



**Macharia v Republic (Miscellaneous Criminal Application
E160 of 2023) [2024] KEHC 8329 (KLR) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E160 OF 2023**

SM MOHOCHI, J

JULY 8, 2024

BETWEEN

FRANCIS KAGUEMA MACHARIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is an Application by way of a Notice of Motion Supported by the Sworn Affidavit of Francis Kaguema Macharia evenly dated 23rd October 2023 and filed on the 30th October 2023, seeking the following relief(s);
 - a. SPENT
 - b. THAT this honourable court be pleased to grant the applicant leave to institute private prosecution proceedings against one WILSON NDUNGU from Kabazi for the offense of breaking and stealing contrary to Section 304 (1) (6) and Section 279(6) of the penal code.
 - c. THAT this honourable court be pleased to direct the officer in charge of Kabazi Police Post to deliver to the applicant the investigation file for purposes of prosecution.
2. The Application is premised on the following four grounds;
 - i. That, the suspect broke into the compound of the complainant Applicant and therein stole a Metallic Basin, metallic arm chair, Sadak boots one pair and a panga all valued at Kshs 600, 4000,1000 and 500 respectively
 - ii. That, the Applicant reported the theft at Kabazi police post which is under Kirengero police Station.



- iii. That, he investigating officer who is the officer in charge of the post took down our statements and even went to see the exhibits but he failed, neglected and or refused to take the suspect to court.
 - iv. That, the Applicant complained to the Respondent who refused to take any step and the suspect remains at large.
 - v. That, the suspect is a dangerous character who is physically abusive to his neighbors and to his grandmother.
 - vi. That, the Application is supported by above grounds and the affidavit of Francis Kaguema Macharia the Applicant herein plus such other and further grounds to be adduced at the hearing hereof.
 - vii. That, it's only fair that the suspect is tried herein Nakuru and put into custody.
3. The Applicant Submits that, between the 15th and 16th of May 2023 Wilson Ndungu his neighbor has been a menace for a long time. The suspect broke into his compound and took away with him a metallic basin, Gumboots, a panga, metallic arm chair all valued at approximately Kshs 6,100/-.
 4. The Applicant reported the incident at Kabazi Police Post and recorded statements together with other witnesses. The Applicant went ahead and found the suspect with the metallic basin at Kabazi centre and he was wearing his gumboots. The investigating officer was duly informed but for some reasons the Investigating Officer did not record the items but instead he summoned the two parties to the Police Station for a reconciliation meeting.
 5. The Applicant was not satisfied and opted to complain to the ODPP who did not offer any solution as they did not respond to the complaint forcing the complainant to file the present application.
 6. That, when the ODPP refuses to act on an investigation/prosecution, and when the complainant brings his complaint on ill will and financial inducement as in this case, this court ought to allow the applicant to previously prosecute the suspect. In this case the Applicant relies on the decision of *Jenifer C. Tele vs Dpp & 3 Others* (2021) eKLR.
 7. That, the Applicant has been able to prove that the offence occurred but the ODPP due to a bribery case at the police station, was not prosecuted with a full file for prosecution and when confronted by the ODPP he opted to do nothing about the complain, therefore showing that the ODPP is either in bad with the investigating officer on the matter of being compromised.
 8. The Applicant thus Applies that his case be allowed.

Respondent's Case

9. Jackline Kisoo a Prosecution Counsel at the Respondent swore an affidavit dated 15th May 2024 deponing that they were served with the Applicant's Application dated 23rd October, 2023 and having read and understood the same, the Respondent wish to reply as follows;
 - i. That, the complainant and Applicant herein filed a report at Kirengero Police Station, Subukia under OB No. O5/08/07/2023 concerning a breaking and stealing incident at his home. An inquiry file No. 2 of 2023 was opened. the investigation diary is exhibited as JK1.
 - ii. That, the Applicant recorded his witness statement to the effect that on 16th June, 2023, he realized that his pair of black gumboots, a metallic basin, a metallic chair and a panga were missing from his house. On 1st July, 2023 he sighted a metallic basin being used by his neighbor



