



Weideneder v Director of Public Prosecutions & 4 others (Miscellaneous Criminal Application E206 of 2022) [2023] KEHC 19512 (KLR) (20 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19512 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E206 OF 2022**

A. ONG'INJO, J

JUNE 20, 2023

**IN THE MATTER OF ARTICLE 2, 19, 20, 22, 23, 25, 27, 29, 47, 48, 49,
50, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF FREEDOM OF SECURITY OF PERSONS

BETWEEN

STEFAN WEIDENEDER APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

**DIRECTOR OF CRIMINAL INVESTIGATION CHANGAMWE POLICE
STATION 2ND RESPONDENT**

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

DUNCUN AMWOYO 4TH RESPONDENT

ROGERS OMAMBIA ONGIGE 5TH RESPONDENT

RULING

Application

1. The Notice of Motion applications dated 5th September 2022 brought under Certificate of Urgency were pursuant to Articles 19, 20, 21, 22, 23, 28, 29, 49, 165 (6), 258 & 259 of the Constitution of Kenya, Section 123 (1) part 5 of the Criminal Procedure Code cap 75 of the laws of Kenya, Section 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, Bail and Bond Policy of 2015, Rules 3 (1)(2) of the High Court (Practice and Procedure Rules), Section 10 of the Judicature Act, and all other enabling provisions of the law.



2. The Applicants seek for the following orders: -
- a. That the instant application be certified as urgent and the same be heard ex-parte in the first instance.
 - b. That the Honourable Court does make the following orders in terms of the 4th Respondent and 5th Respondent:
 - a. Orders the completion of investigations by the 2nd Respondent on the Complaint OB No. 50/01/07/22 within 30 days.
 - b. Order that the 1st Respondent recommends the prosecution of the 4th and 5th Respondents and others not before the Honourable Court on the Complaint in OB No. 50/01/07/22 within 7 days from the lapse of prayer 2a.
 - c. That the Honourable Court be pleased to issue the following orders in terms of arrest: -
 - a. An arrest warrant be issued against the 4th and 5th Respondents for the purpose of investigations.
 - b. The 2nd Respondent be compelled to effect the warrant of arrest.
 - c. In the alternative, the Honourable Court does direct an alternative Security Agency subject to its discretion to effect the said arrest.
 - d. That the Honourable Court does order for the subsequent arraignment, charging of and prosecution of the arrestees, and or suspects in prayer 2 and 3 herein.
 - e. That the Honourable Court be pleased to issue court orders releasing the mobile phones belonging to the Applicant's girlfriend, Barbra Isomanga and the associated minor currently held by the Changamwe Police Station upon completion of investigations and or within 30 days of the Honourable Court's orders.
 - f. That the costs of the suit be in the cause.
 - g. Any other order that this court deems fit and just in the circumstances.
3. The application was supported by grounds on the face of the application and the Supporting Affidavit of the Applicant.

2nd, 3rd and 4th Respondent's Grounds of Opposition

4. The 2nd, 3rd and 4th Respondents opposed the application on the following grounds: -
1. That the 3rd Respondent is required to conduct investigations independently per Article 245 (4)(a)(b) of the Constitution and the orders sought herein seek to interfere with the independent investigations being carried out by the 3rd Respondent.
 2. That the application seeks to usurp the powers of the 1st Respondent as provided under Article 157 of the Constitution.
 3. That the application herein is meant to curtail and or fetter the 1st Respondent's constitutional mandate contrary to Article 157 (10) of the Constitution.



4. That the application is an abuse of the court process and ought to be dismissed with costs.
5. That the claim against the 4th Respondent (No. 236864 IP Duncan Amoyo) herein is filed contrary to Section 12, 13 and 13A of the *Government Proceedings Act* (Cap 40) Laws of Kenya.
6. That the claim against the 4th Respondent (No. 236864 IP Duncan Amoyo) herein was filed contrary to Section 66 of the *National Police Service Act* No. 11A of 2011 Laws of Kenya.
7. That Article 245 (4) (a) and (b) is clear that no person may give a direction to the Inspector General with respect concerning the investigation of any particular offence or offences and the enforcement of the law against any particular person or persons.

