



**Njiiri v Director of Public Prosecutions & another; Kenya Airways  
(Interested Party) (Petition E007 of 2023) [2023] KEHC 19631 (KLR)  
(Constitutional and Human Rights) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19631 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E007 OF 2023**

**LN MUGAMBI, J**

**JULY 7, 2023**

**BETWEEN**

**JACKSON KIRUTHI NJIIRI ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA AIRWAYS ..... INTERESTED PARTY**

**JUDGMENT**

1. This Constitutional Petition was filed by Jackson Kiruthi Njiiri on 10<sup>th</sup> January, 2023.

**Petitioner's Case**

2. The petitioner alleged that on 21<sup>st</sup> January, 2018 he was arraigned alongside others in Milimani Chief Magistrate's Court Criminal Case No. 1109 of 2018 where he took plea on charges relating to Money laundering and theft that had purportedly occurred between 1<sup>st</sup> January, 2013 and December, 2015 at the interested Party's (Kenya Airways) Head Office in Nairobi.
3. The initiator of the complaint giving rise to those charges was the interested party (Kenya Airways), the Petitioner's employer.
4. In 2019, the Charge Sheet was amended to strike out name of the two accused persons that had fled from the court's jurisdiction.



5. That 1<sup>st</sup> Respondent again sought to amend the charge sheet and dropped charges against the 4<sup>th</sup> accused, Jane Wanjiru Kiboi.
6. The Petitioner averred that no good reasons have been given as to why charges against some of the accused persons have been withdrawn, particularly the 4<sup>th</sup> accused. He stated that the Jane Wanjiru Kiboi was her immediate boss at work and by virtue of the employer's (interested party) regulations, she was required to approve all that the petitioner did in the course of his employment. He alleged that the termination of charges against the 4<sup>th</sup> accused violates Article 157 of *the Constitution* for being arbitrary and discriminatory against him.
7. The Petitioner alleged that he had information that the termination of the charges in respect of the 4<sup>th</sup> accused was motivated by extraneous matters amounting to abuse of office by the 1<sup>st</sup> Respondent.
8. He claimed that since his arraignment in 2018, the criminal case in question has never been heard despite it coming up for hearing and mentions before court on innumerable times. He alleged that there is no good reason why the matter has never taken off six (6) years after he took plea and nine years from the date the alleged offence purportedly happened.
9. The petitioner claimed that his constitutional right to a fair trial under Article 50- has been violated as a result of the excessive delay in prosecution of Criminal Case No. 1109 of 2018. He stated that the evidence of the workmates he may have wanted to call as witnesses may no longer be in the employment of the Interested Party six (6) years later. Further, memories of witness fade with time and even the evidence against him by prosecution witnesses after such a long period might not be reliable and will thus prejudice him and he will undergo an unfair trial founded on unreliable evidence.
10. He averred that the criminal proceedings were brought for the improper motive of covering crime by senior officers of interested party, and this what was being continued through withdrawal of criminal charges against 4<sup>th</sup> accused Jane Wanjiru Kiboi who is also a Senior Official of the Interested Party.
11. The petition is supported by affidavit of the petitioner sworn on 10<sup>th</sup> January, 2023 which substantially reiterates what is alleged in the Petition.
12. He thus prayed for the following reliefs: -
  - a. A declaration that the delay in prosecuting the Petitioner in Milimani Chief Magistrate's Court, Criminal Case No.1109 of 2018 has violated the petitioner's fundamental rights and freedoms and is consequently unconstitutional.
  - b. A declaration that the Petitioner's right to a fair trial has been breached by the undue delay in commencing and carrying out the prosecution of the Petitioner in Milimani Chief Magistrate's Court, Criminal Case No.1109 of 2018.
  - c. A declaration that the prosecution of the Petitioner in Milimani Chief Magistrate's Court, Criminal Case No.1109 of 2018 is improper, unlawful and unconstitutional and should be terminated forthwith.
  - d. An Order of damages to the petitioner for unlawful, malicious and unconstitutional prosecution in Milimani Chief Magistrate's Court, Criminal Case No. 1109 of 2018.



