



**Mugure v Attorney General & 3 others; Director Of Military Prosecutions (Interested Party) (Petition E002 of 2023) [2024] KEHC 12449 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12449 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
PETITION E002 OF 2023  
MA ODERO, J  
OCTOBER 11, 2024**

**BETWEEN**

**MAJOR PETER MWAURA MUGURE ..... PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**THE CHIEF OF DEFENCE FORCES ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**THE DIRECTOR OF MILITARY PROSECUTIONS ..... INTERESTED PARTY**

**A plea bargain that reduced the charges against one co-accused and allowed them to become a prosecution witness is non-prejudicial to the other accused.**

*The petitioner, a KDF officer, challenged his prosecution for murder in the High Court, asserting that jurisdiction lay with a Court Martial under the Kenya Defence Forces Act. He also contested a plea bargain between the Office of the Director of Public Prosecutions (ODPP) and a co-accused, claiming it was prejudicial. The court held that the High Court had jurisdiction to try the case, as murder was not exclusive to a Court Martial, and found the plea bargain lawful and non-prejudicial. It dismissed the petition, ruling that the petitioner’s constitutional rights had not been violated during his arrest or prosecution.*

Reported by John Ribia

***Jurisdiction*** – jurisdiction of the High Court vis-à-vis the jurisdiction of the Court Martial – jurisdiction to try serving military officers for offences not categorized as service offences under the Kenya Defence Forces Act - whether offences not categorized as service offences under the Kenya Defence Forces Act, such as murder, were triable exclusively by Court Martial or whether civilian courts retained jurisdiction - whether the High Court had jurisdiction to try a serving military officer for the offence of murder or whether the trial should be conducted by



*a Court Martial – Constitution of Kenya articles 157, 162, 165, and 169; Kenya Defence Forces Act (Cap 199) sections 2, 4, 21, 55 to 136, 140(4), and 213; Criminal Procedure Code Act (Cap 75) sections 127, and 137(1); Interpretation And General Provisions Act (Cap 2) section 63; Penal Code Act (cap 63) sections 203, and 204.*

**Criminal Law** – *plea bargain agreements – where one of two accused enter into a plea agreement and gets their charge lessened while giving evidence against the co accused – whether that was prejudicial - whether a plea bargain agreement entered into by the Office of the Director of Public Prosecutions (ODPP) with one of two persons accused of murder, which resulted in the charges of murder being withdrawn and substituted with the lesser charge of being an accessory after the fact of murder, was prejudicial to the Petitioner as the other accused – Constitution of Kenya articles 157, 162, 165, and 169; Kenya Defence Forces Act (Cap 199) sections 2, 4, 21, 55 to 136, 140(4), and 213; Criminal Procedure Code Act (Cap 75) sections 127, and 137(1); Interpretation And General Provisions Act (Cap 2) section 63; Penal Code Act (cap 63) sections 203, and 204.*

**Criminal Law** – *victim protection – where an accused sought to be protected as a victim for a crime he committed - whether one could claim to be a victim (under the Victim Protection Act) of the very crime which one was charged with having committed – Victim Protection Act (Cap 79A) section 2.*

**Criminal Law** – *service offences – active military officers charged with offences not categorized as service offences under the Kenya Defence Forces Act – mandate to investigate – mandate to prosecute - whether the Directorate of Criminal Investigations (DCI) had the authority to investigate alleged criminal conduct of military personnel, or if such jurisdiction exclusively vested in the military police under the Kenya Defence Forces Act (KDFA) - whether the Office of the Director of Public Prosecutions had the authority to prosecute military personnel for offences under the Penal Code, or if prosecution should only be undertaken by the Director of Military Prosecutions (DMP) before a Court Martial – Constitution of Kenya articles 157, 162, 165, and 169; Kenya Defence Forces Act (Cap 199) sections 2, 4, 21, 55 to 136, 140(4), and 213; Criminal Procedure Code Act (Cap 75) sections 127, and 137(1); Interpretation And General Provisions Act (Cap 2) section 63; Penal Code Act (cap 63) sections 203, and 204.*

### **Brief facts**

The petitioner, a serving officer in the Kenya Defence Forces (KDF), was arrested by officers from the Directorate of Criminal Investigations (DCI) on November 15, 2019, and charged with murder in High Court Criminal Case No. 18 of 2019. The charges related to the alleged murder of three civilians. The petitioner contested his arrest, detention, and prosecution, arguing that, as a military officer, he should be tried by a Court Martial under the Kenya Defence Forces Act (KDFA).

The Office of the Director of Public Prosecutions (ODPP) also charged a co-accused, Collins Pamba, in a related case, Criminal Case No. 19 of 2019. However, Pamba entered into a plea bargain with the ODPP, resulting in the withdrawal of his murder charges and their substitution with the lesser charge of being an accessory after the fact of murder. The petitioner argued that the plea agreement was prejudicial, as Pamba became a prosecution witness against him.