Willy to roast maize and he immediately reported the matter at Kabazi Police Post. On 3rd July, 2023, he again sighted his neighbor Willy putting on his black gumboots. He again reported the matter at Kabazi Police Post. Witness statements from the complainant and his witnesses exhibited as JK2 (a) - (e))

- iii. That, the suspect Wilson Kiritu Mwaura alias Willy was arrested and the metallic basin was kept as an exhibit. Witness statements from the suspect and his witnesses exhibited as JK3 (a) - (c))
 - iv. That, both the Applicant and the suspect claim ownership of the basin. The Applicant's wife, Lucy Wanjiru identified the basin as having some blue paint on it. On the other hand, the suspect recorded a statement stating that he purchased the basin from a scrap metal dealer at Kshs. 180/=.
 - v. That, the police inquiry file was forwarded to the Respondent for perusal and advice and the police covering report was exhibited as JK4
 - vi. That, on 25th August, 2023 the Respondent advised the investigating officer through letter REF: 0DPP/NYH/ADV/2/VOL.II/ (174) to record the statement of the scrap metal dealer who allegedly sold the metallic basin to the suspect with instructions to resubmit the file for further advice upon compliance. The letter was exhibited as JK5.
 - vii. That, statement was indeed recorded the inquiry file was re submitted.
 - viii. That, on 27th September, 2023, the Respondent after careful perusal of the facts and evidence found that there was no witness to the theft and that both parties having failed to proof ownership of the metallic basin, the charge could not be sustained. However, the parties were referred to arbitration through the area chief, Kabazi Location and the letter exhibited as JK6
 - ix. That, Article 157 of the *Constitution* of Kenya 2010 established the independent Office of the DPP with, among others, powers to institute criminal proceedings against any person for an offence alleged to have been committed.
 - x. That, among the functions of public prosecutors is making the decision to charge or not for any criminal offence.
 - xi. That, it is the responsibility of the Respondent is to ensure that the right person is charged for the right offence and that one is not charged where there's no realistic prospect of conviction such as this case where proof of ownership of the metallic basin was essential in arriving at the decision to not to charge considering the circumstances of the case wholesomely.
 - xii. That, the decision arrived at was in line with the ODPP Decision to *Charge Guidelines of 2019* which requires that the Evidentiary test and Public interest test must be met for a decision to charge to be made.
 - xiii. That, there is insufficient evidence in the police file to sustain and prove the charge of breaking and stealing contrary to section 304 (1)(b) and section 279 (b) of the *Penal Code* respectively.
 - xiv. That, the applicant has failed to demonstrate that the Respondent is unwilling unable to prosecute the matter and which are the only grounds available for an application of this nature.
10. The Respondent submits that, the Applicant herein filed an application dated 23rd October, 2023 seeking leave to institute private prosecution proceedings against Wilson Ndungu for the offence of breaking and stealing contrary to section 304 (1) (b) as read with section 279 (b) of the *Penal Code*.



He also prayed that the court to direct the officer in charge of Kabazi Police Post to hand over the investigation file for purposes of the private prosecution.

