



**Wamburu v Director of Public Prosecution & another (Petition E430 of 2023)
[2024] KEHC 11496 (KLR) (Constitutional and Human Rights) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11496 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E430 OF 2023
EC MWITA, J
SEPTEMBER 20, 2024**

BETWEEN

WELLINGTON KIHATO WAMBURU PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

THE CHIEF MAGISTRATE AT MAKADARA 2ND RESPONDENT

JUDGMENT

Petitioner's case

1. Sometime in 2018, the petitioner's company, Eldad Holdings Limited (Eldad), entered into a contract to supply cement to Starley Kirimi through Eurofix Royal Industries Limited (Eurofix). The petitioner's company supplied cement worth Kshs. 1,312,070 but Eurofix refused to pay for it.
2. Eldad filed civil suit No. E 464 of 2021 (Eldad Holdings Limited v Eurofix Royal Industries Limited) at Ruiru Law Courts. Eldad obtained default judgment and a decree was issued for Kshs. 1,527, 392. The petitioner's advocates instructed auctioneers to execute and although warrants of attachment were issued, they were not executed.
3. After several failed attempts to execute, the auctioneers obtained a break-in order and police assistance from court; executed the warrants and carted away goods. The goods were stored for the required period after which they were sold through a public auction on 20th September 2022. Auctioneers recovered Kshs. 350,000 from that auction out of Kshs. 1, 542,700 in the decree.
4. In the meantime, Eurofix filed an application to set aside the default judgement, without success. On 6th December 2022, Eurofix's director accompanied by police officers from Mwiki police station invaded



- the petitioner's hardware shop and arrested his wife for allegedly stealing Eurofix goods worth Kshs. 14, 888, 893 on 7th September 2022, the date execution was carried out by auctioneers.
5. Upon learning of the arrest, the petitioner went to the police station to find out why his wife had been arrested but was also arrested and detained at the police station. Eventually, the petitioner's wife was released unconditionally but the petitioner was released on a police bond of Kshs. 10,000 and told that he would be informed when to appear in court for plea.
 6. On 15th December 2022, the petitioner was charged in criminal case No. E 5661 of 2022 at Makadara Chief Magistrate's Court with the offence of stealing goods worth Kshs.14, 888,893 belonging to Eurofix. On 16th May 2023, the petitioner took plea and was released on a cash bail of Kshs. 200,000. He spent the night in remand for failing to raise the cash bail until the following day, 17th when he raised the cash bail and was finally released.
 7. In the meantime, Eurofix filed another application seeking to set aside the default judgment but the application was once again dismissed on 20th June 2023. Eurofix filed an appeal against that ruling which is pending in the High Court at Thika.
 8. It is the petitioner's case that the criminal case against him is an abuse of power by the DPP and a violation of his rights and fundamental freedoms. According to the petitioner, the DPP initiated criminal prosecution despite his company, Eldad and Eurofix fighting it out in the civil case over the execution conducted by a duly authorised auctioneer.
 9. The petitioner asserted that the criminal prosecution is irrational and was instituted without following due process. This, he argued, is supported by a letter dated 25th August 2023 from the Director of Criminal Investigations and annexed to his further affidavit sworn on 4th December 2023.
 10. The petitioner maintained that the criminal prosecution is an abuse of the powers bestowed on the DPP and a gross violation of his constitutional rights and fundamental freedoms. He relied on East Africa Pentecostal Churches Registered Trustees & 1754 others v Samwel Muguna Henry & 4 others [2015] eKLR on the infringement of constitutional rights and the manner of infringement.
 11. The petitioner took the position, that the DPP did not act in the interest of administration of justice. Rather, he is aiding abuse of the legal process and the rule of law by instituting the criminal prosecution. He relied on Hassan Ali Joho v Inspector General of Police & 3 others [2017] e KLR; Kuria & 3 others v Attorney General [2002] 2 KLR 69 and Robert Waweru Maina & 4 others v Director of Public Prosecutions & 3 others [2022] e KLR.
 12. Based on the above arguments, the petitioner urged the court to grant an order of certiorari to remove to this court and quash the proceedings in CR. Case No. E5661 of 2022 Republic v. Wellington Kihato Wamburu, at the Chief Magistrates' court Makadara; an order of prohibition prohibiting the DPP (respondent) from instituting any criminal proceedings against him for the same set of facts and an order for compensation for violation of his rights.
 13. The petitioner also prayed for costs of the petition and any other relief the Court may consider appropriate and just to grant.