The petition sought declarations on jurisdictional issues, the procedural validity of the plea bargain, and alleged violations of the petitioner's constitutional rights.

### **Issues**

- i. Whether the High Court had jurisdiction to try a serving military officer for the offence of murder or whether the trial should be conducted by a Court Martial.
- ii. Whether a plea bargain agreement entered into by the Office of the Director of Public Prosecutions (ODPP) with one of two persons accused of murder, which resulted in the charges of murder being withdrawn and substituted with the lesser charge of being an accessory after the fact of murder, was prejudicial to the Petitioner as the other accused.
- iii. Whether the Directorate of Criminal Investigations (DCI) had the authority to investigate alleged criminal conduct of military personnel, or if such jurisdiction exclusively vested in the military police under the Kenya Defence Forces Act (KDFA)



- iv. Whether the Office of the Director of Public Prosecutions had the authority to prosecute military personnel for offences under the Penal Code, or if prosecution should only be undertaken by the Director of Military Prosecutions (DMP) before a Court Martial.
- v. Whether offences not categorized as service offences under the Kenya Defence Forces Act, such as murder, were triable exclusively by Court Martial or whether civilian courts retained jurisdiction
- vi. Whether one could claim to be a victim (under the Victim Protection Act) of the very crime which one was charged with having committed

### **Held**

1. Jurisdiction was everything, any court acting without jurisdiction would be acting in vain. The jurisdiction of any court was derived from either the Constitution or legislation or both. No court could arrogate to itself jurisdiction except that which was conferred upon it by law.
2. The petitioner who was a serving military officer at the time of his arrest was covered by the Kenya Defence Forces Act (KDFFA) as the Act governed the regulation of the affairs of all disciplined forces whilst in service to the Republic of Kenya. Similarly, the Kenya Defence Force Act contemplated how offences committed by military personnel were to be dealt with and the appropriate remedies.
3. Section 211 of the KDFFA provided that the trial in a civil court of a person subject to the Act (such as the petitioner) was not in any manner whatsoever restricted save for offences provided for under Part VI of the KDFFA that provided service offences. For a civilian court to try any of the offences covered by sections 55 to 136 would amount to wading into the jurisdiction of the Courts Martial. However, the offence of murder was not one of the offences reserved for the Court Martial under Part VI.
4. Section 56 of the KDFFA provided that nothing in the KDFFA or any order, disciplinary code, rules, regulations or manual shall affect the jurisdiction of any civil court to try a person for any offence triable by a civil court. The offence of murder was provided for by sections 203 and 204 of the Penal Code of Kenya. Section 133(1)(a) as of the KDFFA also provided for the punishment for a person convicted for the offence of murder by a court martial. Therefore, the KDFFA did not recognize that the offence of murder could be committed by military personnel. Murder could not be said to be a purely 'military offence' that could only be committed by service men or women and was peculiar to the jurisdiction of the military criminal justice system. The offences only triable by a court martial were provided for by sections 55 to 136 of the KDFFA. Murder was not a service offence identified and provided for by the provisions of the KDFFA.
5. Section 63 of the Interpretation and General Provisions Act provided that where an act of omission constituted an offence under two or more written laws, the offender shall, unless a contrary intention appeared, be liable to be prosecuted and punished under any of those laws, but shall not be liable to be punished twice for the same offence.
6. The petitioner was liable to be tried under either the Courts Martial or the Civilian Courts for the offence of Murder. The only restriction was that he could not be tried in both court systems for the same offence. There was nothing to show and neither had the petitioner alleged that he had already been tried before a Court Martial in respect of the charge of murder he was facing.
7. The petitioner had misconstrued the law in asserting that being a military officer he was only liable to be tried before a Court Martial. Notwithstanding his status as a military officer the civilian courts had full jurisdiction to try the petitioner for certain offences which included the offence of murder.
8. The Courts Martial was an institution uniquely created to address military offences committed by military personnel and to try civilians who had committed offences in a military setting. The KDFFA did not in any way curtail jurisdiction of civilian courts to try military officers for offences triable in a Civil Court murder being one such offence.
9. Article 165(3)(a) of the Constitution of Kenya bestowed upon the High Court unlimited original jurisdiction in Criminal and Civil matters. Section 213 made it clear that the Director of Military Prosecutions will only conduct prosecution before a court martial in respect of offences allegedly