## Respondents Case

13. The 1<sup>st</sup> Respondent (ODPP) filed grounds of opposition dated 22<sup>nd</sup> February, 2023 and also the replying affidavit dated 7<sup>th</sup> March, 2023 sworn by Festus Njeru Njue, the Prosecutor in Milimani Criminal Case No. 1109 of 2018, Republic Vs Hassan Ahmed Haffidh & Others.
14. The deponent swore that he had perused the court file in respect of Criminal Case No. 1109 of 2018 and in fact confirmed that this criminal case had previously been fixed for hearing on many occasions but was never heard for various reasons which are not attributable to the 1<sup>st</sup> Respondent only.
15. He cited the dates which the matter had been before court totaling 41 times. The dates were as follows:  
18/6/2018, 21/6/2018, 19/7/2018, 5/9/2018, 18/10/2018, 21/1/2019, 1/2/2019, 5/4/2019, 17/5/2019, 10/6/2019, 19/7/2019, 22/10/2019, 23/10/2019, 13/11/2019, 14/11/2019, 26/11/2019, 4/12/2019, 16/9/2020, 8/10/2020, 11&12/1/2021, 27/4/2021, 9/6/2021, 13/7/2021, 28/7/2021, 7/9/2021, 19/10/2021, 10/12/2021, 11/1/2022, 17/2/2022, 24/2/2022, 10/3/2022, 21/4/2022, 16/6/2022, 29/6/2022, 15/11/2022, 31/11/2022, 5/12/2022 and 14/2/2023.
16. According to the deponent who swore on behalf of 1<sup>st</sup> Respondent, reasons for the failure to make any progress in the matter varied. Going by what is discernible through reasons given in the replying affidavit, sixteen incidences are accounted for as occasioned by the absence of the accused persons, especially 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused which led to charges against 3<sup>rd</sup> and 4<sup>th</sup> being withdrawn on 11<sup>th</sup> January, 2022 after attempts to arrest them completely failed upon fleeing the Court's jurisdiction.
17. There were also instances when the trial court was not sitting or the Court was sitting but the court file was not presented to the court. That accounted to a total of six times, being; 21/1/2019, 5/4/2019, 14/11/2019, 15/11/2019, 10/3/2020 and 28/7/2021.
18. The High Court granted stay following an application by the 1<sup>st</sup> accused. This was conveyed to the trial court on 5<sup>th</sup> September, 2018 and for the entire duration of stay, nothing transpired apart from mentioning of the case.
19. There were instances when advocates representing some of the accused persons did not attend court as was the case on 26/11/2019 while on 16/6/2022, the case could not proceed because the Advocate for the 1<sup>st</sup> accused informed court that he had just come on record and was yet to get proper instructions.
20. That 1<sup>st</sup> respondent (ODPP) also conceded that he had a share of the blame. On 7<sup>th</sup> September, 2021, case could not be heard since the DPP had called for the prosecution file so as to undertake a review of the same. On 5<sup>th</sup> December, 2022, the prosecution counsel was unwell.
21. The deponent deposed that following withdrawal of charges against 4<sup>th</sup> accused by the 1<sup>st</sup> Respondent, the accused and the other co-accused protested and refused to take fresh plea when the matter came up on 31<sup>st</sup> March, 2023 and 14<sup>th</sup> February, 2023 insisting that they needed to be provided with reasons for the withdrawal of the charges against the 4<sup>th</sup> accused.
22. The other substantial contribution for the delay came from Covid Pandemic. The deponent stated from 10<sup>th</sup> March, 2020 nothing substantive happened until the 27<sup>th</sup> April, 2021 when the trial court attempted to hear the case virtually but immediately ran into headwinds due to voluminous nature of documentary evidence and had to stop.
23. The deponent thus averred the delay has is largely been caused by reasons beyond its control.



