



REPUBLIC OF KENYA



KENYA LAW
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**Emodo v Republic (Criminal Revision E005 of 2023)
[2023] KEHC 18621 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL REVISION E005 OF 2023
WM MUSYOKA, J
JUNE 19, 2023**

BETWEEN

CHARLES BARASA EMODO APPLICANT

AND

REPUBLIC RESPONDENT

*(Revision arising from the proceedings in Busia CMCCR Appli. No.
E150 of 2022, Charles Barasa Emodo vs. Vincent Echakara and 4 others)*

RULING

1. The proceedings herein were initiated by way of a letter dated 18th May 2023, and lodged herein on 28th May 2023. The letter is addressed to the Judge, and the applicant complains that his application to initiate a private prosecution was arbitrarily dismissed.
2. The applicant had filed a chamber summons at the primary court, dated 29th September 2022, seeking leave to commence a private prosecution against Vincent Echakara, Samuel Okemo, John Oramisi and George Okonera; asking the court to sign the charge sheet and to admit it; and to issue summonses to compel attendance by the 4 proposed accused persons to answer to the charge.
3. In the affidavit in support, Charles Barasa Emodo, the applicant, avers that he had been assaulted by the 4 proposed accused persons, on 9th February 2021. He reported the matter at Adungosi Police Station, where he recorded a statement. However, after that he was denied a P3 form, and his witnesses were stopped by the area Chief from accessing the police station to record their statements. He thereafter issued a notice to the Attorney-General of intention to sue the State. He avers that the police have been reluctant to arrest the 4 and subject them to prosecution, hence his application to prosecute them privately. He has attached documents to demonstrate that he made a report at the Adungosi Police Station. There is correspondence to and from the Attorney-General.



4. The application named Vincent Echakara, Samuel Okemo, John Oramisi and George Okonera as respondents. They were served, and filed a response, through Vincent Echakara, who averred that he had been informed by the police at Adungosi that the matter was still under investigation, and that the applicant had failed to cite the police in the application.
5. The matter came up for hearing on 24th April 2023. The applicant was present, and so was Mr. Olaka, the Advocate for the respondents. The application was not argued orally, and it appears that the court chose to determine it on the basis of the papers filed. That was quite within the mandate and discretion of the court.
6. The court delivered a ruling on 10th May 2023. In the short ruling, the court said:

“The Applicant has moved the court for an order for private prosecution against the Respondents. He relies on sections 89 and 90 of the Criminal Procedure Code that governs the institution of complaints. From the application of 29/9/2022 the Applicant has expressed frustrations with the Chief of Ong’aroi Sub-Location and the OCS Adungosi police station for failing to act on his complaints. However, I am of the view that the Applicant has not exhausted all his avenues to get justice such as a meeting with the ODPP Busia who has constitutional authority to direct investigation of his matter.

The application is disallowed.

Hon. TA Madowo, Senior Resident Magistrate.”

7. Revision, which is provided for under section 362 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, targets orders, decisions and sentences made or imposed by the trial court, with a view to address any incorrectness, irregularity, illegality or impropriety in them, or the manner that the proceedings leading up to them were conducted. The provision targets the act of or conduct by the trial court, with the intent to correct or straighten out or smoothen any mistakes or errors made by that court, which rendered its decision or proceedings irregular, improper, incorrect or illegal.
8. The law on private prosecutions is now fairly clear. There is a large body of case law on it. Under *the Constitution* of Kenya, Article 157, the Director of Public Prosecutions has unfettered prosecutorial powers, which he exercises without control from anyone, including the courts. There is monopoly over prosecutions by the Director of Public Prosecutions. However, like all powers, even where it is alleged that the prosecutorial powers of the Director of Public Prosecutions are unfettered, there are limits. Limits exist as such powers can always be abused, or used for ulterior purposes, or there could be inertia or reluctance to exercise them to the detriment of some citizens. For inertia or inaction or reluctance to act, there is the remedy of private prosecution.
9. In *Rufus Riddlebarger vs. Brian John Robson* [1959] EA 841 (Forbes Ag P, Windham JA & Sir Owen Corrie Ag JA), the court said :

“This being so, a private prosecution can only be given legitimacy and allowed by the court to be instituted or maintained if it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority. It must be shown to be taken only as a safeguard against extraordinary impropriety, capricious, corrupt or biased failure or refusal to prosecute by the public prosecuting agencies. The court will therefore, require to be satisfied by the private prosecutor, that the private proceedings are necessary because the Attorney-General and his officers or the Police, do not wish to act on the complaint, and that they have declined to act or refused to take action, for culpable reasons.”



10. The criteria for grant of permission to prosecute privately has been set out and elaborated in a number of cases, which include *Kimani vs. Kihara* (1983) eKLR (1985) KLR 79 (Simpson & Sachdeva, JJ), *Floriculture International and 4 others vs. The Attorney General*, High Court Miscellaneous Civil Application No. 114 of 1997 (Kuloba, J), *Otieno Clifford Richard vs. Republic* [2006] eKLR (Lesiit, Wendoh & Emukule, JJ), *Isaac Aluoch Polo Aluochier vs. Stephen Kalonzo Musyoka & 218 Others* [2013] eKLR (M. Ngugi, J), *Shamsber Kenya Limited vs. Director of Public Prosecutions & another* [2017] eKLR (Kimaru, J), *Victor Sambu & 5 others vs. JSN* [2020] eKLR (Kimaru, J) and *Jenifer C. Tele vs. Director of Public Prosecution & 3 others* [2021] eKLR (R. Korir, J). They include evidence that the police and prosecutorial authorities had been made aware of the matter, but had failed to initiate a prosecution, and that the failure to prosecute was unreasonable and unjustifiable. The other point is that an application seeking leave to institute a private prosecution can only be competent if the Director of Public Prosecutions is named as a respondent, because in all criminal proceedings, it is the Director of Public Prosecutions who represents the police in court. See *Frandik Nyamwaro Ogora vs. Elkana Obwaya Nyandika & 2 other* [2018] eKLR (Okwany, J).
11. Were the criteria met in this case? What triggers applications for leave to mount private prosecutions is the failure by the key players in prosecutions to act, after complaints are placed before them. These players are the police and the Director of Public Prosecutions. In this case, a report was made to the police, yet the police were not named as a respondent in the matter. The reason that the police and the Director of Public Prosecutions should be made parties is so that they can account for their inertia, and so that the court can assess whether there was any such inertia in the first place. These criteria were not met. Rather than join the police and the Director of Public Prosecutions, the applicant joined the proposed accused persons, who have a minimal role to play in whether a prosecution should be mounted or not. At best, the proposed accused persons should be named as interested parties, not respondents. He also involved the Attorney-General, yet the Attorney-General no longer has any role in criminal prosecutions. He should have reported the failure by the police to act, to the Director of Public Prosecutions, who has power, under the *Constitution*, Article 157(4), to direct the police to investigate. His case was fatally wounded when he failed to name the police and Director of Public Prosecutions in these proceedings as parties.
12. The trial court was alive to what I have discussed above, particularly to the fact that the Director of Public Prosecutions was not involved, by way of either a report being made to him of the failure by the police to act, and by not being made a party to these proceedings. The trial court did not act illegally or improperly or incorrectly in declining to grant leave to the applicant to initiate a private prosecution of the respondents herein. I find no basis to revise the decision of the trial court, and I hereby decline to do so. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 19TH DAY OF JUNE 2023.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Charles Barasa Emodo, the applicant, in person.