- committed under Part VI. Murder is not one of the offences falling under Part VI. The Director of Military Prosecutions is not authorized to conduct prosecutions in civilian courts.
10. The Office of the Director of Public Prosecution (ODPP) was a creation of the Constitution which was the Supreme Law of the Land. The KDF Act which creates the office of Director of Military Prosecutions could not supersede the Constitution. The ODPP was mandated to prosecute any person before any court (other than a Court Martial). By commencing prosecution of the petitioner under the Penal Code the ODPP effectively blocked the prosecution of the petitioner for the same offence by a Court Martial.
  11. Section 2 of the Victim Protection Act defined a victim as any natural person who suffered injury, loss or damages as a consequence of an offence. The same Act defined an accused as a person who was charged with an offence under any written law.
  12. The petitioner asserted that as the father to some of the slain persons he was in fact a victim. Plea bargaining was a fairly new area of jurisprudence in Kenya. The Victim Protection Act itself was silent on whether a person accused of a crime could also be considered a victim of the very crime of which he had been accused. That would be nothing short of an absurdity.
  13. One could not claim to be a victim of the very crime which one was charged with having committed. The ODPP was perfectly entitled to consider and to enter into a plea bargain agreement with Collins Pamba notwithstanding the fact that the persons alleged to have been killed were family members of the Petitioner. For the ODPP to secure plea agreements with one or more accused persons where several persons had been charged with the same offence, there was nothing illegal and/or unprocedural in the plea bargain agreement entered into in the matter.
  14. Many of the said objections raised by the accused were matters which the accused ought to raise in his defence at the trial as they did not raise constitutional issues.

*Petition dismissed, no order as to costs.*

## **Citations**

### **Cases**

#### **Kenya**

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR)— (Followed)
2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 15 (KLR) — (Explained)
3. *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* Constitutional Petition 1 of 2020; [2021] KEELC 4674 (KLR) — (Explained)
4. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (Civil Appeal 50 of 1989; [1989] KECA 48 (KLR) — (Explained)
5. *Poghisyo v Republic* Miscellaneous Criminal Application E079 of 2022; [2022] KEHC 10495 (KLR) — (Explained)

#### **Nigeria**

*Civil Liberties Organisation & others v Nigeria* (2000) AHRLR 243 — (Followed)

### **Statutes**

1. Constitution of Kenya articles 157, 162, 165(3)(5); 169(1)(2) — (Interpreted)
2. Criminal Procedure Code (cap 75) sections 127L(2); 137(1) — (Interpreted)
3. Interpretation and General Provisions Act (cap 2) section 63 — (Interpreted)
4. Kenya Defence Forces Act (cap 199) sections 2, 4, 55-136, 140(4); 211; 213; part VI — (Interpreted)
5. Penal Code (cap 63) sections 203, 204 — (Interpreted)
6. Victim Protection Act (cap 79A) section 2 — (Interpreted)

#### **Canada**

Canadian Victims Bill of Rights (SC 2015) — section 4 — (Interpreted)



## Texts

1. Garner, BA., (Ed) (2009) *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn
2. Hogg, QM., (Lord Hailsham) *et al* (Eds) (1995), *Halsbury's Laws England* London: Butterworth 4th Edn
3. Saunders, JB., Burrows, R., (Eds) (1989) *Words and Phrases Legally Defined* London: Butterworths Vol 3 p 113

## Advocates

None mentioned

## JUDGMENT

1. Before this court for determination is the Petition dated May 4, 2023 in which the petitioner Major Peter Mwaura Mugure sought the following orders:-

- “(a) A declaration that primary jurisdiction to try military personnel vests in military authorities either through summary trials or court martial.
- (b) A declaration that the jurisdiction of this Hon. High Court was improperly invoked in the criminal matter facing the petitioner in criminal case No 18 of 2019, Republic v Peter Mwaura Mugure. High Court of Kenya at Nyeri, to the detriment and prejudice of the petitioner sacrosanct constitutional right to a fair trial.
- (c) Despite prayer (a) and (b) above, a declaration that this Hon court is inherently clothed with jurisdiction to deal with issues raised in this instant petition which fundamentally touch on the question of whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened and/or violation of the Constitution.
- (d) A declaration that the Hon DPP lacks the requisite primary jurisdiction to prosecute military persons who are subject to the Kenya Defence Forces Act for any alleged criminal offence.
- (e) In the alternative to prayer No (d) above a declaration that the jurisdiction of the Hon. DPP in the criminal matter facing the petitioner herein in criminal case No 18 of 2019, Republic vPeter Mwaura Mugure. High Court of Kenya at Nyeri was improperly invoked fundamentally implicating the Petitioner's sacrosanct right to a fair trial.
- (f) A declaration that primary investigative jurisdiction over military personnel of the Kenya Defence Forces for any alleged criminal offence vests in military authorities under the command and control of the 4<sup>th</sup> respondent and not with agents of the National Police Service.
- (g) A declaration that the institution and continued prosecution of the petitioner herein in criminal case No 18 of 2019, Republic vPeter Mwaura Mugure, at the High Court of Kenya at Nyeri, by the hon.
- (h) DPP is actuated and/or driven by ulterior motives other than the interests of justice and be and is hereby declared an abuse of the court process.



