



**Republic v Wanguru Principal Magistrate (Criminal Revision  
E124 of 2021) [2023] KEHC 1600 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1600 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL REVISION E124 OF 2021  
RM MWONGO, J  
MARCH 7, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**WANGURU PRINCIPAL MAGISTRATE ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Samuel Njuku Kamau was in the process of constructing a residential house in Bosnia Village, Nguka Ward, Mwea West in June 2021. The construction came to the notice of the Sub-County Public Health Officer, Kirinyaga County Department of Health. By way of a Charge Sheet under the [Public Health Act](#) Sections 126(1) as read with section 120(3), the Health Officer initiated criminal charges against Kamau for his failure to submit an approved building plan. The case was filed in the Wanguru Principal Magistrate's Court on July 2, 2021.
2. The DPP subsequently filed an objection to the proceedings in the lower court. The grounds were, *inter alia*, that only DPP had prosecutorial powers and that the Public Health Officer had no such powers under law, unless consented to by the DPP.
3. In his ruling, after a detailed analysis of the constitutional principles regarding the constitutional mandate of the Office of the DPP and its powers vis-a-vis the powers of Public Health Officers, the trial magistrate dismissed the DPP's objection. The applicant seeks to review the trial court's proceedings and determination.
4. This petition is primarily about whether the Public Health Officer, Kirinyaga County, has the authority to institute criminal proceedings or whether only the DPP is entitled to exercise prosecutorial power. In addition, the secondary question is whether the Magistrate's court was entitled to engage



in an exercise of constitutional interpretation concerning the primary question. Finally, this court will need to determine whether to stay the proceedings of the lower court

5. The application for Revisions seeks the following orders:
  - a. That the Honourable Court be pleased to grant a stay of proceedings in Wanguru SPMCrC No. E408 of 2021 pending hearing and determination of this Revision.
  - b. That the Honourable Court be pleased to set aside the entire ruling dated 11<sup>th</sup> August, 2021 by the learned Senior Principal Magistrate Honourable Gerald M Mutiso in Wanguru SPMCrC No. E408 of 2021.
  - c. That this Honourable Court be pleased to issue an order of prohibition against the Public Health Officer from undertaking powers of prosecution and criminal proceedings in the name of the Republic against any person pending hearing and determination of this application.
  - d. That this Honourable Court be pleased to declare that the delegated prosecutorial powers purportedly being exercised by the Director of Public Health Services are null and void in the light of Article 157 the *Constitution of Kenya* 2010 and 57(4) of the *Office of the Director of Public Prosecutions Act*.
  - e. That the case be handled by a different magistrate other than the Hon. Gerald M Mutiso SPM as this will be in the interest of justice.
  - f. That this Honourable Court be pleased to give directions inviting submissions and granting audience to the Director of Public Prosecutions to enable us canvass this application before the court.
6. The grounds upon which the application is premised are as follows:
  - i. That the above-mentioned matter was registered in the SPM Court Wanguru on July 5, 2021 wherein one Mr. Njagi, a Public Health Officer attached to the Sub County Public Health Office in Mwea West, Kirinyaga County, filed a charge sheet in a bid to initiate and or commence criminal proceedings in the name of the Republic against Daniel Njuku Kamau without any involvement of the Office of the Director of Public Prosecutions within the Republic of Kenya.
  - ii. That upon presentation of the charge sheet and during the plea taking Prosecution Counsel exercising prosecutorial power on behalf of the Director of Public Prosecution objected to initiation and or commencement of the said criminal proceedings by a stranger.
  - iii. That upon hearing the objection raised by the Prosecution Counsel, the Hon. Gerald M Mutiso SPM invited submissions on the issue of who has the power to conduct criminal proceedings. Ultimately the Hon. Magistrate, in his ruling dated August 12, 2021 overruled the objection by Prosecution Counsel.
  - iv. That further in his ruling, the Hon. Magistrate went on legal excursion where he sought to interpret the provisions of Article 157 of the *Constitution* and more specifically Article 157 (12) of the *Constitution* vis a vis Section 167 of the *Public Health Act*.
7. At the hearing, there was an attempt by the Public Health Officers Association to appear as interested parties in the suit, and they had filed submissions. Their appearance was objected to by the state. This court upheld the objection and ruled that the said party had not served any documentation on the



parties and could not be permitted to be a party in such circumstances. Their submissions were struck out.