11. That the background of the application according to the applicant's grounds in the Notice of Motion application and supporting affidavit is that, he alleges that on diverse dates between 15th and 17th May, 2023, the suspect Wilson Ndungu broke into his compound and therein stole a metallic basin, metallic arm chair, one pair of Sadak boots and a panga valued as Kshs. 600/=, 4,000/-, 1,000/= and 500/= respectively. He reported the matter at Kabazi Police Post which is under Kirengero Police station when he allegedly saw Wilson Ndungu with the metallic basin and gumboots on 1st July, 2023. He alleges that the officer in charge recorded statements of witnesses and went to see the exhibits but failed to take the suspect to court hence the application.
12. The Respondent submit that, the Applicant's report was duly recorded at Kirengero Police Station, Subukia under OB No. 05/08/07/2023 and an inquiry file No. 2 of 2023 was opened. An investigation was duly carried out witness statements were recorded, the suspect Wilson Ndungu was arrested and interrogated and the metallic basin claimed by the Applicant was kept as an exhibit.
13. That, procedurally the inquiry file was forwarded to the Respondent herein where upon perusal and advice, the file was forwarded back to the investigating officer to conduct further investigations pertaining to the ownership of the metallic basin as both parties claimed ownership of the same.
14. The suspect indicated that he had bought the said basin from a scrap metal dealer.
15. That, a careful perusal of the police file and the witness statements provided revealed that, there was no witness to the housebreaking and theft and that both parties having failed to prove ownership of the metallic basin, the charge could not be sustained. However, the parties were referred to arbitration through the area chief, Kabazi Location.
16. That, Article 157 of *Constitution* of Kenya 2010 establishes the independent Office of the DPP with, among others, powers under Article 157 (6) (a) to 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 further provides that, the Director of Public Prosecutions shall not require the consent of any person for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
17. The Respondent submit that. the power to decide whether to institute criminal proceedings against any suspect, rests with the ODPP and this power is independently exercised having regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process as per the dictates of Article 157 (11). These considerations were considered in the present case accordingly informing its decision not to charge the suspect.
18. That analyzing the evidence so far gathered, the Applicant in his statement, stated that on 15th June he left his black pair of gumboots, one metallic basin, one metallic chair and a panga and on waking up the following day on 16th June, 2023 at 7:30am he found the items missing. Later on, 1st July, 2023, he spotted the suspect with the metallic basin as he was using it to roast maize and that was when he had the matter reported at Kabazi Police Post. Later on, 3rd July, he stated that, he saw the suspect putting on his gumboots. He again reported at the police post. His wife identified the metallic basin at the place where the suspect was roasting maize. He was subsequently arrested and the basin kept as an exhibit.
19. That, the Applicant's wife, Lucy Waniiru Macharia recorded a statement. She identified the subject metallic basin 16th July, 2023 when she saw the suspect. using it to roast maize. She stated that,



- she identified it by some blue paint that it had. She confronted the suspect, an altercation ensued prompting her to call the Applicant and they reported the matter at Kabazi Police Post.
20. That, Mary Njeri Mwangi was an employee of the complainant who usually worked in the homestead and farm. She stated in her statement that she was informed of the stolen items as gumboots which were white in colour, one panga, a metallic chair and a metallic basin that was grey and partially blue. Her evidence was that she recalled the items having worked in the Applicants house.
 21. That, Annah Muthoni stated that sometimes Gladys Wanjiru, a scrap metal dealer would leave her to man the shop and she did not remember selling a metallic basin to anyone and that the suspect was not familiar to her.
 22. The suspect on the other hand states that, on 24th June, 2023, he purchased a metallic basin in a scrap metal shop in Subukia at a cost of Kshs. 180/= . Part of the money Ksh. 110/ was sent to him by his mother and Kshs. 50/= was sent by his friend George Maragwa. George recorded a statement confirming that the suspect indeed received moneys. Timothy Munene Ndirangu was also the suspect's witness who confirmed that he saw the suspect with the metallic basin and was to use it in the business of roasting maize.
 23. That, an analysis of the facts as presented shows that there was no eyewitness to the theft and/or housebreaking. Nobody saw the suspect commit any offence. The suspect was however arrested on account of being in possession of a metallic basin which both parties claimed. The Applicant states that his wife was the one who identified the metallic basin as theirs since it had some blue paint.
 24. That on the other hand, the suspect states that he purchased the basin from a scrap metal dealer and therefore the basin was legally his. It was therefore imperative for the parties to avail proof of ownership for the metallic basin. None of the witnesses availed conclusive proof to support the issue of ownership and that was why the ODPP requested that the issue of ownership be investigated further before a decision to charge could be made.
 25. Further, several material contradictions were also noted in the initial report as well as the statements recorded. The dates of the report in the Occurrence Book and the Applicant's statement are contradictory as to when the housebreaking occurred. The items named by Mary Njeri Mwangi were also contradictory. She mentioned that the Applicant's gumboots were white in colour whereas the suspect stated that they were black in colour.
 26. That, the Applicant is seeking to institute private prosecution and has sought leave to do so through this court as Section 88 (1) of the *Criminal Procedure Code* provides;