- (i) An order of prohibition do issue against the Respondents and/ or any other authority, body or persons from prosecuting or continuing to prosecute the Petitioner in High Court Criminal Case No. 18 of 2019 Republic V Peter Mwaura Mugure, or in any other matter relating to the suspected murder of the three deceased persons therein.
- (j) A declaration that military personnel of the KDF can only be arrested in accordance with the relevant laws governing the conduct of military affairs and consequently agents of the national police service can only arrest and/or detain military personnel for immediate and onward transfer to military authorities.
- (k) A declaration that the arrest of the petitioner herein by agents of the 3<sup>rd</sup> respondents on November 15, 2019 at the Nanyuki Civil Police Station was malicious, illegal, unlawful, unconstitutional, ultra-vires, actuated by malice and other ulterior motives contrary to fair administration of justice and the Kenya constitution 2010.
- (l) A declaration that the detention and/or imprisonment of the petitioner by civil police at the Nanyuki Police Station between 15/11/2019 – November 18, 2019 was un-procedural, illegal, unlawful and unconstitutional, ill-conceived, driven by ulterior motives and violated the petitioner’s constitutional right to liberty, right to human dignity and his societal standing as a military personnel.
- (m) A declaration that the remand of the applicant in civil custody at the Nanyuki police station from November 15, 2019- November 18, 2019 was un-procedural, illegal, unlawful and unconstitutional and violated the Petitioner’s sacrosanct constitutional right to freedom and security of the person.
- (n) A declaration that the remand of the Petitioner in civil custody at the Nyeri maximum prison from December 6, 2019 to date is un-procedural, illegal, unlawful and unconstitutional.
- (o) [N] A declaration that the transfer of the petitioner’s criminal matter from Nanyuki law court in Laikipia County to Nyeri County was un-procedural, unlawful and unconstitutional.
- (p) A declaration that the 4<sup>th</sup> respondent failed and/or neglected their primary role according the petitioner the full benefit and protection of the law when they allowed civil authorities to override their jurisdiction authority over he petitioner.
- (q) A declaration that the decision and/or action or omission of the 4<sup>th</sup> respondent to cede jurisdiction to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is discriminative, oppressive, vexatious, and actuated by interests other than justice and constitutes an abuse of the legal process.
- (r) A declaration that the 1<sup>st</sup> respondent has failed and/or neglected her primary duty of providing dutiful and conscientious legal advice to the other respondents on the separation of powers between civil and military authorities, occasioning gross miscarriage of justice or in the alternative the 2<sup>nd</sup> and 4<sup>th</sup>



respondent are not amenable or are impervious to dutiful and conscientious legal advice from 1<sup>st</sup> respondent.

- (s) A declaration that the disappearance and subsequent death of the three persons in the criminal matter facing the Petitioner ought to have been proper subject for an inquest.
  - (t) An order of judicial review quashing the plea-bargain agreement between Collins Pamba and the Hon DPP in Criminal Case No 19 of 2019, Republic v Collins Pamba at the High Court of Kenya or in the alternative an order of mandamus to issue compelling the Hon DPP to move the Hon. High Court of Kenya in accordance with section 127 L(2) *C.P.C*
  - (u) An order for compensation to the Petitioner for the loss of his personal liberty having been in close arrest for more than three (3) years contrary to section 140(4) *Kenya Defence Forces Act*, which specifically limits the period of close arrest for an arrested/accused military personnel to a maximum of an aggregate of forty two (42) days.
  - (v) A declaration that agents of the 3<sup>rd</sup> respondents grossly violated the petitioner's right to privacy when they accessed his phone data without a court order of November 15, 2019.
  - (w) A declaration that the Petitioner is entitled to Compensatory general, exemplary, aggravated and punitive damages for the wanton and gross violations of his constitutional rights by the Respondents' severally and jointly and consequently an award of damages to the tune of the global sum of Kenya shillings Thirty Million (Kshs 30,000,000) or such amount as this Hon Court deems fit and just to grant and interests therein.
  - (x) A declaration that the Petitioner merits costs.
  - (y) Any other appropriate relief at the discretion of this Honourable Court.”
2. The Petition was supported by the affidavit of even date sworn by the petitioner, as well as the supplementary supporting affidavit dated October 6, 2023. The 2<sup>nd</sup> respondent Director of Public Prosecutions and the 3<sup>rd</sup> respondent Director of Criminal Investigations opposed the Petition by way of a replying affidavit dated September 21, 2023 sworn by Corporal Reuben Mwaniki a police officer attached to DCI headquarters.
3. The matter was canvassed by way of written submissions. The petitioner filed the written submissions dated December 4, 2023 whilst the 2<sup>nd</sup> respondents relied upon the written submissions dated May 20, 2024.

## Background

4. This petition arises from the arrest and arraignment in court of the petitioner before the High Court in Nyeri on a charge of murder contrary to section 203 of the *Penal Code* cap 63 laws of Kenya vide High Court Criminal Case No 18 of 2019. That trial is ongoing before another court.
5. The petitioner filed this Petition challenging the jurisdiction of the High Court to try him for the offence of murder on grounds that being a military officer, the trial ought to have been conducted before a court martial.



