



**Mulunda v Attorney General & 3 others (Constitutional Petition
9 of 2022) [2023] KEHC 607 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CONSTITUTIONAL PETITION 9 OF 2022**

DK KEMEL, J

FEBRUARY 2, 2023

**IN THE MATTER OF KIMILILI TRAFFIC CASE NO E119 OF
2022-REPUBLIC OF KENYA VERSUS TITUS WANJALA
WANYAMA**

AND

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 24,
25, 27, 157, 159, 165, 244, 258, AND 259 (1) OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CONTRAVENTION AND/OR
THREATEDED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS AS SET OUT UNDER ARTICLES
27, 28, 29, 47 AND 50 OF THE CONSTITUTION OF KENYA**

BETWEEN

BETWEEN

ISIAH MULUNDA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

INSPECTOR-GENERAL OF POLICE 3RD RESPONDENT

CHIEF MAGISTRATE'S COURT, KIMILILI 4TH RESPONDENT



RULING

1. Pursuant to the provisions of Articles 2, 3, 10, 22 (1), 27, 50, 157, 159 of the Constitution of Kenya, 2010 and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 the Petitioner/Applicant filed a Notice of Motion application dated August 26, 2022, subsequently filed on August 30, 2022. He sought orders that; this Honourable Court be pleased to order a stay of proceedings in Bungoma Traffic Case No E239 of 2022 (Republic vs Isaiah Mulunda) pending the hearing and determination of this application; that this Honourable Court be pleased to order a stay of proceedings in Bungoma Traffic Case No E239 of 2022 (Republic vs Isaiah Mulunda) pending the hearing and determination of the Constitutional Petition.
2. The application was premised on the grounds that:
 - i. The State is prosecuting the Petitioner based on evidence that clearly absolved him of the charges/liability of causing death by obstruction contrary to Section 46 of the Traffic Act
 - ii. Article 50 of the Constitution of Kenya provides for the right to a fair trial and Article 159 of the Constitution together with Section 4 of the ODPP Act provides for the guiding principles that should guide the ODPP in conducting its duties amongst others impartiality and the need to serve the cause of justice prevent abuse of the legal process and public interest
 - iii. the 2nd Respondent in deciding to prosecute and continuing to prosecute the Petitioner abdicated its constitutional duty by failing to prevent and avoid the abuse of legal processes in instituting Bungoma Traffic Case No E239 of 2022 (Republic vs Isaiah Mulunda) without any grounding in the evidence tendered to it by the 3rd Respondent which clearly and unambiguously absolved the Petitioner.
 - iv. Any objective review of the findings and evidence availed by the 3rd Respondents demonstrates the Petitioner clearly did not commit any act or omission that may have led to the offence he is charged with before the 4th Respondent and in the circumstances it is patently evident from the Respondent's conduct thus far that the Respondents are intent on perpetrating a breach of inter alia the Petitioner's constitutional right to a fair trial as provided for by Article 50 of the Constitution or at best indifferent to the occurrence of such a patent breach.
 - v. The proceedings in Bungoma Traffic Case No E239 of 2022 (Republic vs Isaiah Mulunda) have already commenced and the matter is next scheduled for hearing on September 6, 2022 thus it is of utmost urgency that the Honourable Court does intervene on an urgent basis to prevent the continued hearing by the 4th Respondent of evidently flawed proceedings that have no foundation in justice.
 - vi. The continued prosecution of the Petitioner is an outright abuse of the Court process for the reasons outlined and clearly endangers the Petitioner's constitutional right to a fair hearing by subjecting him to a trial that the acts leading to did not disclose an offence.
 - vii. The Petitioner will suffer prejudice and emotional anguish if subjected to the trial which does not meet any objective standard of fairness or justice.
3. According to his supporting affidavit filed on the even date, on June 29, 2019 a road traffic accident occurred along the Bungoma-Webuye highway in which a motor vehicle registration number xxxx was