“ A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission.”
 27. That, such Application can only be instituted where the state is unable and unwilling to prosecute the case which is not the case herein. The Applicant's complaint was comprehensively investigated and the file was forwarded to the ODPP. The file was perused, recommendation for further investigation was made and upon resubmitting the file, advice was given in good time. The Applicant has not availed any evidence that the ODPP was unable or unwilling to perform its mandate. In fact, the Respondent submit that it duly exercised its mandate in making the decision not to charge.
 28. That what is crucial in instituting criminal proceedings, is making the decision to charge or not for any criminal offence. It is the responsibility of the ODPP to ensure that the right person is charged for the right offence and that one is not charged where there's no realistic prospect of conviction such as



in this case and that the decision arrived at in the applicant's case was made in line with the National Prosecution Policy and the ODPP Decision to Charge Guidelines of 2019 which requires that the evidentiary test and public interest test must be met for a decision to charge to be made.

29. That, the evidentiary test is considered first and it means that the totality of the evidence both for and against the suspect should be objectively assessed and should establish a realistic prospect of conviction.
30. That, considering the failure to secure crucial witnesses, the material contradictions and the insufficient evidence with regard to ownership of the stolen items, it would not be possible to sustain charges against the suspect.
31. The evidentiary test also requires that key evidence be availed to prove all the elements of a charge and that the same is relevant, reliable, admissible, credible and available and that it can withstand the strength of rebuttal evidence.
32. The Applicant has stated that, he intends to have the suspect charged with breaking and stealing contrary to section 304 (1)(b) and section 279 (b) of the Penal Code respectively. Section 304 (1) (b) provides;

“Any person who having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.”

33. That, this charge to meet the evidentiary test, there must be proof that the house was broken into and secondly, that it was done during daytime. No such key evidence is present. In fact, going by the statement of the applicant and his wife, the perpetrator committed the offence at night if at all. Section 279 (b) provides;

“If the theft is committed under any of the circumstances following, that is to say if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house the offender is liable to imprisonment for fourteen years.”

34. This section too fails to meet the evidentiary test as there is no proof that there was use, attempt to use or threat of any violence caused to the complainant going by his statement as there was no evidence provided of a break in in the first place and there was no eyewitness.
35. The Respondent submits that, it has handled the Applicant's complaint with utmost professionalism and has applied the law and was guided by the decision to charge policy guidelines to make a decision not to charge and that not at all criminal investigations will lead to prosecution, the evidence in the Applicant's case fell short.
36. That the Applicant being disgruntled, filed the instant Application and wants the suspect prosecuted based on suspicion and without evidence contrary to the dictates of criminal law which requires the prosecution to prove a case against an accused person beyond any reasonable doubt. Reliance is made to the case of Jenifer C. Tele v Director of Public Prosecution & 3 others (2021] eKLR that held;

...the decision as to whether or not to commence criminal proceedings does not lie with a complainant in the first instance, but with DPP exercising discretion judiciously and guided by the evidence available, public interest considerations, as well as the need to prevent and avoid abuse of the criminal justice process.”



37. That no good ground has been raised by the Applicant to support his Application as guided by the principles laid out in the case of *Floriculture International Limited & others versus Attorney General*, High Court Misc. Civ. App. No. 114 of 1997.