## **Parties' Submissions**

### **Applicant's Submissions**

8. The applicant in their submissions raised two questions, namely;
  - a) whether the trial court in giving an interpretation of the constitution usurped the jurisdiction of the High Court, and
  - b) whether Public Health Officers have powers to initiate and or conduct criminal prosecutions in the name of the Republic in the absence of written authority from the Director of Public Prosecutions.

### **On the first question as to whether the honourable magistrate gave an interpretation of the constitution and usurped the jurisdiction of the High Court;**

9. The applicant submits that an interpretation of the constitution as defined by the constitution under Article 165(3)(d) entails *inter alia*:
  - a. Determination of whether any law is inconsistent with or in contravention of the constitution.
  - b. Determination of whether anything said be done under the authority of this constitution or of any law is inconsistent with, or in contravention of, this constitution.
  - c. 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.
10. That it is clear from the proceedings and the ruling that the honourable magistrate assumed jurisdiction and proceeded to give an interpretation of the DPP's exercise of the state powers of prosecution vis-a-vis the Public Health Act.
11. In *John Kipng'eno Koech & 2 Others v Nakuru County County Assembly & Others* [2013] eKLR the court stated that:

“Jurisdiction is the practical authority granted to a formally constituted body to deal with and make pronouncements on legal matters and by implication to administer justice within area of responsibility. It is a scope, validity, legitimacy or authority to preside or adjudicate upon a matter.”
12. That the trial magistrate had no jurisdiction to engage in the pursuit as it did, given the provisions of Article 265(3)(d) which empowers the High Court to hear any questions respecting the interpretation of the constitution. That a court's jurisdiction flows from either the constitution or legislation or both as found in *Samuel Kamau Macharia & Anor v Kenya Commercial Bank Ltd & Another*

### **On whether Public Health Officers have powers to initiate and or conduct criminal prosecutions in the name of the Republic in the absence of written authority from the Director of Public Prosecutions**

13. The honourable magistrate stated in his ruling that Article 157 of the constitution does not give the Office of the Director of Public Prosecutions exclusive powers to initiate and prosecute all criminal



cases in Kenya because Article 157(12) permits parliament to enact laws conferring prosecution powers on authorities other than the DPP.

14. Further, the honourable magistrate stated that Article 157 (6) of the Constitution vests the state powers of prosecution on the Director of Public Prosecutions but there is nothing to suggest that those powers are exclusive to the DPP in all criminal cases.
15. The applicant submits that the trial court assumed the jurisdiction of the High Court to interpret the constitution and proceeded to misinterpret the express provisions of Article 157 of the constitution.
16. The applicant further submits that the trial magistrate's interpretation that section 167 of the Public Health Act Cap 242 that vests public health officers with prosecutorial powers independent of the mandate of the DPP as articulated under Article 157 (6) is unconstitutional and contrary to the spirit and principles enshrined in the constitution.
17. The office of the DPP is a creature of the constitution and Article 157 vests in the office the Director of Public Prosecutions the state powers of prosecutions. The essence of state powers of prosecutions entails the control of criminal prosecutions in respect of offences recognized by all statutes.