The DPP's response

14. The Director of Public Prosecution (the DPP) opposed the petition through grounds of opposition and written submissions. The DPP contended that the petitioner had not adduced evidence to demonstrate that the charges against him in the impugned criminal prosecution is an abuse of his



prosecutorial powers and an abuse of the legal process. The petitioner had also not demonstrated the prejudice he would suffer in the ongoing criminal prosecution.

15. The DPP asserted that the criminal prosecution was constitutionally and properly instituted as the decision to charge was made in accordance with Article 157(6) read with 157(10)(11) of *the Constitution*. The DPP maintained that the petitioner had not demonstrated that investigation and the decision to charge and prosecute him were illegal, unfair and irrational and, therefore, unconstitutional.
16. According to the DPP, a complaint was made and it is in the public interest that such complaints be investigated and the perpetrators of crime be charged and prosecuted. The DPP argued that Accuracy and correctness of evidence, or facts in the prosecution's case can only be assessed by the trial court.
17. The DPP relied *Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another* [2018] eKLR that in exercising the powers in Article 157, he had regard to the public interest, the interest in the administration of justice and the need to prevent and avoid abuse of the legal process.
18. On whether an order for certiorari should be granted, the DPP relied on *Municipal Council of Mombasa v Republic, Umoja Consultants Ltd* (2002) eKLR and *Pastoli v Kabale District Local Government Council and Others* (2008) 2 EA 300, for the argument that he acted within the law in making the decision to institute criminal prosecution against the petitioner devoid of illegality, irrationality and procedural impropriety.
19. The DPP again relied on *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR and *Kuria & others v Attorney General* (supra) that the prayer for prohibition had been overtaken by events since the criminal case was instituted before the petition had been filed and, therefore, there is nothing left for this court to prohibit. The Court was urged to dismiss the petition with costs.

Response by the Attorney General

20. The Attorney General (AG) also opposed the petition through grounds of opposition. The AG contended that the petitioner had not demonstrated how the trial court had violated his constitutional rights.
21. It was further contended, that by virtue of Article 160(5) of *the Constitution* read with section 6 of the *Judicature Act*, the trial Court enjoys judicial immunity. The petitioner did not also discharge the burden of proof required under sections 106 and 107 of the *Evidence Act*.
22. According to the AG, Article 157 vests power to prosecute on the DPP, an independent constitutional office that is not subject to the control of any person or authority. This court can only interfere on the principles of illegality, irrationality and procedural impropriety.
23. It was asserted that the petitioner was properly and legally charged within the parameters of *the Constitution*. The prosecution was instituted in exercise of DPP's constitutional mandate under Article 157(6) of *the Constitution*.
24. The AG took the view, that although the petitioner alleged contravention of his rights guaranteed under Articles 10, 25, 50 and 157 of *the Constitution*, he had failed to demonstrate how the trial court had violated these rights. Reliance was placed on *Anarita Karimi Njeru v Republic* [1979] eKLR; *Mumo Matemo v Trusted Society of Human Rights Alliance and 5 others* (2013) eKLR; *Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Management Service* (2014) eKLR; and



Kamal Jadvai Vekeria v Director General, Kenya Citizens and Foreign National Management Service (2016) eKLR.

25. Further reliance was placed on sections 107 and 108 of the *Evidence Act* and *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR; *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR and *Hassan Ahmed Ibrahim v Kenya National Bureau of Statistics & 2 others* [2019] eKLR, for the proposition that the petitioner had not adduced tangible evidence that could assist the court grant the orders sought.
26. The AG again relied on Article 160(5) of *the Constitution* and *Moses Wamalwa Mukhamari v John. O. Makali & 2 others* [2020] eKLR, that the court cannot be sued for an act or omission in the lawful performance of a judicial function.