- driven at a high speed into the rear of a tractor registration number xxxx, which he was driving and its trailer registration number is xxxx.
4. He averred that the police investigations confirmed that he had not caused the accident in question and revealed the one at fault as the driver of the motor vehicle registration number xxxx. (he attached a copy of the police cover report and investigation diary confirming the same).
 5. He averred that from the finding of the 3rd Respondent, he believed that it is apparent that he did not commit an act or omission that may have led to the offence he is now charged with before the 4th Respondent.
 6. He averred that the decision by the 2nd and 3rd Respondents to re-arrest and prosecute him for the offences of causing death by obstruction have abdicated their respective constitutional duties and are purposing a clear abuse of the legal process.
 7. He averred that the proceedings in Bungoma Traffic Case No E239 of 2022 (Republic vs Isaiah Mulunda) have already commenced and the matter was next scheduled for hearing on September 6, 2022.
 8. In response, the 2nd and 3rd Respondent vide No xxxx PC Jackline Were, the Base Commander Bungoma Traffic Base swore a replying affidavit on November 7, 2022 averring that the Petitioner was arraigned in Court on December 17, 2021 following traffic accident that occurred on June 29, 2019 at about 0515hrs at Misango area along Bungoma-Webuye Road.
 9. She averred that the accident involved a tractor registration no xxxx being driven by the Petitioner and a Saloon car registration no xxxx make Toyota Ipsum driven by Erick Wanyama Juma who died on the spot.
 10. He averred that their investigations concluded that the Petitioner caused the accident and that he ought to be charged for causing the death of Erick Wanyama by obstruction contrary to Section 46 of the [Traffic Act](#) Cap 403 Laws of Kenya.
 11. In response to the 2nd and 3rd Respondents replying affidavit, the Petitioner filed a further replying affidavit sworn on November 14, 2022. He averred that the deponent PC Jackline Were is misleading the Court and lying on oath by stating that she recommended that the investigations findings recommended that he be prosecuted for the offence of causing death by obstruction.
 12. The application was canvassed by way of written submissions. The Petitioner and the 2nd and 3rd Respondents filed and exchanged their submissions. The 1st and 4th Respondent did not enter appearance or participate in the disposition of this application.
 13. The Petitioner submitted on two issues: whether he met the threshold of grant of stay of criminal proceedings and whether he met the threshold for grant of the conservatory order of stay of proceedings in the lower Court.
 14. On the issues of whether he met the threshold of grant of stay of criminal proceedings, he submitted that the same is a discretionary power and it ought to be exercised by the Court wisely and subject to the circumstances of each case. He submitted that based on the replying affidavit sworn by the 3rd Respondent's officer on behalf of the 2nd Respondent, it was evident that the Petitioner is a victim of oppression, malice and ill motive.
 15. On the issue of whether he met the threshold for grant of the conservatory order of stay of proceedings in the lower Court, he submitted that his case has met the requisite threshold as he has depicted the



- unconstitutional acts by the 1st and 2nd Respondents who have threatened his right to a fair hearing and equal protection from discrimination.
16. In response, the 2nd and 3rd Respondent submitted that the Petitioner's submissions are solely on his opinion that there is no enough evidence to secure a conviction against him and not on how the Respondents violated his constitutionally guaranteed rights. Counsel further submitted that the mere fact that the Petitioner has been charged with an offence is not a violation of a right in the circumstances and that the Petitioner ought to defend himself before the proper Court which is not this Constitutional Court.
 17. It was submitted that the recommendation by the DPP for prosecution of the Petitioner is within its powers under Article 157 of the Constitution of Kenya and Section 6 of the ODPP Act.
 18. It was submitted that the Petitioner failed to prove any malice with regard to the decision on his prosecution and that the same was exercised within the ambits of the law.
 19. I have considered the application the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.
 20. Article 21(a) of the Constitution provides that 'it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.' Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and must perform their functions in accordance with the Constitution.
 21. Nevertheless, Article 23 grants the High Court power to uphold and enforce the bill of rights. A public authority will be found to have acted unlawfully and or unconstitutionally if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness).
 22. The functions of the Director of Public Prosecutions are provided under Articles 157 6, 9(a), (b), (c), (7), (8), (9), 10 and 11 of the Constitution.
 23. The director of public prosecutions exercises the state functions of prosecution including the institution, undertaking, taking overs, continuance and or termination of criminal proceedings amongst other functions and duties.
 24. The above position is replicated in Section 6 of the Office of the Director of Public Prosecutions Act which provides that pursuant to Article 157 (10) of the Constitution, the Director of Public Prosecutions shall:- (a) not require the consent of any person or authority for the commencement of criminal proceedings; (b) not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and (c) be subject only to the Constitution and the law. It is also important to mention that under Article 245 (4) (a) of the Constitution, 'no person may give direction to the Inspector General with respect to the investigation of any offence or offences.' Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.
 25. Its trite that the Constitution vests the DPP with the sole Authority, power and responsibility to exercise control over the prosecution of all criminal matters except the institution of cases at the Court Martial.



Individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution. A proper and effective administration of the criminal justice system is a matter of great public interest. Clearly, the decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.