24. The 1<sup>st</sup> Respondent opposed the petitioner's averment that he would be prejudiced because the people he would have called as witnesses may no longer be in the employment of the interested party. He stated that this cannot be a sufficient ground for not testifying in a case as the testimony is not dependent on remaining in employment.
25. Responding to the issue raised by the petitioner concerning unreliability of witnesses' testimony due to delay in commencement of hearing, he stated that the witnesses will be cross-examined on oath to test their credibility.
26. On contestation made by the petitioner against the withdrawal of the charges in respect of the 4<sup>th</sup> Accused Jane Wanjiru Kiboi, the 1<sup>st</sup> respondent asserted that its decision was guided by both the evidential and public interest test and was not in any way informed by improper motive or extraneous considerations.
27. The 1<sup>st</sup> Respondent further stated that the petitioner did not demonstrate how the withdrawal of the charges against the 4<sup>th</sup> would prejudice his defence.
28. He claimed that the petitioner also failed to demonstrate that he would not receive a fair trial in the criminal proceedings before the trial court.
29. The 1<sup>st</sup> Respondent asserted that the court cannot interfere with exercise of power by a state organ in exercise of its constitutional mandate unless it is demonstrated that the state organ has acted outside the bounds of reasonableness, procedural fairness, malafides or total disregard of doctrine of proportionality in its decisions making.

#### **2<sup>nd</sup> Respondent's Grounds of Opposition**

30. The 2<sup>nd</sup> respondent (Attorney General) filed grounds of opposition dated 12<sup>th</sup> April, 2023 indicating that no cause of action had been disclosed against the Attorney General or the agencies the Attorney General represents.
31. On 10<sup>th</sup> May, 2023, the Advocate of the petitioner informed this court that the petitioner was not opposed to the 2<sup>nd</sup> respondent being discharged from the petition.

#### **Petitioner's Submissions**

32. The petitioner submitted that his petition is primarily based on Article 50(2) that *the constitution* which guarantees an accused that the right to a fair trial, a right which cannot be limited under *the Constitution*.
33. The petitioner reiterated the facts of the case in which he emphasized that plea was not taken in 2018 and that since that time there has never been a hearing. He submitted that 1<sup>st</sup> respondent had resorted to giving excuses impeding a timeous trial of the case as dictated by *the Constitution*.
34. He blamed the 1<sup>st</sup> respondent for having the accused persons arrested and charged in piecemeal manner and also for inclusion of the two fugitives Vagnela Baghel and Dutta Biny Kumar in the charge sheet stating that the long wait as the Prosecution attempted to pursue them led to waste of time.
35. The petitioner further submitted that too much time was also wasted during Covid 19 Pandemic when Jane Wanjiru Kiboi alleged she had contracted a serious disease and this led to numerous adjournments yet in reality, it now turns out it was a calculated move between her and the 1<sup>st</sup> Respondent to get time to consider her request for withdrawal of the charges and make a state witness as ultimately the charges were dropped on 5<sup>th</sup> November, 2022.