### Respondent's Submissions

Whether the DPP has exclusive prosecution powers including power to appoint and revoke appointments of prosecutors under Article 157 of Constitution, and therefore whether section 167 of the Public Health Act Cap 242 Laws of Kenya is inconsistent with Article 157 of the Constitution;

18. In Stephen Mburu Ndiba v Ethics & Anti-Corruption Commission & another [2015] eKLR it was held:

“...the statutory basis upon which the commission can prosecute can easily be traced to the mother law, the Constitution. The Constitution is clear that the power to prosecute is not the preserve of the Director of Public Prosecution; any person or authority can institute prosecution although the Director of public Prosecutions can take over such prosecution with the consent of such person or authority”.
19. Article 157 (6) (b) of the Constitution sheds more light on this implying that criminal proceedings can be commenced by any person or authority. The DPP does not always have to be the initiator of such proceedings.
20. The respondent argued that Article 157 (12) of the Constitution goes further to say that indeed Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions. As far as the Ethics & Anti-Corruption Commission is concerned, such legislation, conferring upon it powers of prosecution, can be found in section 32 of the Act. This Act was conceived much earlier than the Constitution and therefore the enactment of section 32 of the Act cannot be said to have been legislated from article 157(12) perspective; however, prior to the promulgation of the Constitution, individuals and authorities including public authorities and a host of other public bodies could still institute and prosecute criminal cases against any person without any reference to the Director of Public Prosecutions or to the Attorney General before him.
21. According to the respondent, the judgment in Court of Appeal case of Esther Theuri Waruiru & Another v Republic Criminal Appeal No. 48 of 2008 [2011 eKLR] would not be binding on the High Court. Justice Mativo in Michael Waweru Ndegwa v Republic supra, observed that the said Court of Appeal judgment “never made any reference at all to section 32 of the Anti-Corruption Act; neither was there any discussion of the constitution provisions of articles 157(6)(b) and 157(12) on the exercise of powers to prosecute by the other persons or authorities such as the Anti-Corruption Commission.”



For this reason, Justice Mativo concluded that “Much as this court is bound by the decisions of the Court of Appeal by virtue of the doctrine of stare decisis, its decision in *Esther Theuri Waruiru & Another Versus Republic* supra can be distinguished and validly be departed from for the reasons I have given.”

22. The respondent submits that the import of the foregoing ratio decidendi in the High Court Judgments quoted above is that the conferment of prosecutorial powers on other persons other than the DPP under the *Public Health Act* Cap 242 or by any other law enacted prior to the 2010 *Constitution*, is legal and not inconsistent with Article 157(12) of the *Constitution*.
23. It is thus erroneous and misleading for the Applicant to submit that section 167 of the *public Health Act* is no longer applicable, as having been repealed by section 57(4) of the *ODPP Act* No. 2 of 2013. The respondent invited the Court to take judicial notice of the status of section 167 of the *Public Health Act*.

**On whether the Hon. Magistrate usurped the powers of this Honourable Court by invoking the provisions of the Constitution to reject the public prosecutor’s prayer for dismissal of charges instituted by an appointee of the County Director of Health under section 167 of the Public Health Act Cap 242 Laws of Kenya.**

24. It is the applicant’s submissions that the Hon. Magistrate usurped powers of this Honourable Court by “purporting to interrogate constitutionality of section 167 of the Public Health Act,” which is a special jurisdiction only reserved for High Court pursuant to article 165 (3) (d).
25. In paragraph 42 of his reasoned Ruling, the Hon. Magistrate observed that the DPP could only revoke appointments of public prosecutors appointed by him pursuant to section 85 of the *Criminal Procedure Code* CAP 75 Laws of Kenya. For prosecutors appointed pursuant to other legislations including the *Public Health Act*, their revocation can only be done by Parliament through legislation. Such prosecutors are therefore not subject to the whims, directions and/or control of the ODPP.