Determination

27. The petitioner has challenged his prosecution before the Chief Magistrates Court at Makadara, Nairobi in Criminal Case No. E 5661 of 2022. The petitioner contended that the DPP's decision to charge him violated his fundamental rights and freedoms guaranteed under *the Constitution*. He also contended that the DPP's decision violated Article 157(10) and (11) of *the Constitution* which provides that in the exercise of his authority, the DPP shall not be under the direction of anybody or authority and that in exercising the powers the DPP "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."
28. The petitioner argued that his prosecution is a response to the civil suit (No. E 464 of 2022- *Eldad Holdings Limited v Eurofix Royal Industries Limited*) filed by his company against Eurofix to recover Kshs. 1,312,070 for supply of cement and judgment was obtained and executed against Eurofix. The prosecution is, thus a revenge and personal vendetta.
29. The respondents on their part contended that the petitioner's case is not well founded; that there was no violation of rights and fundamental freedoms and that the DPP exercised his mandate in accordance with *the Constitution* and the law.
30. The issue for determination in this petition, is whether the DPP's decision to charge the petitioner in Criminal case No E 5661 of 2022 was contrary to Article 157(11) of *the Constitution* and, therefore, a violation of the petitioner's constitutional rights.
31. The DPP is established under Article 157(1) of *the Constitution* with mandate to institute and undertake criminal proceedings against any person, in any court and in respect of any offence. In the exercise of this mandate, the DPP does not require consent from any person or authority, and is not under anyone's direction. That is; the DPP undertakes his duties and discharges his mandate independently as required by *the Constitution*. Article 157(11), however, states that in exercising his powers, the DPP should have regard to public interest, interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
32. It is now well settled that courts will not interfere with the exercise of the DPP's discretion if it is done in accordance with *the Constitution*. In *Republic v Inspector General of Police and 2 others. Ex Parte Zelea Jaka Akiru (MSA HC Misc. Application No. 77 of 2013)*, the Court stated that the DPP has a constitutional duty to prosecute offences and in the exercise of such mandate, the DPP may use police investigators thus, acts within his powers to file criminal prosecution. The court emphasised that prosecution is to be instituted only where investigations reveal an offence.



33. In *Republic v Attorney General & 4 Others ex parte Kenneth Kariuki Gathii* [2014] eKLR, the Court observed;

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.... However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

34. In this petition, the petitioner argued that his arrest was not in tandem with Article 157(11) of *the Constitution*. This is because his arrest and prosecution was a revenge after his company obtained judgment and executed against the complainant's company-Eurofix. Applications to set aside the judgment having been dismissed, recourse was had in the criminal case. The DPP argued that investigations determined that there were reasonable grounds to suspect that the petitioner had committed a criminal offence hence recommended that charges be preferred against him.
35. I have considered the arguments by parties and perused the record. The DPP did not file a replying affidavit and did not deny that there is a civil suit between the petitioner's company and Eurofix where judgment had been obtained in favour of the petitioner's company; warrants of attachment issued and executed by an auctioneer. It was after the attachment and sale of the goods that a complaint was lodged leading to the petitioner's arrest and arraignment.
36. That the petitioner was arrested and charged after attachment in execution of a decree issued by a court of law, is clear based on the date of the attachment and arrest and arraignment. This fact is also borne in the charge sheet and particulars of the offence.
37. Section 24 of the Police Service Act provides for the functions of the Police Service which include; investigating crime, maintenance of law and order and protection of life and property. The police are, however, required to exercise their powers and discharge their functions subject to the constitutional standards of human rights and fundamental freedoms.
38. Once investigations are over, the DPP makes the decision whether or not to prosecute (Article 157(6)). In the exercise of these powers, the DPP should have regard public interest, interests of the administration of justice and the need to prevent and avoid abuse of the legal process. (Article 157(11)). The import of Article 157(11) is that the decision to prosecute should be to serve public interest, interests of the administration of justice. It should prevent and avoid abuse of the legal process.
39. The petitioner's case is that the decision to prosecute him was not made in the public interest or interests of administration of justice. The response filed on behalf of the respondents fell short of responding to the petitioner's concerns that the real reason behind his arrest and prosecution was to a revenge over the attachment and sale of goods belonging to Eurofix by his company following a lawful decree and warrants of attachment issued by the court.
40. Section 193A of the Criminal Procedure Code provides 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."



