



**Kimeu v Director of Criminal Investigations & 2 others (Criminal Application E024 of 2022) [2023] KEHC 3347 (KLR) (Crim) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3347 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPLICATION E024 OF 2022  
GL NZIOKA, J  
APRIL 20, 2023**

**BETWEEN**

**RAPHAEL NDOLO KIMEU ..... PETITIONER**

**AND**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 1<sup>ST</sup> RESPONDENT**

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

**KAHAWA CHIEF MAGISTRATE'S COURT ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner filed a petition dated 25<sup>th</sup> January 2022, in the Constitutional and Human Rights Division of the High Court of Kenya in Nairobi. The matter was subsequently transferred to the High Court Criminal Division in Nairobi. The reason thereof being that, the nature of the prayers therein, where the Petitioner was seeking that, an order be issued to restrain the Respondents from arresting and charging him, could be heard and determined in the Criminal Division.
2. Upon hearing the parties, the court directed the Petitioner to consider amending the petition as the prayers sought for were civil in nature, and the Criminal Division was dealing with criminal cases. Consequently, the Petitioner filed an amended petition dated 22<sup>nd</sup> February 2022, which is the subject of this decision.
3. In a nutshell, the Petitioner avers that, he has been charged *vide* the Chief Magistrate's Court, Criminal case No. E055 of 2022, at Kahawa Law Courts. That, prior to his arraignment in court, he was working with Kenya Power and Lighting as an Acting General Manager, Network Management, with effect from 15<sup>th</sup> December 2021. That following the prosecution, he has been suspended from employment.



4. The Petitioner narrates under paragraphs 35-38 of the affidavit in support of the petition the nature of charges he is facing in the trial court and the probable explanation as to why he should not have been charged. That, basically that, at the time the offence occurred he was working as an Engineer, dealing with the technical aspects of the power distribution and not physical security infrastructure, which involves the power lines and tower that are said to have been vandalized.
5. He further avers that he has been singled out for prosecution among many in the management and therefore discriminated against. Further, the decision to charge him was influenced by the utterance of the Head of State who termed the alleged acts vandalism as “Economic sabotage”. That by succumbing to the Head of state pressure, the Directorate of Public Prosecution has abdicated its duties under Article 157 of the Constitution of Kenya. Therefore, the court should not “standby and countenance a travesty of justice and gross abuse of legal process”.
6. That, he is challenging the constitutionality, validity and legality of the arrest, pre-charge detention and the criminal charges against him among other ground of violation of his freedom.
7. He therefore prays that the court grant the following orders stipulated under paragraph 59 of the petition: -
  - a. A declaration that the charges and criminal proceedings against the Petitioner in Kahawa Chief Magistrate’s Court Criminal Case No. E005 of 2022 violate his right to equality, protection and equal benefit of the law and freedom from discrimination and are to that extent null and void.
  - b. A declaration that the charges and criminal proceedings against the Petitioner in Kahawa Chief Magistrate’s Court Criminal Case No. E005of2022 on the basis of the particulars in the charge sheet violate his right to administrative action that is reasonable.
  - c. A declaration that the charges and criminal proceedings against the Petitioner in Kahawa Chief Magistrate’s Court Criminal Case No. E005 of 2022 for alleged omissions or acts not constituting part of his job description is not a bona-fide exercise of the 1st Respondent’s investigative powers and amounts to an abuse of legal process.
  - d. A declaration that the charges and criminal proceedings against the. Petitioner in Kahawa Chief Magistrate’s Court Criminal Case No. E005 of 2022 influenced by the comments and intervention by the head of state on national television violate Article 157(10) & (11) of the Constitution and are to that extent null and void.
  - e. Judicial review order of prohibition restraining the Respondents from undertaking any further criminal proceedings against the Petitioner for alleged omission and acts not constituting part of his job description and/or in relation to vandalism of electricity transmission network or any other charges incidental thereto.
  - f. Judicial review order of certiorari to remove to this court for purposes of quashing the 1st Respondents recommendation to charge and decision of the 2nd Respondent to prefer criminal charges against the Petitioner arising from the alleged incidents of vandalism of the Petitioner’s employer’s infrastructure and/or any other charges incidental thereto.
  - g. Judicial review order of certiorari to remove to this court for purposes of quashing the criminal charges and charge sheet in Kahawa Chief Magistrate’s Court Criminal Case No. E005 of 2022.
  - h. Damages for violation of the Petitioner’s.