5th Respondent's Response

5. The 5th Respondent averred that he has been sued in the small claims court in SCC No. Sm120 Of 2022 Msa – *Stefan Weideneder v Rodgers Omambia Ongige & Duncan Amwoyo* where the Applicant herein is claiming Kshs. 80,000 and Euros 3,000, general damages and others. That there is a similarity of the case he is claiming in that case and the complaint herein, and that the same case cannot give him rights to sue when his complaint is that no investigation has been carried out and concluded.
6. The 5th Respondent contends that the applicant sent him to collect his girlfriend, one Barbra Isomanga, and take her to his apartment which he had leased for 19 days. That the applicant had previously stayed in the apartment on 11th June 2022 for 6 days without payment which he promised to pay on the next visit.
7. That while in the car, the 5th Respondent overheard a conversation between the said Barbra Isomanga and the applicant about two underage girls and that she assured him that they were indeed the ones she had sent the naked videos and pictures earlier and had agreed to the amount offered of Kshs. 10,000.00 each for the services.
8. The 5th Respondent stated that he was alarmed by the said conversation and alerted his brother who informed police officers from Moi International Airport, and that the applicant was found in the company of two underage girls on the balcony of one of the bedrooms by the police officers. That he was summoned to appear before the Sub-County Criminal Investigations Officer
9. The Application was canvassed by way of written submissions.

Analysis and Determination

10. This court has considered the Notice of Motion application, Supporting Affidavit thereto, Replying Affidavit by the 5th Respondent, Grounds of Opposition by the 2nd, 3rd and 4th Respondents, Supplementary Affidavit sworn by the Applicant, submissions filed by the parties herein and enabling provisions of the law, the following issues arise for determination: -
 - a. Whether an order for completion of investigations by the 2nd Respondent on the Complaint in OB No. 50/01/07/22 within 30 days should be issued and whether the phones should be released.
 - b. Whether the court should compel the 1st Respondent to recommend prosecution of the 4th and 5th Respondents within 7days.



- c. Whether the court should issue warrants of arrest for the 4th and 5th Respondents and whether the 2nd Respondent should be compelled to effect the warrants of arrest against the 4th and 5th Respondents.
 - d. Whether an order should issue for an alternative Security Agency to investigate and effect arrest of the 4th and 5th Respondents.
11. Article 244 of the [Constitution](#) provides for the objects and functions of the National Police Service as follows: -
 - a. strive for the highest standards of professionalism and discipline among its members;
 - b. prevent corruption and promote and practice transparency and accountability;
 - c. comply with constitutional standards of human rights and fundamental freedoms;
 - d. train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
 - e. foster and promote relationships with the broader society.
 12. Section 24 of the [National Police Service Act](#) No 11 A of 2011 sets out functions of the National Police Service including investigation of offences and apprehension of offenders among other duties. The exercise of those duties must guard against violation of rights and fundamental freedom in the Bill of Rights under Chapter 4, Articles 19 to 51 of the [Constitution](#) of Kenya, 2010.
 13. However, the said function should be exercised with caution as was held in the case of [Anthony Njenga Mbuti & 5 others v Attorney General & 3 others](#) [2015] eKLR, it was held as follows: -