6. The petitioner further challenges the authority of the Directorate of Criminal Investigations to investigate him. He contends that as a military officer it is only the Military Police who have power to investigate him.
7. The petitioner also challenges the authority of the Director of Public Prosecutions to prosecute him arguing that as a military officer he can only be prosecuted by the Director of Military Prosecution (DMP) before a Court Martial.
8. Finally the petitioner challenges the plea bargain Agreement reached between the office of the DPP and one Collins Pamba. He argues that the said plea bargain agreement is prejudicial to himself, violates his constitutional rights and urges the court to set aside the same.

### **Analysis and Determination**

9. I have carefully considered the petition filed before this court, the reply filed thereto as well as the written submissions filed by both parties.
10. The petitioner has filed before this court a constitutional petition alleging the breach by the respondents of various articles of the [Constitution of Kenya 2010](#), arising from his arrest, arraignment in court and prosecution for the offence of murder.
11. The threshold of a constitutional Petition was set out in the case of [Anarita Njeru v Republic](#) [1979] KLR where the court observed as follows:-

“if a person is seeking redress from the High Court on a matter which involves a reference to the [Constitution](#), it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed....”

12. Similarly in [Communications Commission of Kenya & others v Royal Media Services Limited & 5 others](#) [2014] eKLR the court stated that

“Although article 22(1) of the [Constitution](#) gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in [Anarita Karimi Njeru v Republic](#), (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the [Constitution](#) alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

13. The court while considering the elements of a sustainable Constitutional Petition in [Grays Jepkemoi Kilplagat v Zakayo Chepkoga Cheruiyot](#) [2021] eKLR stated that:-

“It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the



allegations or complaints.....Although I have in my foregoing discussion adverted to grounds (c) and (d) of the preliminary objection that there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court.” [Own emphasis]

14. It is not in any doubt that the petitioner herein was at all material times a serving member of the Kenya Defence Forces (hereinafter) KDF .
15. The petitioner submits that being a military officer he can only be tried by a Court Martial. That the Civil Courts which here includes the High Court have no jurisdiction to try him for the offence of murder.
16. It is trite law that jurisdiction is everything and any court acting without requisite that jurisdiction will be acting in vain. Blacks Law Dictionary 9<sup>th</sup> Edition defines ‘jurisdiction’ as  
“ the power given to a court to entertain, hear and determine a dispute before it.
17. Halsburys Law of England 14<sup>th</sup> Edition defines jurisdiction as:-  
“ .....the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in the formal way for decision.”
18. In Owners of Motor Vessel ‘lilian S’ v Caltex Oil (kenya) Limtied [1989] KLR the court stated thus  
“Jurisdiction is everything without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings.
19. In Words and Phrases Legally Defined Vol 3, John Beecroft Saunders defines jurisdiction as follows:  
By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics..... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given. [Own emphasis]
20. The jurisdiction of any court is derived from either the Constitution or legislation or both. No court can arrogate to itself jurisdiction except that which is conferred upon it by law. The question of whether a court has the jurisdiction to entertain a matter is not a mere procedural issue; it goes to the very heart of the matter. Where the law provides for the jurisdiction of any particular court then that court can only act strictly within the limits of said jurisdiction.
21. The petitioner has challenged the power of the High Court to try him for the offence of murder. He submits that being a military officer his trial could only be conducted before a Court Martial. The



Petitioner relied on the provisions of the Kenya Defence Forces Act (2012) (hereinafter 'KDFA') and has cited several cases in which military personnel had challenged the jurisdiction of the High Court to try them.

22. Articles 165(3)(5) and 162 of the Constitution of Kenya 2010 set out the jurisdiction of the High Court as follows:-

- (3) Subject to clause (5), the High Court shall have –
- (a) unlimited original jurisdiction in criminal and civil matters;
  - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;
  - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of -
    - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
    - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
    - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
    - (iv) a question relating to conflict of laws under article 191;and
  - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (5) The High Court shall not have jurisdiction in respect of matters -
- (f) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
  - (g) falling within the jurisdiction of the courts contemplated in article 162(2). [Own emphasis]

23. The same constitution through article 169(1) and (2) creates the subordinate courts in the following terms:-

“The subordinate courts are -

- a. the Magistrates Courts.
- b. the Kadhis' Courts
- c. the Courts Martial; and



- d. any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by article 162(2)
- (2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).

24. I have carefully perused the provisions of the Kenya Defence Forces Act. The preamble to the Act states that the KDFA is:-

“An act of Parliament to provide for the functions, organization and administration of the Kenya Defence Forces pursuant to articles 232 and 239(b) of the Constitution to give effect to article 241 and other relevant articles of the Constitution, to provide for disciplinary matters and for connected purposes”

25. Section 4 of the Act provides for the persons to whom the KDFA will apply as follows:-

“4. Application of the Act.