- i. Any other relief that the court may deem fit to grant.
8. However, the 1<sup>st</sup> Respondent opposed the petition vide a replying affidavit dated; 21<sup>st</sup> May 2022, sworn by No. 234521 CI Keith Robert. In a nutshell, he deposes that, the arrest and prosecution of the Petitioner is not selective, in that as General Manager, Network Management, he held greater responsibility than any other officer in Kenya Power and Lighting Co. Ltd.
9. He narrates at paragraphs 8-16 the events that took place that led to the arrest and prosecution of the Petitioner and argues that the Petitioner was charged based on evidence and not any other extraneous reasons or influence of any person or authority. Further he was jointly charged with two others. As such the State was guided by Article 157(10) of Constitution in its decision to charge him.
10. However, the Petitioner in a supplementary affidavit dated; 20<sup>th</sup> June 2022, denies all the allegations in the Replying affidavit relating to the date of his appointment as the Acting General Manager. He denied the alleged neglect to act on the email communicating the vandalism, and stated that the email communicating vandalism was addressed to him for information purposes and not for action
11. The petition was disposed of vide filing of submission. The Petitioner submitted that the court has twin jurisdiction under Article 165(3) (d) (ii) and (6) and (f) of the Constitution to interrogate the Powers of Director of Public Prosecution under Article 157 of the Constitution and exercise supervisory role over the subordinate courts.
12. The decision of the court of Appeal in Judicial Service Commission & Another v Lucy Muthoni Njora [2021] eKLR was cited, wherein the court held that, the court in Judicial Review should “must involve a measure of merit analysis” and implored upon this court to interrogate the vitality of the charges and whether there is threshold to support the decision to charge.
13. The Petitioner further submitted that, both offences he is charged with of sabotage contrary to section 343(a) of the Penal Code and Neglect of duty contrary to section 128 as read with section 36 of the Penal Code have no legal or factual foundation and neither imposes statutory nor a common law duty upon him. That, such a duty can only arise under a contract of employment.
14. He argues that, being singled out for prosecution is an affront of his constitutional rights, to wit, the right to equal protection and benefit of the law and freedom from discrimination and right to fair administrative act; contrary to Articles 27 and 47 of the Constitution of Kenya, 2010. He relied on the case of Bitange Ndemo v Directors of Public Prosecution and 4 others (2016) eKLR where the proceedings in the trial court were terminated by the High Court on the grounds of selective prosecution.
15. That, the State has failed to act within the provisions of Article 157 of the Constitution. He referred to the decision of the court in the cases of; Philomena Mbete Mwilu - Vs- Director of Public Prosecution & 3 others (2019) eKLR, Hassan Ali Jobo v Inspector of Police, and 3 others (2017) eKLR and Commissioner of Police & the Director of Criminal Investigation Department & Another v Kenya Commercial Bank Ltd & 4 others (2013) to argue that, where the State prosecutes a person on the influence of third parties, the prosecution cannot stand, and that, the Director of Public Prosecution should act without undue influence from any person or authority.
16. Finally, the Petitioner reiterated that the prayers sought for in the amended petition be allowed as they are merited. He relied on the decision in the case of; Cyrus Shakhbalanga Khwa Jirongo v Soy Developers Ltd & 9 others (2021) eKLR.
17. However, the Respondents, vide submissions dated, 16<sup>th</sup> May 2022, argued that, jurisdiction is everything and referred to the cases of Motor vessel Lilian’s” v Caltex Oil (K) Ltd (1989) eKLR and



*Joseph Njuguna Mwaura & others v R.* That, the court has unlimited jurisdiction to determine whether fundamental rights and freedoms have been violated.