“That the conduct by law enforcement officers profiling suspects on mere suspicion, arresting and detaining them with no evidence of crime committed is arbitrary and discriminatory guaranteed in our constitution.”
 14. Vide OB No. 50/01/07/22, the applicant reported a complaint against the 4th and 5th Respondents in relation to offences of harassment, extortion, abuse of office by a police officer and fraud. He recorded a statement as to the details of the said crime against him on 30th July 2022. He however complains that no action has been taken against the 4th and 5th Respondents and their agents and they have continued to harass and intimidate him using different phone numbers. The applicant is under the belief that the 2nd and 3rd Respondents are actively protecting the 4th and 5th Respondents and they have no intention of arresting them.
 15. The 2nd, 3rd and 4th Respondents filed Grounds of Opposition dated 27th September 2022 in which they contended that the 3rd Respondent is mandated to conduct investigations independently without interference as per Article 245 (4)(a) and (b). That the application by the applicant is meant to curtail and/or fetter the 1st Respondent’s Constitutional mandate under Article 157 and is therefore an abuse of the court process and should be dismissed.
 16. When this matter came up on 30th November 2022, Mr. Mogaka Advocate for the applicant then indicated that the minors whom the 4th and 5th Respondents alleged to have been molested by the applicant recorded their statements at the DCI Headquarters. Mr. Mogaka also informed the court that the officers who were involved in the matter in one way or another had either been fired or transferred and the lead investigator one Joseph Njiru was summarily dismissed on 13th October 2022 whereas Iddi Juma was transferred to Nanyuki. He also indicated that the two arresting officers one Dickson and



his colleague had been transferred to Mandera and the investigations file removed from Changamwe Police Station to the Mombasa Regional DCI headquarters.

17. In the application herein, it was also prayed that mobile phones belonging to the applicant's girlfriend and the associated minor should be released upon completion of the investigations. From the submissions by Mr. Mogaka Advocate, it is apparent that investigations into the complaints made by and against the applicant are underway. Action has been taken against police officers involved and mobile phones confiscated for purposes of investigations. The applicant reported the complaint on 30th July 2022 and filed this application on 6th September 2022 citing delay in investigations. Considering that this report was made at a time when this country was going through an exercise of general elections, it cannot be concluded that there was inordinate delay in investigations of the complaint. However, the 2nd and 3rd Respondents are expected under Article 244 and 245 (4)(a) and (b) to expedite investigations within a reasonable period of time particularly being that there are allegations of molestation of minors. Upon completion of the investigations, the parties involved have a right to be informed and/or appraised of the outcome of the investigations. The independence of the 3rd Respondent cannot be interfered with merely by the applicant seeking to put the 3rd Respondent to account.
18. Considering that the investigations have been pending for over 6 months, this court hereby orders that the results of the investigations should be forwarded the ODPP within a period of 30 days from the date hereof to recommend whether or not the applicant, 4th and 5th Respondent and any other person should be prosecuted for the offences under investigations as per Article 157 (6) of the *Constitution* of Kenya, 2010 which provides as follows:
- 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 under paragraph (b).
19. Section 6 of the *Office of the Director of Public Prosecution Act*, 2013 also states: -
- “Pursuant to Article 157(10) of the *Constitution*, the Director 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 or her powers or functions under the *Constitution*, this Act or any other written law and;
 - c) Be subject only to the *Constitution* and the law.”
20. Whether or not the phones belonging to the applicant girlfriend and the associated minor should be released will depend upon the outcome of the investigations and whether they will be required as exhibits. The decision to release will therefore be left to the Mombasa Regional DCI who is said to be currently investigating the matter.



21. On whether the court should issue warrants of arrest for the 4th and 5th Respondents and whether the 2nd Respondent should be compelled to effect the warrants of arrest against the 4th and 5th Respondents will depend upon the outcome of investigations and a recommendation by the DPP.
22. In conclusion, the application herein succeeds to the extent that the applicant is entitled to have his complaint and the complaint against him investigated expeditiously and he has a right to be informed of the outcome of the said investigation. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 20TH DAY OF JUNE 2023**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Kago Advocate H/B for Mr. Sitonik Advocate for Applicant

Mr. Ngiri for 1st Respondent

No appearance for Mr. Makuto Advocate for 2nd to 4th Respondents

No appearance for Ms. Rajab Advocate for 5th Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Court: Copy of ruling to be supplied upon payment of copying charges by applicant. Respondent to be supplied for free.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

20. 6.2023