**Whether the learned Hon. Magistrate usurped the jurisdiction of the High Court to interpret Constitutional provisions**

26. Further the Applicant claims that the Magistrate court interrogated the constitutionality of Section 167 of the *Public Health Act* and powers of Director of Public Prosecutions under Article 157 of the *Constitution* usurping special jurisdiction only reserved for the High Court. The question before the Magistrate’s court was on the application of the said Article of the Constitution.
27. The respondent relied on the case of *Republic v Chairman, Political Parties Disputes Tribunal ex parte Susan Kibika Wakarura*, [2017] eKLR whereby the subordinate court’s entitlement to apply the Constitution in matters which they ordinarily have jurisdiction was upheld. It is our humble submission that the constitutional provisions aforementioned were not interpreted as the Magistrate’s Court merely applied them in determining the issues arising therefore the jurisdiction of the High Court to interpret constitution provisions was not usurped by the learned Magistrate as alleged.

As to whether Public Health Officers have powers to initiate and or conduct criminal prosecutions in the name of the Republic in the absence of authority from the Director of Public Prosecutions?

28. The respondent submitted that Section 167 of the *Public Health Act* provides that a Health Authority may specifically authorize any of its officers in writing to prosecute any offence as it provides:
  - “ 1) A health authority may, by any of its officers or by any person generally or specially authorized in writing by the authority, prosecute for any



contravention of, offence against, or default in complying with, any provision of this Act or any rule made or deemed to be made thereunder, if the contravention, offence or default is to have been committed within or to effect his area.

- (2) Where any officer or person has, under subsection (1), prosecuted any person for any contravention of, offence against or default in complying with any provision of this Act, or any rule made or deemed to be made thereunder, and the accused has been convicted of that contravention, offence or default, all fines and penalties imposed may be recovered by such officer or person as a civil debt recoverable summarily.”

29. Going by the above provision the respondent submitted that a health authority may prosecute any person who has committed an offence by any of the officers or any person specifically authorized in writing to prosecute the same. Article 157 (12) of the Constitution permits Parliament to enact laws conferring prosecution powers on authorities other than the DPP.

### **Issues for Determination**

30. The issues that arise for determination by this court are as follows
1. Whether the trial court usurped the powers of the High Court in interpreting the Constitution
  2. Whether Public Health Officers have powers to initiate and or conduct criminal prosecutions in the name of the Republic in the absence of written authority from the Director of Public Prosecutions.

### **Analysis and Determination**

#### **Whether the trial court usurped the powers of the High Court in interpreting the Constitution**

31. The system of Courts in Kenya is set out under Articles 162 to 170 of the Constitution. Article 165(3) (d)(i)-(iii) gives the High Court:

“jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –

- i) .....
- ii) the question whether anything said to be done under the authority of this constitution or of any law is consistent with or in contravention of this Constitution
- iii) .....

32. The same constitution at Article 169 establishes the subordinate courts and at Article 169(2) provides for their jurisdiction as follows:

“Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1)”

33. No provisions were cited by the respondent concerning the constitutional or statutory powers of the trial court to engage in the constitutional interpretation exercise which resulted in the finding that the DPP has no exclusive powers of prosecution.



34. Under the Magistrates Court Act Cap 10 the jurisdiction of subordinate courts is set out, *inter alia*, as follows in section 4:

- “ 4. Criminal jurisdiction of Resident Magistrate’s Court The Resident Magistrate’s Court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as are for the time being conferred on it by—
- (a) the Criminal Procedure Code (Cap. 75); or
  - (b) any other written law.”

35. It is arguable that the matter which was before the trial magistrate was the offence under the Public Health Act, and that in the process of that argument an objection arose which was not worded as an application for constitutional interpretation, but arose as an objection in the course of the trial court’s exercise of its proper jurisdiction.

36. I have perused the lower court file. It is clear that the state counsel sought to take over the prosecution in the lower court from the Public Health Officer, that the said officer declined, and the arguments under the Constitution ensued. To that extent, there was nothing that can be said to have been unconstitutional about the proceedings in the lower court.

37. However, the determination of the trial court was that:

“I hold that a health authority may commence prosecutions under the Public Health Act without the permission of the Director of Public Prosecutions “

The above holding is a problematic position in light of constitutional provisions stating otherwise. It also invites this court into the exercise of its supervisory powers of revision under both Article 165(6) and (7) of the Constitution and Section 362 of the Criminal Procedure Code.