This Act applies to the following persons

- a. every member of the regular forces.
- b. an officer or service member of the reserve force, whether of the regular or volunteer reserve who is called out for service or is in training.
- c. auxilliary reserve force.
- d. Any person who though not otherwise subject to this Act, is serving with the Defence Forces under an engagement and has agreed to be subject to this Act.
- e. Cadets
- f. An alleged spy of the enemy.”

26. It is quite obvious that the petitioner who was a serving military officer at the time of his arrest is covered by this Act as said Act governs the regulation of the affairs of all disciplined forces whilst in service to the Republic of Kenya. Similarly the Kenya Defence Force Act does contemplate how offences committed by military personnel are to be dealt with and the appropriate remedies thereto.

27. The petitioner sought to make a distinction between himself as a military officer and civilians i.e non-military personnel. He argued that as a military officer he could only be tried by the court martial for any offence he had allegedly committed.

28. Section 2 of the KDFA defines Civil Courts in the following terms:

“a court of ordinary criminal or civil jurisdiction.”

29. The Act further defines a “Civil offence” as

- “(a) an offence under Part XV11
- (b) an offence under a written law other than this Act.



- (c) an act which if committed in Kenya would constitute an offence contemplated in paragraph (a) or (b).

30. Section 211 of the [KDFEA](#) which deals with Trials by Civil Courts provides that

- (i) Nothing in this Act restricts the offences for which a person may be tried by a civil court, or the jurisdiction of a civil court to try a person subject to this Act for an offence other than an offence under Part VI.
  - (2) Where a person –
    - a. is tried by a civil court for a civil offence; and
    - b. (b) has already been sentenced to or awarded punishment for an offence under Part VI consisting of an act or omission that constitutes (whether wholly or in part) the civil offence.

Section 63 of the Interpretation and General Provisions Act (cap 2) shall not apply but the civil court shall in sentencing the person have regard to the punishment imposed in respect of offences under Part VI”

31. Therefore section 211 of the [KDFEA](#) clearly provides that the trial in a civil court of a person subject to the Act (such as the Petitioner) is not in any manner whatsoever restricted save for offences provided for under Part VI.

32. Part VI of the Act provides for service offences. These are covered by sections 58-136 of the Act which go on to provide for the offences which cannot be tried in Civil Courts. Most of the offences covered by section 55- section136 cover what may be loosely termed as military offences e.g. Desertion, mutiny, failure to obey orders, Spying, Abuse of military Authority etc.

33. However the above sections also include certain offences which are also covered by the Penal Code e.g stealing, Destruction of Property, Fraud, Corruption etc.

34. For a civilian court to try any of the offences covered by sections 55- 136 would amount to wading into the jurisdiction of the Courts Martial. However it is important to note that the offence of murder IS NOT one of the offences reserved for the Court Martial under Part VI.

35. Particularly section 56 of the [KDFEA](#) provides that

“Nothing in this Act or any order, disciplinary code, rules, regulations or manual shall affect the jurisdiction of any Civil Court to try a person for any offence triable by a Civil Court.  
[own emphasis]

36. The offence of Murder is provided for by sections 203 and 204 of the [Penal Code](#) of Kenya. Section 133(1)(a) as of the KDFEA also provides for the punishment for a person convicted for the offence of murder by a Court Martial. Therefore the KDFEA does recognize that the offence of murder can be committed by military personnel. Certainly murder cannot be said to be a purely ‘military offence’ that can only be committed by service men or women and is peculiar to the jurisdiction of the military criminal justice system. As stated earlier the offences only triable by a Court Martial are provided for by sections 55 - 136 of the KDFEA. Murder is not a service offence identified and provided for by the provisions of the KDFEA.



37. Section 63 of the *Interpretation and General Provisions Act* Cap 2 Laws of Kenya provides as follows:-

“Where an act of omission constitutes an offence under two or more written laws, the offender shall, unless a contrary intention appears, be liable to be prosecuted and punished under any of those laws, but shall not be liable to be punished twice for the same offence.” [own emphasis]

38. Accordingly the petitioner is liable to be tried under either the Courts Martial or the Civilian Courts for the offence of Murder. The only restriction is that he cannot be tried in both court systems for the same offence. There is nothing to show and neither has the Petitioner alleged that he has already been tried before a Court Martial in respect of the charge of murder he is now facing.

39. I find that the petitioner has misconstrued the law in asserting that being a military officer he is only liable to be tried before a Court Martial.

40. As discussed and demonstrated above notwithstanding his status as a military officer the Civilian courts have full jurisdiction to try the Petitioner for certain offences which includes the offence of murder.

41. The Courts Martial is an institution uniquely created to address military offences committed by military personnel and to try civilians who have committed offences in a military setting. The KDFCA does not in any way curtail jurisdiction of civilian courts to try military officers for offences triable in a Civil Court murder being one such offence.