36. That the petitioner requested for reasons for the said withdrawal in exercise of his right to public information but it was not provided by 1<sup>st</sup> respondent.
37. That had the withdrawal of charges for Jane Kiboi been done early enough, all the adjournments that came up camouflaged as being on account of her illness would not have occurred. It was submitted for the Petitioner that withdrawal of charges against her ought to have been done earlier on as information necessary for withdrawal was always available to 1<sup>st</sup> Respondent even on the very first day of the trial.
38. That given that in the replying affidavit, the respondent had only confirmed to have had witnesses on three occasions, it is a clear indication that the respondent has had no intention of prosecuting criminal case No. 1109 of 2018 to its logical conclusion.
39. That the respondent has actively engaged in abuse of legal process in contravention of Article 157 (11) and 50(2) (e) by implying that the right to a fair trial can be limited by want of diligence or poor case management on its part. Counsel for petitioner submitted thus: -
- “The reasons being set out by the respondent in their replying affidavit as having caused the delay in commencing the prosecution, amount to a limitation of petitioner’s fair trial rights. The 1<sup>st</sup> respondent to be saying:
- “Yes, there is delay in commencing prosecution but same is not unreasonable because 1<sup>st</sup> Respondent had reasons to apply for innumerable adjournments in the impugned trial we submit this is simply untenable”
40. Counsel reiterated that the delay in commencing the trial is detrimental to the petitioner as it will be difficult for the petitioner to procure good witnesses and retrieve relevant documents. Further, even if the witnesses are available, they may not remember all relevant facts due to the long passage of time. He insisted that six years later, the memories of these witnesses will most likely be inaccurate hence the petitioner’s right to a fair trial is likely to be compromised.
41. The petitioner relied on the case of Charlo Karisa Salimu Vs Republic [2016] eKLR which cited with approval Canadian and South African Authorities decisions in urging that a period or timespan can be applied to the term ‘unreasonable delay’ and proceeded to throw a challenge to this court to seize this moment. Counsel tactfully implored:
- “...the gauntlet has also been thrown to this Honourable court being the constitutional court to get parameters of what constitutes delay. We are convinced that this court is equal to the task...”
42. Counsel for the petitioner also referred to the case of Thuita Mwangi & 2 Others Vs Ethics & Anti-Corruption Commission & 32 Others (2013) eKLR where the court stated as follows regarding what to consider in determining if there has been unreasonable delay: -
- “...What is clear from the decision is that what constitutes ‘unreasonable delay’ is not a matter capable of mathematical definition but one dependent on facts and awareness of a particular case...”
43. Concerning the powers of the 1<sup>st</sup> respondent, the petitioner’s advocate argued that pursuant to Article 157 (ii), the 1<sup>st</sup> respondent’s is obligated to uphold public interest, interest in the administration of justice and the need to avoid abuse of legal process. Counsel submitted that failure by 1<sup>st</sup> respondent to provide reasons for termination of charge against 4<sup>th</sup> accused and insisting on refusal to avail to



the petitioner the materials it considered that in making the decision for withdrawal is illegal and a demonstration of arrogance on the part of the 1<sup>st</sup> Respondent and hence an abuse of legal process. He submitted that if the prosecution had come across exculpating material relating to the 4<sup>th</sup> accused, it was obligated to provide to the same to the other accused as well; and if the 4<sup>th</sup> accused was made a state witness, then her statements ought to be provided to the petitioner too.

44. The petitioner also wondered how the 4<sup>th</sup> accused who was her boss was discharged and what considerations went into making that decision that could not apply to him. He argued that it had been his intention to rely on cross-examination of 4<sup>th</sup> accused to lay a foundation for his defence as it is only her who can establish the petitioner roles or duties at the Interested Party's place of work.
45. The petitioner submitted that he would not know how and where to get the 4<sup>th</sup> accused following her discharge in order to testify on his behalf.
46. The petitioner contended that in the circumstances, it would be safer for the entire criminal case to be terminated instead of selective termination that was taking place.