18. That for effective case management and expeditious disposal of cases, similar disputes are effectively adjudicated before specialized divisions of the High Court in Nairobi. That, the matter herein is a constitutional petition seeking for orders of certiorari, prohibition, damages and other reliefs, so it should have been filed in the right forum.
19. The Respondent argued that, the order of prohibition should be issued sparingly and relied on the cases of *Joram Mwenda Guantai v The chief Magistrate*, Civil Appeal no 228 of 2003 (2007) 2EA 170, and *Kuria & others v AG* (2002) 2 KLR 69. That, there is water tight evidence against the Petitioner in the criminal case, and it should be allowed to proceed. In that regard, reference was made to the case of *Diamond Hashem Lalji & Another v Attorney general & 4 others* (2018) eKLR.
20. Having considered the petition and the affidavits in support thereof, the replying affidavits and submissions by the respective parties, I find that, there is no dispute that, the Petitioner is seeking for orders equitable remedies that are civil in nature. That kind of matters are generally heard and determined in the Constitution and Human Rights Division of the High Court.
21. The matters heard in the Criminal Division are basically criminal in nature and relates to inter alia, hearing and determination of; murder cases, criminal appeals from subordinate courts, revision under the revisionary and/or supervisory jurisdiction and all other miscellaneous criminal application.
22. These matters are premised on the provisions of the Penal Code and the Criminal Procedure Code. A perusal of the petition on the face value clearly indicate that, none of these statutory provisions have been invoked.
23. To the contrary, reference is made to the constitutional provisions per se. Therefore, petition for enforcement of human rights are filed in the Constitutional and Human Rights. I concur with the Respondent's submission in that this matter should have been filed there.
24. As a matter of fact, I raised the issue with the Petitioner at the outset, and expected the same to be addressed, but it was not. Indeed, when the matter was referred to the Criminal Division of the High Court, the Petitioner had not been charged. He was seeking restrain the 1<sup>st</sup> Respondent from charging him before any the court of law.
25. It is noteworthy the application to that effect was withdrawn, after he was charged. At that point the Petitioner should have gone back to the Constitution & Human Rights Division of the High Court to canvass this matter.
26. It is not lost to this court that, it has unlimited and inherent jurisdiction under Article 165 of the *Constitution* as a High Court to hear and determine this matter. However, it will not be good practice, to hear a single matter in Criminal Division of the High Court, whereas all others of the kind are filed, heard and determined in a designated division. In my considered opinion, that may encourage "forum shopping"
27. Be that, as it may, I wish to indicate that, even on merit, the Petitioner has deposed to several matters, which in my considered opinion are evidential in nature. It should be understood that, justice is weighed on a scale. It is seen to be done when the scale balances. The scale balances when both sides of the case have been heard and matter deliberated on merit.
28. At this stage, this court will not delve into the evidential matters as it may be prejudicial to the matter in the trial court. I hold the opinion that, the matter in the trial court will be subjected to a full hearing



where the parties will call witnesses for examination in chief, cross-examination and re-examination. It is during that process the true factual position of the case will be determined. Of course if it turns out that, there is no evidence, the Petitioner will be acquitted, and if there is evidence a conviction will follow.

29. The question that arise at this stage is whether the Petitioner will suffer prejudice if he were to be subjected to the trial. In my opinion the trial is a due process of law. It does not per se, amount to violation of one's right. It is the process of sieving, the truth from falsehood, the merit and lack of it. If eventually the Petitioner is acquitted, he can then sue for damages if he was maliciously prosecuted.
30. I hold the view that, the High Court should be slow in prohibiting prosecution and little interference unless there is clear glaring violation of the powers by an Institution, due to the fact that, the other arms of Government should be allowed to carry out their mandate under the Constitution of Kenya under the Doctrine of Separation of Powers.
31. Furthermore, the interest of the public demands that a matter of this nature where the acts complained of, affect the public, its interest should be protected just as the interest of the suspect to a fair trial should. In the given circumstances, the case should be heard fully.
32. Further I find that, although the Petitioner argued he has been charged alone, the Respondent avers, he has been charged with two (2) others. In the given circumstances, I decline to allow any of the prayers in the amended plaint/petition.
33. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 20<sup>TH</sup> DAY OF APRIL 2023**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. Isahi holding brief for Mr. Nganga for the Petitioner

Mr. Kiragu for the Respondent

Ms Ogutu-Court assistant