42. In the Nigerian case of *Civil Liberties Organisation & others v Nigeria*, (2000) AHRLR 243 the African Commission on Human and Peoples Rights observed as follows

“With particular reference to special tribunals [which here includes Courts Martial] the African Commission has been emphatic that their jurisdiction should not include trying offences over which ordinary courts have jurisdiction. In the Media Rights case the Commission held that setting up of the Special military tribunal and clothing it with jurisdiction to try treason and other related offences which offences were recognized by Nigerian law as falling within the jurisdiction of the regular courts was unacceptable as it infringed on the independence of the judiciary.

Besides infringing on the independence of the judiciary the practice of giving special tribunals and military court the jurisdiction that belongs to ordinary courts undermines the authority of ordinary courts which they should enjoy in any country that cherishes democracy and the rule of law.” [own emphasis]

43. The commission went to state that

“The African Commissions’ position that military courts should not have jurisdiction over civilians and offences that fall within the jurisdiction of Ordinary courts is partly consistent with the UN Basic principles on the Independence of the Judiciary.”

44. The decision of the commission is persuasive authority. Murder is an offence ordinarily triable in Civilian courts and even where the suspect is a military officer nothing would prevent the conduct of the trial in the regular courts.



45. Finally on this point of jurisdiction article 165(3(a) of the Constitution of Kenya 2010 bestows upon the High Court

“unlimited original jurisdiction in Criminal and Civil matters.”

[own emphasis]

46. the *Constitution* is the supreme law of the land and cannot be subject to any other written law. The KDFEA is legislation that is subject to the provisions of the *Constitution*. The said Act cannot be cited in an attempt to oust the unlimited original jurisdiction bestowed upon the High Court by the *Constitution*.

47. Where the murder was committed by a military officer and the victim was also a military officer then an argument may be made for a trial before a Court Martial. However this is a case in which the victims were civilians. I therefore find that the High Court has full jurisdiction and authority under law to try the Petitioner on a charge of murder. The petitioner’s prayer to have his trial transferred to a Court Martial is declined.

48. The petitioner also contends that the office of the Director of Public Prosecutions has no authority to prosecute military personnel who are subject to the KDFEA for any criminal offence. That his trial may only be prosecuted by the Director of Military Prosecution. (DMP)

49. Section 213 of the *KDFEA* which sets up the office of the Director of Military Prosecutions Provides as follows –

1. There shall be a Director of Military Prosecutions in the Ministry responsible for Defence who shall be appointed by the Defence Council.
2. A person shall not be appointed as the Director of Military Prosecutions unless the person is-
  - (a) an officer not below the rank of “Lieutenant Colonel”. and
  - (b) an advocate of the High Court of Kenya of not less than ten years standing.
3. A person appointed as the Director of Military Prosecutions under this section shall –
  - (a) have power to direct military police to investigate any information or allegation of criminal conduct, and a military police shall comply with any such direction;
  - c. exercise powers of prosecution under this Act and shall undertake prosecutions at a court-martial against any person subject to this Act in respect of any alleged offence under Part VI;
    - (ba) notwithstanding the provisions of section 157, have power to decide whether to prosecute or not to prosecute in relation to any offence under this Act wherein the accused person elects to be tried by court martial, or a commanding officer, or an appropriate superior authority remands the case for trial by court martial;
    - (bb) amend or substitute a charge referred to him or her by the Commanding officer or appropriate superior authority at any time before a Court Martial is convened;



- (bc) Refer a change or a substituted change to the commanding officer or appropriate superior authority with directions that the same be tried summarily or dismissed
  - (c) have power with the permission of the Judge Advocate to discontinue any proceedings before a court-martial at any stage before summing up by Judge Advocate.
4. The Director of Military Prosecutions shall not discontinued proceedings before a court martial unless with the permission of the Judge Advocate. [Own emphasis]
50. A clear reading of section 213 makes it clear that the Director of Military Prosecutions will only conduct prosecution before a court martial in respect of offences allegedly committed under Part VI. As stated earlier murder is not one of the offences falling under Part VI. The Director of Military Prosecutions is not authorized to conduct prosecutions in civilian courts.
51. “Article 157 of the Constitution establishes the office of the Director of Public Prosecutions as follows:-
- 6. The Director of Public Prosecutions shall exercise State powers of prosecution and may –
    - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
    - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and (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 or Public Prosecutions under paragraph (b).
  - (7) If the discontinuance of any proceedings under clause
  - (6) (c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.
  - (8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.
  - (9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
  - (10) The Director of Public Prosecutions shall not require the Consent of any person or authority 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.
  - (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. [own emphasis]
52. Once again it is important to mention that the ODPP is a creation of the Constitution which is the Supreme Law of the Land. The KDFA which creates the office of Director of Military Prosecutions cannot supercede the Constitution.
53. The ODPP is mandated to prosecute any person before any court (other than a Court Martial).