### **Analysis and Determination**

47. Having read the petition, the responses and the submissions of the parties, I find that the following are the issues for determination in this petitioner.
  - i. Whether Petitioner's right to a fair trial has been violated by unreasonable delay in the trial of Milimani Chief Magistrate's Criminal Case No. 1109 of 2018.
  - ii. Whether the withdrawal of criminal charges against the 4<sup>th</sup> accused in Criminal Case No. 1109 of 2018 has been done for improper or ulterior motives by 1<sup>st</sup> respondent?
  - iii. Whether the discharge of the 4<sup>th</sup> accused will prejudice the petitioner in the said criminal case?
  - iv. Whether this petition has merit.
48. The first issue is whether the Petitioner's right to fair trial has been violated by unreasonable delay in trial of Milimani Criminal Case No. 1109 of 2018.
49. In support of this contention, the petitioner deposed in the supporting affidavit that he was charged on 21/6/2018 in Milimani Criminal number 1109/2018 but lack of diligence on the part of 1<sup>st</sup> respondent has contributed to long delay as the hearing in that case has never commenced to this day.
50. The petitioner argued that the 1<sup>st</sup> year was all wasted because the 1<sup>st</sup> respondent took time to withdraw charges against the two-fugitive accused that had been charged alongside the petitioner and only withdrew the charges after it was discovered that the said accused persons were no longer within the court's jurisdiction.
51. The petitioner further blamed the 1<sup>st</sup> respondent for working in cahoots with 4<sup>th</sup> accused Jane Wanjiru Kiboi to delay proceedings by purporting that the 4<sup>th</sup> accused had contracted a serious disease during Covid 19 Pandemic while in actual fact she had made a request to the 1<sup>st</sup> Respondent to withdraw the charges which was in reality the cause of the many adjournments which were disguised as necessitated by her illness.
52. In response the 1<sup>st</sup> respondent acknowledged that there had been delay in the hearing of this case but it was not entirely to blame for the same. The 1<sup>st</sup> respondent outlined the various dates that the matter



had been before court for hearing and for mention and why it was not heard on the dates it had been scheduled. Out of a total of 41 incidents; 16 instances were due to absence of some of the accused persons particularly 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused. In another, occasion the 2<sup>nd</sup> accused was unwell. In other instances, the trial court was not sitting despite the prosecution being ready with witnesses to proceed. The trial court had been away on six occasions. The High Court granted stay of proceedings pursuant to an application by the 1<sup>st</sup> accused the which lasted for a long while. In some instances, advocates did not attend court (26<sup>th</sup> November, 2019) and in another occasion an advocate was not ready.

53. For the 1<sup>st</sup> respondent, it was argued that only on 7<sup>th</sup> September, 2021 when the DPP called for file in order to review it and on 5<sup>th</sup> December, 2022 when prosecution counsel was unwell that the DPP was the cause for the adjournment.

54. The right to an expeditious trial is protected in [the constitution](#) which secures it as follows:

55. Article 50(2) (e) states:

“Every accused person has the right to a fair trial, which includes the right:

(e) to have the trial begin and conclude without unreasonable delay.”

56. As is clearly expressed above, [the constitution](#) does not give the exact period within which the trial must started and completed; it instead uses the phrase: -

“begin and conclude without unreasonable delay”

56. The petitioner invited the court to determine with exactitude the amount of time or period that the phrase, ‘unreasonable delay’ may apply to citing the developments in Canada where courts have determined a fixed time limit for the hearing and disposal of criminal cases.

57. I do not think it is prudent for this Court to read into [the Constitution](#) what the framers of this Constitution omitted and found it wise to leave open for discretion that is guided by reasonable consideration of all relevant factors. I thus find wisdom in the jurisprudence that has hitherto guided courts in this country which hold this is a matter which based on assessment of the circumstances of the each particular case. The Court of Appeal case of Julius Kamau Mbugua Vs Republic (2010) eKLR is a case in point. In the case the court held that in determining whether or not there is unreasonable delay, it is not mathematical or administrative formula to be applied but rather it is a judicial determination done by the court upon considering all the relevant factors within the context of the whole proceedings. Indeed, even in Chalo Karisa Salimu Vs Republic (2016) eKLR despite the Court of Appeal referring to the said Canadian decision it only expressed cautious hopefulness by acknowledging that Kenyan situation could be somehow different though one day we could get there as well. It remarked:

“... Taking into account peculiar Kenyan circumstances, perhaps one day the courts will give an interpretation limiting the period a criminal trial ought to take just as they have done in Canada...”

58. The issue of whether or not a trial has delayed is thus a question of facts that must be determined by examination of all circumstances of a case.

