instead replaced them with the charge of affray against both the applicant and interested party. The applicant’s depositions to this end are as follows:
  - “7. That upon review of the CCTV footages, the examination of the medical reports, preliminary investigation the police informed the DPP who charged the suspect one Billy with the offence of assault the matter was streamlined in the judicial system I was waiting to be summoned to testify on the same as the Complainant.
  8. That subsequently and to my dismay I was informed that the charges had been dropped albeit mysterious (sic) by the DPP and without any consultation or reason whatsoever
  9. That its(sic) this conduct of the Office of DPP that is being impugned by the Applicant.
  10. That I was further informed that the said Billy had now been charged with a lesser offence of affray
  11. That contemporaneous with the above I am now being invited to take plea as a co-accused completely uncalled for and drastic decision by the DPP which decision is the subject of challenge in this petition.
27. It is not clear from these depositions the applicant’s source of information and in the same breath, it is not clear who has invited the applicant to take plea. The nature or form of the invitation is also not apparent. Nevertheless, the question that would concern the court here is the exercise of discretion by the Director of Public Prosecutions in his decision to withdraw the charge against the interested party and file a fresh charge against the interested party and the applicant.
28. In the absence of the court proceedings, the circumstances under which the one charge was withdrawn and substituted with another are not clear. Without sufficient material before court, the court would not be able to determine whether in exercising his powers under Article 157, the Director of Public Prosecutions had regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Suffice it to say, the burden was always on the applicant to provide sufficient material in this respect but it is a burden that, in my humble view, was not discharged satisfactorily.



29. Be that as it may, the element of discretion is prominent both in Article 157 (6) (c) of the Constitution and section 87(a) of the Criminal Procedure Code which are the provisions under which criminal proceedings may be discontinued. It is necessary I reproduce them to illustrate my point.

Article 157 (6) (c) of the Constitution reads as follows:

- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
- (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b). (Emphasis added).

Section 87(a) of the Criminal Procedure Code, on the other hand, reads as follows:

87. Withdrawal from prosecution in trials before subordinate courts
- (a) In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal— (emphasis added).

30. The exercise of discretion here is at two levels; that exercised by the prosecutor or the Director of Public Prosecution and the discretion exercised by the court to reject or allow the discontinuance of criminal proceedings. Whichever level the discretion is exercised, a judicial review court will be hesitant to intervene and interfere with the exercise of the discretion unless it can be demonstrated that the discretion was exercised whimsically or capriciously rather than judiciously. The court emphasised this point in *Chief Constable of the North West Police vs Evans* (supra) where it was stated as follows:

“The remedy by way of judicial review under RSC...is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and ...administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner...and not to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.” (Per Lord Hailsham at 1160E-H).”

31. Similar observations were made by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan BC* [1976] 3 All ER 665 at 695, [1977] AC 1014 at 1064 where he noted:

“The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred.”

32. Courts may intervene to review a power conferred by statute on the ground of unfairness but only if the unfairness in the purported exercise of the power be such as to amount to an abuse of the power. See *Preston v IRC* [1985] 2 All ER 327, [1985] AC 835, per Lord Templeman.
33. Now, without the proceedings, the court may not tell with any conviction, whether in withdrawing the charge against the interested party and substituting it with a different charge against both the applicant and the interested party, discretion was properly exercised both by the Director of Public Prosecutions and the court in which the criminal proceedings may have been conducted. In the absence



of the necessary material and, therefore, in the absence of the evidence to the contrary, the court can only proceed on the presumption that the discretion was properly exercised. Accordingly, the order for mandamus would not lie.

34. Finally, Order 53 Rule 3. (2) of the Civil Procedure Rules is to the effect that if the impugned proceedings are before court, as the applicant seems to suggest, the court must be served with the substantive notice of motion. The rule reads as follows:

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

35. Although, the applicant seeks to have this Honourable Court quash and prohibit criminal proceedings against him, he has neither named the court nor served upon the presiding officer of the court seized of the proceedings with the notice. If any of the orders sought were to be granted, they would directly affect the court seized of the criminal proceedings yet that court has not been given opportunity to be heard. Order 53 Rule 3(2) is couched in such terms that the requirement to serve all persons who are directly affected by the proceedings or the ensuing orders is mandatory. That being the case, failure to serve that category of persons may render the application fatal.

36. In the final analysis, I do not find any merit in the applicant's application. For the reasons I have given, I hold that the application is misconceived and an abuse of the process of this Honourable Court. It is hereby dismissed. Considering that the respondents did not file any response to the application, I make no order as to costs. It is so ordered.

**SIGNED, DATED AND POSTED ON CTS ON 1 JUNE 2024**

**NGAAH JAIRUS**

**JUDGE**