38. The same was reiterated in the *Jenifer C. Tele case* (*supra*) where it was held that

“for a person to be granted leave to institute private prosecution he must establish that he had made a complaint to the police and had accorded reasonable opportunity for the police to investigate the case; that the Director of Public Prosecutions had been seized of the case and declined to institute or conduct criminal proceedings; that failure by the state agencies to prosecute is culpable, unreasonable and without any legally justifiable reason; that unless the suspect is prosecuted there is likelihood that there will be failure of public and private justice; that the person instituting private prosecution has suffered special, exceptional and substantial injury or damage that is personal to him and not motivated by malice, politics or some other ulterior consideration devoid of good faith and finally, that there was demonstrable ground that grave social evil will occur if the police and the Director of Public Prosecutions have acted capriciously, corruptly and in a biased manner that the only remedy is to grant leave to the aggrieved party to institute private prosecution.”

39. The Respondent therefore pray that the Application be dismissed in its entirety.

Analysis and Determination

40. Upon considering the Application and its opposition, this court is of the considered opinion that the only solo issue in consideration is, whether the Applicant has made a case warranting the grant of the orders sought?

41. Article 258 of *Constitution* which expressly allows for public interest litigation.

42. In the case of *Rufus Riddle Barger vs Brian John Robinson* [1959] EA 8 the court opined that

“...a private prosecution can only be given legitimacy and allowed by the court to be instituted or maintained if it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority”

43. Other cases that have dealt with the Application for leave to privately prosecute fortifying the Principles guiding private prosecutions are: *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 others* [2013] eKLR; *Otieno Clifford Richard vs Republic* High Court at Nairobi (Nairobi Law Courts) Misc Civil Suit No. 720 of 2005, the High Court (Nyamu, Emukule and Wendoh, JJ); *Republic vs Chief Magistrates Court at Mombasa ex parte Ganijee & Another* [2002] 2 KLR 703; *Gregory and Another v. Republic thro' Nottingham and two others* [2004] 1 KLR 547 and *Amwona & Others V KBL* [HC MISC APP NO. 19 OF 2004].

44. The principles that guide a Court in the grant or denial of leave or permission to an applicant to institute private prosecution are entrenched in the *locus classicus* of *Floriculture International Limited and others* High Court Misc. CIV App. No. 114 of 1997 where Kuloba J outlined the following principles that the Applicant:

- i. Must have made a report of the alleged offence to the police, the AG (in the current constitutional dispensation, the DPP) or any other prosecution authority and allowed them sufficient time to institute criminal proceedings;



- ii. Has to clearly demonstrate that the DPP has declined to institute/conduct prosecution;
 - iii. Has to demonstrate that the refusal or failure by the DPP to prosecute is culpable and without reasonable cause;
 - iv. Has to show that failure to prosecute will result in public or private injustice;
 - v. Has to demonstrate that he or she has the requisite locus standi by virtue of having suffered special, exceptional or substantial injury or damage. Moreover, the applicant has to demonstrate that he or she approaches the court in good faith, not to settle otherwise civil action; and
 - vi. Has to show demonstrable grounds that a grave social evil is being allowed to flourish unchecked and that the intended private prosecution is aimed at neutralizing the attempts of crooked people to stifle criminal justice
45. I am unpersuaded that the Applicant has made out a case warranting the grant of the orders sought for the following reasons;
46. Firstly the Respondent has justified its decision not to prosecute and as such the same cannot be termed as inability or refusal to prosecute
47. Secondly the Applicant's Application and intended private prosecution cannot muster the Public interest test
48. Thirdly the Applicant has not showcased if any how the decision not to prosecute was informed by malice or corruption and finally it is manifest that the Applicant and his neighbor have run ins and that if this private prosecution were to be allowed it shall be in furtherance of personal vendetta.
49. Article 157(II) gives the caveat to the Director of Public Prosecutions on the conduct of his functions thus;
- "In exercising the powers conferred by this article, the Director of Public Provisions shall have regard to the public interest, interests of the administration of Justice and the need to present and avoid abuse"
50. This Court is unpersuaded that a private prosecution herein shall further the public interest and interest of administration of justice.
51. In the upshot this court finds this Application to be without merit and the same is accordingly dismissed.

It is so Ordered.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 8TH JULY 2024

MOHOCHI S.M

JUDGE