59. In the present case, the petitioner contends that the delay of six years is an unreasonable period for someone to be in court without a single witness being called to testify in the case. The petitioner blamed the 1<sup>st</sup> respondent for this state of affairs insisting that it is the 1<sup>st</sup> respondent who has been wasting time instead of getting on with the trial.



60. The petitioner cited the issue of 3rd and 4<sup>th</sup> accused, he said the 1<sup>st</sup> respondent wasted too much time trying to pursue them for over one (1) year before withdrawing the matter on account that they had fled the jurisdiction of the court.
61. The 1<sup>st</sup> respondent in response tried to demonstrate that the delay was not entirely caused by it. It cited incidents where it was ready but in almost six of those occasions, the trial court was not sitting or the criminal case file could not be availed in court.
62. That was also a time that the matter was put in abeyance due to Covid 19 pandemic and even attempt to have it heard virtually by the court during that period stopped because of the heavy documentation involved in terms of evidence.
63. The 1<sup>st</sup> respondent also stated that there was also a lengthy period when the lower court case following a stay order obtained by the 1<sup>st</sup> accused that barred the trial from going on for a considerable period.
64. The 1<sup>st</sup> respondent also brought to the fore instances when the matter could not be heard either because advocates were not ready or accused was unwell or were simply absent.
65. Clearly, from the above factual accounts, it cannot be said the blame for the delay was contributed by one party. Each and every actor in this trial has a fair share of blame. Besides, there were also factors beyond control of the actors, for instance Covid 19 Pandemic and orders of stay that the High Court issued and halted the commencement of the trial.
66. The blame directed at the 1<sup>st</sup> respondent only is thus not genuine and I reject it.
67. I would also not fault the 1<sup>st</sup> respondent to charge 3<sup>rd</sup> and 4<sup>th</sup> accused and for the attempt to pursue them to bring them to justice. I do not agree that time spent while chasing after those suspects was wasted time. It was in the interest of justice for the 1<sup>st</sup> respondent to do everything within its means to bring to justice everyone that evidence implicated with the commission of the crime.
68. If the petitioner felt that more than necessary time was being spent in that pursuit and his trial was being delayed, he should have promptly raised the issue with trial court might have limited the time for the 1<sup>st</sup> Respondent to engage in that pursuit or seek severance of the trial so that the Petitioner can be tried separately. The fact that he waited for the six years shows lack diligence of the part of the Petitioner as well. I believe that had the matter been raised with the trial court, it would have appropriately addressed it in real time. I find the belated attempt to bring it up at this time as insincere.
69. Having said so, then what should be the factors to consider in determining if the delay is unreasonable or not? In my considered view; the court may consider:
  1. Duration of the delay.
  2. Reasons for the delay.
  3. Conduct of the party complaining about the delay- did he seize the earliest opportunity to assert his right to an expeditious trial?
  4. Whether real prejudice has been demonstrated by the petitioner or is likely as a result of this delay.
70. Concerning the length of the delay, obviously six years is a long period for one to have been in court without a single witness being called to testify in his case.