54. Section 63 of the *Interpretation and General Provisions Act* [cited earlier] provides that where an offence is provided for by two or more laws then the prosecution of that offence effectively bars the possibility of prosecution for the same offence under a different system of law.
55. By commencing prosecution of the Petitioner under the *Penal Code* the ODPP effectively blocked the prosecution of the Petitioner for the same offence by a Court Martial.
56. In the case of *Poghisbo v Republic* [2022] eKLR the Applicant was charged with actions which amounted to offences both under the KDFFA and the Penal Code. He was tried by a Court Martial and was found culpable.
57. The applicant then filed an application before the High Court seeking leave to appeal against the decision of the court Martial. The Director of Military Prosecutions sought to be named as the respondent in the application. In declining to admit the DMP as a respondent the High Court stated as follows
- “Although it is not disputed that the proceedings in the court martial have not been concluded, this fact by itself does not give the Director of Military Prosecutions authority or any legal basis to defend the application filed in this court. It is common knowledge that the application though emanating from proceedings in the court martial is distinct and separate from those proceedings and this being a conventional court not a court martial, the DMP cannot be the respondent in the 1<sup>st</sup> respondent’s application. Flowing from the foregoing, it is my finding that the forum for the proceedings involving the 1<sup>st</sup> respondent having changed from the court martial to this court, the office of the DPP was properly named as the respondent in the application.” [own emphasis]
58. Similarly the petitioner herein having been charged before the High Court I find that the ODPP is the proper authority to conduct his prosecution.
59. The petitioner has challenged the plea bargain agreement entered into by the ODPP and one Collins Pamba who initially faced similar charges with the petitioner.
60. The petitioner was arrested by police on November 15, 2019. The petitioner was then arraigned at the High Court in Nyeri vide Criminal Case No 18 of 2019 (see Annexure PMM ‘8’ to the Petition)
61. At the same time one Collins Pamba was also arraigned in the High Court at Nyeri and similarly faced three Counts of murder vide Criminal Case No 19 of 2019 (see Annexure PMM ‘9’). However the said Collins Pamba eventually entered into a plea bargain agreement with the ODPP which resulted in his charges of Murder being withdrawn and substituted with the lesser charge of Being an Accessory after the fact of murder contrary to section 222 of the *Penal Code*.
62. The said Collins Pamba pleaded guilty to the lesser charge and was sentenced to serve five (5) years imprisonment. He was then treated as a prosecution witness in the case against the petitioner.
63. The petitioner submits that the Plea bargain Agreement was not procedural and that the same was prejudicial to himself as having lost family members as a result of the murder for which he is charged, he (the petitioner) is in effect a victim. That as contemplated by section 137(I) of the *Criminal Procedure Code* the petitioner ought to have been informed and/or consulted before the plea agreement was reached.



64. Section 137(1) of the *Criminal procedure Code* provides as follows:-

“137(1) A prosecutor shall only enter into a plea bargain agreement in accordance with section 137 A.

(a) .....

(b) .....

(c) unless the circumstances do not permit, after affording the victim or his legal representations to the prosecution regarding the contents of the agreement.”

65. The obvious question that arises is whether the petitioner can be deemed to be a victim of a crime which he is alleged to have committed? The relevant legislation in this regard would be the *Victim Protection Act 2014*.

66. Section 2 of the *Victim Protection Act* defines a “Victim” as” any natural person who suffers injury, loss or damages as a consequence of an offence.”

67. The same Act defines an “Accused” as “a person who is charged with an offence under any written law.”

68. The petitioner asserts that as the father to some of the slain persons he is infact a ‘victim’

69. Plea bargaining is fairly new area of jurisprudence in this country. The *Victim Protection Act* itself is silent on whether a person accused of a crime can also be considered a victim of the very crime of which he has been accused. To my mind this would be nothing short of an absurdity.

70. Section 4 of the *Canadian Victims Bill of Rights* SC 2015 which is an Act for the recognition of Victims Rights provides as follows:-

“An individual is not a victim in relation to an offence, or entitled to exercise a victim’s rights under this Act, if the individual is charged with the offence found guilty of the offence or found not criminally responsible on account of mental disorder or unfit to stand trial in respect of the offence.” [own emphasis]

71. It is my opinion that the above provision makes perfect sense. One cannot claim to be a victim of the very crime which one is charged with having committed. In my view the ODPP was perfectly entitled to consider and to enter into a plea bargain agreement with Collins Pamba notwithstanding the fact that the persons alleged to have been killed were family members of the petitioner. It is quite common for the ODPP to secure plea agreements with one or more accused persons where several persons have been charged with the same offence. I find nothing illegal and/or unprocedural in the plea bargain agreement entered into in this matter.

72. I have considered all the other grounds raised by the petitioner in challenging his prosecution for this offence e.g. his manner of arrest, detention etc. In my view many of the said objections are matters which the accused ought to raise in his defence at the trial as they do not in my view raise constitutional issues.

73. Finally I find no merit in this petition. The same is hereby dismissed in its entirety.

74. No orders on costs.

**DATED IN NYERI THIS 11<sup>TH</sup> DAY of OCTOBER, 2024.**

**MAUREEN A. ODERO**



**JUDGE**