38. This leads me naturally to the next issue.

**Whether Public Health Officers have powers to initiate and or conduct criminal prosecutions in the name of the Republic in the absence of written authority from the Director of Public Prosecutions.**

39. Upon hearing the objection raised by the Prosecution Counsel, the Hon. Gerald M Mutiso SPM invited submissions on the issue of who has the power to conduct criminal proceedings. Ultimately, in his decision dated 12<sup>th</sup> August, 2021, the Hon. Magistrate, overruled the objection by the DPP.

40. Although the honourable magistrate properly noted the provisions of Article 157 (6) (b) of the Constitution, he appeared not to have internalized the meaning thereof. That Article provides as follows:

“ The Director of Public Prosecutions shall exercise State powers of prosecution and may –

- (a) .....
- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by any 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 any criminal proceedings instituted by the DPP or taken over by the DPP”

41. The clear meaning of this provision is not difficult to appreciate. First, it is that the DPP exercises state powers of prosecution. That means that the entire gamut of state power to prosecute is vested under the DPP. Second, it means that the DPP has constitutional power to institute and undertake, take over and continue or discontinue all manner of criminal proceedings.
42. The applicant’s case is that one Mr. Njagi, a Public Health Officer attached to the Sub County Public Health Office in Mwea West, Kirinyaga County, filed a charge sheet in a bid to initiate and or commence criminal proceedings in the name of the Republic against Daniel Njuku Kamau without any involvement of the Office of the Director of Public Prosecutions within the Republic of Kenya.
43. It is true, as argued by the trial court, that Article 157 (12) of the *Constitution* goes further to say that indeed Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.
44. It was not shown that Parliament had enacted legislation, since the promulgation of the 2010 Constitution, conferring powers of prosecution on other authorities. What was relied upon as such power was Section 167 of the *Public Health Act* which provides that a health authority may specifically authorize any of its officers in writing to prosecute any offence under the Act. The provision is as follows:
- “1) A health authority may, by any of its officers or by any person generally or specially authorized in writing by the authority, prosecute for any contravention of, offence against, or default in complying with, any provision of this Act or any rule made or deemed to be made thereunder, if the contravention, offence or default is to have been committed within or to effect his area.”
45. It was submitted that a health authority may prosecute any person who has committed an offence by any of the officers or any person specifically authorized in writing to prosecute the same. Further, that Article 157 (12) of the *Constitution* permits Parliament to enact laws conferring prosecution powers on authorities other than the DPP where it provides:
- “(12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions”
46. I have perused the *Public Health Act*, Cap. 242, and note that it was first enacted in as Act No. 38 of 1921. It then had amendments as Cap. 130 of (1948), Act No. 39 of 1956, L.N. 187/1956, L.N. 188/1956, L.N. 172/1960, L.N. 173/1960, Act No. 28 of 1961, Act No. 36 of 1962, and so on.
47. The last amendment to Section 167 was in 1970 via Legal Notice No 41 of March 10, 1970. The amendment was merely in the substitution of the words “local authority” with the words “health authority”.
48. Given that situation, it needs no special submission to come to the conclusion that since the *Constitution* 2010 was enacted, Parliament has not enacted legislation conferring prosecutorial powers under the *Public Health Act*. The powers conferred under the *Public Health Act* were given by legislatures under repealed constitutions or under the colonial administration, and cannot be said to have been in contemplation of or in tandem with the Constitution, 2010.