41. In *Republic v Attorney General & 4 Others ex parte Kenneth Kariuki Gathii* (supra), the court observed with regard to this section:

The fact...that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.

42. The DPP did not explain how the petitioner stole the goods when it was the auctioneer, an agent of the court, who executed the warrants. Although one may argue that this is a question of fact and, therefore evidence, the court should not close its eyes in the face of what would be clear abuse of the court process, which is one of the caveats placed against the DPP's discretion when making a decision whether to charge or not.
43. I have also seen letter dated 25th August 2023 from the DCI-Kasarani Sub County to RCIO, Nairobi on complaint by the petitioner for unfair and biased investigations carried out against the petitioner in the criminal matter. The letter clearly stated that upon analysing the documents, the issue was more civil given that there was already Civil Suit No. E464 OF 2021 at Ruiru Chief Magistrate's court and another case HCCOMA E001 of 2023 at Kiambu.
44. From the above letter, the police investigation confirmed that there were civil suits between the parties and the complaint against the petitioner was more of a civil matter.
45. The Court will intervene in a case where a petitioner shows that the criminal prosecution is being used for improper purposes, ulterior motive, or to coerce one to admit a civil claim. This position was well stated in *R v Attorney General Ex p arte Kipngeno Arap Ngeny* (*High Court Civil Application No. 406 of 2001*), that a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose.
46. The court emphasised that "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".
47. Where criminal proceedings are instituted In response to civil proceedings already in court in order to force the petitioner settle the civil claim, would constitute an abuse of the legal process rather than serving the interest of justice.
48. In *Kuria & 3 Others v Attorney General* [2002] 2 KLR 69, it was held that the Court has power and is under duty to prohibit continuation of 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."
49. The court made it plain that an order of prohibition should be granted where "compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious."



50. That is; the machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.
51. And in *Williams v Spautz* [1992] HCA 34; 174 CLR 509; 66 ALJR 585 it was stated that:
- If a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case, that an unfair trial will ensue unless the prosecution is stopped.
52. From the material placed before this Court, it is clear that the intention to prosecute the petitioner was actuated by an improper purpose or ulterior motive or even extraneous factors beyond the constitutional principles espoused in Article 157(11) of *the Constitution*. The petitioner has shown that there was a lawful decree that was executed by an auctioneer, an agent of the court.
53. The DPP did not show that he had sufficient reason to charge the petitioner based on evidence available other than the fact of an execution carried out following the decree issued in the civil case at Ruiru Chief Magistrate's Court. For that reason, it would be improper for this Court not to interfere given that the petitioner will have to undergo a prosecution and respond to allegations made against him in pursuit of extraneous objectives, thus a violation of the spirit of Article 157(11) of *the Constitution*.

Conclusion

54. Having considered the petition, the responses, submissions, authorities and taking into account the material placed before court, I find fault on the part of the DPP. The prosecution was initiated with an improper motive and for purposes of achieving results other than pursuit of justice in violation of Article 157(11) of *the Constitution*.
55. In the circumstances, I am satisfied that the petition has merit and is allowed. The court makes the following orders.
1. A declaration is hereby issued that the decision to arrest and prosecute Wellington Kihato Wamburu in Criminal Case No E5661 of 2022, at the Chief Magistrates Court at Makadara, was in violation of Article 157(11) of *the Constitution*.
 2. An order of certiorari is hereby issued quashing the proceedings in Criminal Case No. E5661 of 2022, Republic v Wellington Kihato Wamburu, at the Chief Magistrates' Court Makadara.
 3. An order of prohibition is hereby issued prohibiting the Director of Public Prosecutions from instituting and maintaining any criminal proceedings against Wellington Kihato Wamburu based on the same set of facts as those in Criminal Case No. E 5661 of 2022 at the Chief Magistrates' Court, Makadara, Nairobi.
 4. Each party do bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024

E C MWITA

JUDGE