26. There is no doubt that a wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receive careful consideration.
27. There is no doubt that Courts have an overriding duty to promote justice and prevent injustice. It is trite that from this duty, there arises an inherent power to stop police investigations (or stop a prosecution) if the Court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the Court or infringement of a citizen's fundamental rights. Abuse of process has been defined as something so unfair and wrong with the prosecution that the Court should not allow an investigator or prosecutor to proceed with what is, in all other respects, a perfectly supportable case. (*Hui Chi-Ming vs R* {1992} 1 AC 34, PC.) Whether an investigation or a prosecution is an abuse of Court process, unfair, wrong or a breach of fundamental rights, it is for the Court to determine on the individual facts of each case.
28. The Petitioner argues that the prosecution is without basis and proper evidence as the investigations did recommend that he was not at fault. He maintained that the oath by PC Jackline Were were lies on oath. The Inspector General is statutorily and constitutionally ordained to undertake investigation, deter and detect crime and arrest. There is no material before me to suggest that the Inspector General exceeded or violated his mandate or breached the Constitution.
29. But what is more important is that it is not for this Court to determine whether the evidence discloses an offence known to the law. That is a function statutorily and constitutionally vested in the DPP. Again, it is not a function of this Court to determine the veracity or to weigh the strength of the evidence or the Petitioner's defence. That is a function for the trial Court hearing the criminal case. This Court can only intervene if there are cogent allegations of violation of constitutional rights; or threat to violation of the Rights; or in clear circumstances where it is evident that the accused will not be afforded a fair trial; or the right to a Fair Trial has been infringed or threatened; or where the prosecution is commenced without a factual basis. The allegations cited by the Petitioners do not pass this threshold. It is not enough to make empty allegation or recite Articles of the Constitution. There must be clear evidence that the Respondents acted in total disregard of the law. The Petitioners are inviting this Court to determine the sufficiency of the evidence (which is constitutionally ordained to the DPP) or weigh the veracity of what ought to be his defence in the lower Court which is not the function of this Court but the trial Court.
30. The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. This is a decision constitutionally vested on the DPP. Where discretion is conferred on the decision-maker the Courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully (Sir Rupert Cross, *Statutory Interpretation*, 13th edn (1995), pp.172–75; J Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see ATCO Gas and Pipelines



Ltd vs Alberta (Energy and Utilities Board) [2006] SCR 140). The DPP is mandated to independently evaluate the evidence and make the decision to prosecute independently.

31. The inherent jurisdiction of the Court to stop investigations or a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. The provisions of the *Constitution* conferring powers upon the High Court to grant such remedies as conservatory orders are a device to advance justice and not to frustrate it.
32. The petitioner seeks for stay of proceedings on the ground that the evidence is not sufficient to sustain a conviction against him in the end. However, the duty to prove those assertions is upon the prosecution and not himself. He should allow the charges to be proved against him and he will have an opportunity to challenge the same in court. In the case of *Republic V Director of Public Prosecution & 3 Others Ex-Parte Bedan Mwangi Nduati & Another [2015] eKLR* it was held;

‘It is trite that the court ought not to usurp the constitutional mandate of the Director of Public Prosecution to investigate and undertake prosecutions in the exercise of the discretion conferred upon that office under article 157 of the *Constitution*. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. 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.’

The applicant is under obligation to show that the court process is being abused and that the rights of the applicant are under serious threat. It is not in dispute that criminal prosecutions are supposed to be in the public interest. Looking at the charges laid against the applicant, it is clear that the same relates to circumstances which led to the death of one of the motorists involved in the traffic accident. During the trial, the applicant will have his day in court to challenge the allegations. There is no evidence that the applicant will not be accorded a fair trial by the trial court.

33. Stay of proceedings is usually resorted to sparingly and only in exceptional circumstances. Gikonyo J in the case of *Kenya Wildlife Service V James Mutembei [2019] eKLR* held as follows;

‘Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases. Stay of proceedings will be exercised where the proceedings are shown to be frivolous, vexatious, or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not or probably would not succeed but he could not possibly succeed on the basis of the pleading and the facts of the case.’

Looking at the circumstances as presented by the parties herein, I am satisfied that the applicant has not met the threshold for the grant of a conservatory order of stay of proceedings pending determination



of the petition herein. The applicant has indicated that he has a good defence to the charges facing him. If that is the position, no prejudice will be suffered by him if he challenges the charges before the trial court. The applicant's rights to a fair trial has not been curtailed in any way.

34. Guided by the tests discussed above, I find that the Petitioner has failed to satisfy the tests for granting the conservatory orders sought. The upshot is that the Petitioner's application dated August 26, 2022 is unmerited. Consequently, I dismiss the said application with no order as to costs.

It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 2ND DAY OF FEBRUARY, 2023.

D.K. Kemei

Judge

In the presence of:

Wanjala for Otieno for Applicant/Petitioner

Nyauma for 2nd and 3rd Respondent

..... for 1st and 4th Respondents

Kizito Court Assistant