49. Those provisions of the Public Health Act must therefore be read together with, and in light of Article 2(4) that declares all law that is inconsistent with the constitution to be unconstitutional. Those provisions must also be read together with Article 262 of the Constitution and the Transitional Provisions in the Sixth Schedule paragraph 7 of the Constitution, 2010, which provide as follows:

“262. Transitional and consequential provisions

The transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date”

Sixth Schedule

“7. Existing Laws

(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

50. Construed in the light of these Constitutional provisions, it cannot be said that the provision of section 167 of the Public Health Act have undergone any post 2010 legislative action to bring them into conformity with the Constitution

51. Thus, the enactment of section 167 of the Public Health Act cannot be said to have been legislated from or pursuant to Article 157(12) of the Constitution. Prior to the promulgation of the Constitution, various individuals and authorities including public authorities and a host of other public bodies could institute and prosecute criminal cases against any person without any reference to the Director of Public Prosecutions or to the Attorney General before him.

52. However, upon promulgation of the Constitution, all such state prosecutorial powers became vested in the DPP unless Parliament specifically legislate pursuant to Article 157(12) of the Constitution to empower any such other bodies.

53. The respondent’s argument was that the conferment of prosecutorial powers on other persons other than the DPP under the Public Health Act Cap 242 or by any other law enacted prior to the 2010 Constitution, is legal and not inconsistent with Article 157(12) of the Constitution.

54. The applicant’s position was that the office of the DPP is a creature of the constitution and Article 157 vests in the office the Director of Public Prosecutions the state powers of prosecutions. The essence of state powers of prosecutions entails the control of criminal prosecutions in respect of offences recognized by all statutes.

55. The question of the DPP’s powers of prosecution was settled in Director of Public Prosecutions v Okemo & 4 others (Petition 14 of 2020) [2021] KESC 13 (KLR) (Crim) (5 November 2021) (with dissent - W Ouko, SCJ on a different point as to extradition). The Supreme Court held:

“6. Under the current constitutional dispensation, the powers to prosecute any conduct of a criminal nature is the exclusive preserve of the Director of Public Prosecutions. This is subject to the provisions of article 157(6)(a) regarding a court martial, and any legislation that may be enacted by Parliament pursuant to article 157(12) of the Constitution. Such legislation must however be consistent with the preceding sub-articles of the main article.”



## Conclusions

56. I find that it has not been shown that there is any provision of the Public Health Act granting prosecutorial powers to the health authorities that has been legislated by Parliament pursuant to Article 157(12) of the *Constitution*.
57. It is evident from the proceedings and the ruling that the learned trial magistrate assumed jurisdiction and proceeded to give an interpretation of the DPP's exercise of the state powers of prosecution vis-a-vis the *Public Health Act*. In the result this turned out to be fallacious.
58. It is trite that the DPP acts independently and his actions cannot be questioned except in situations of abuse of the legal process.

## Disposition

In reviewing the decision of the trial court, I hereby grant the following prayers as sought by the DPP:

- a. This Court hereby reviews and sets aside the proceedings in Wanguru SPMCrC No. E408 of 2021;
- b. This Court hereby set aside the entire ruling dated August 11, 2021 by the learned Senior Principal Magistrate Honourable Gerald M Mutiso in Wanguru SPMCrC No. E408 of 2021.
- c. Court hereby issues an order of prohibition against the Public Health Officer from undertaking powers of prosecution and criminal proceedings in the name of the Republic against any person.
- d. This Honourable Court hereby declares that the delegated prosecutorial powers purportedly being exercised by the Director of Public Health Services are null and void in the light of Article 157 (12) of the *Constitution of Kenya* 2010 and Sec. 57(4) of the *Office of the Director of Public Prosecutions Act*.
- e. That the case be handled by a different magistrate other than the Hon. Gerald M Mutiso SPM as this will be in the interest of justice.
- f. That this Honourable Court allows the DPP to give submissions and in the granting audience to the Director of Public Prosecutions to enable us canvass this application before the court.

Orders accordingly.

**DELIVERED AT KERUGOYA ON THIS 7<sup>TH</sup> DAY OF MARCH, 2023**

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**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mamba for DPP
2. No representation for Respondent
3. Court Assistant - Job