71. As to the reasons for the delay, I have already found as a fact that the reasons for the case not taking off were varied and all actors in that criminal case including the court that is trying it, the advocates, the accused persons have had a fair share of blame for lack of progress in the case. This was further complicated by other supervening events that were beyond the control of the parties at that level such as Covid 19 Pandemic and the order of the High Court that stopped the proceedings for a long while.
72. In regard to the conduct of the petitioner, although he now complains about the delayed hearing of the criminal case No. 1109 of 2018, he has not demonstrated he has been robust in raising this issue of delayed trial before the court he is charged. He did not avail the court record to demonstrate that fact. The question thus becomes, has the petitioner been vigilant in asserting his right to a speedy trial in the court that is seized with the matter or has he just been sitting on his laurels only to wake up after the six (6) years and seek to enforce that right before this forum?
73. In my view, the petitioner has not produced anything to demonstrate that he raised the unfair delay issue with the trial court hence his conduct is not excusable either. He may as well have been unbothered with an expeditious trial. After all, this is not uncommon in this country, it happens oftenly.
74. On the question of possible prejudice, the Petitioner stated that there is a probability that he may not have a proper/fair trial because of the delay citing the possible memory loss of witnesses, that it might be difficult for him to secure witnesses as by the time the case is heard, they might have left the employment of interested party, that it might be difficult to have access to documents which he could use to defend himself and so on.
75. On the issue of possible memory loss of witnesses; it is a fact that following the coming into force of the present constitution, statements of witnesses are now served on to the defence at the commencement of the trial. This includes all documentary evidence that the Prosecution intends to rely on in the case. The petitioner has not complained that this has not been done, hence it would be reasonable to expect that he is already aware of the possible evidence that the prosecution is likely to marshal against him. Should memories of such witnesses' fade, which is likely, they can always be refreshed hence his argument that he might be prosecuted on unreliable evidence is neither here nor there.
76. In any case, if the witnesses digress, he can too use those documents to his advantage to impeach their credit.
77. To that extent, therefore, any prejudice that the Petitioner may be exposed to in that regard can be mitigated.
78. In regard to is his own witnesses, the petitioner said that it might be difficult to secure witnesses since those that he may find the need to call will probably have left employment of the Interested Party where he worked. He also stated that it might prove difficult gathering his own documents to mount his defence.
79. The respondents argued that the fact that witnesses have left employment is not a sufficient ground of their unavailability.
80. The competency of a witness to testify is not determined by whether or not that they will still be in employment of interested party at the time they are required. If the petitioner needs to call any particular witness, he can seek assistance of the court to have the witness summoned whether or not they are in employment of the Interested Party.
81. On the issue of the petitioner not being able to find the documents he may require to defend himself due to time lapse, I say that he is already aware of the case against him from the material already supplied by the prosecution; he can easily predict the relevant documents or possible witnesses he will need to



confront the prosecution case. He does not need to wait for witnesses to testify to start looking for the documents to defend himself. He cannot thus have been waiting for years for witnesses to first testify so that he can begin looking for documents to prepare for his defence. The reason why documents are supplied in advance, to avoid ambush and ensuring the party prepares to meet the case against him. This is not a case where the petitioner is complaining about documents being served six (6) years after the case for that would have been different.

82. I thus find that delay complained has not been demonstrated to have undermined the fair trial of the Petitioner in the criminal case going by the circumstances of this case.

83. The Petitioner alleged that the withdrawal of the charges against his co-accused, 4<sup>th</sup> Accused Jane Wanjiru Kiboi was done by the 1<sup>st</sup> Respondent for improper or ulterior motives. He alleged that it was intended to cover senior officers such as the 4<sup>th</sup> accused from being prosecuted for the crime.

84. The Respondent denied that it withdrew the charges for any ulterior reasons and insisted that its actions are guided by the law, evidence and public interest.

85. No tangible evidence was presented by the Petitioner to substantiate this claim including the one made that the 4<sup>th</sup> accused had feigned sickness in order to buy time to negotiate for withdrawal of the charges against her.

86. Turning now to the legal provisions governing withdrawal of charges, Article 157 (6) c of [the Constitution](#) provides:

“The Director of Public Prosecution shall exercise State Powers of Prosecution and may:-

- c) Subject to Clause 7 & 8, discontinue at any stage before judgement is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by Director of Public Prosecutions under paragraph b.”

87. Section 87 (a) of the Criminal Procedure Code Cap 75 also deals with the withdrawals by the Director of Public Prosecution and states thus:

S. 87 – in at trial before a subordinate court a public prosecutor may, with the consent of the court or on instructions of the Attorney General, at any time before judgement is pronounced, withdraw from the prosecution of any person, and upon withdrawal,

- a) if it is made before accused person is called upon to make is defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.

88. [The Constitution](#) further in Article 157 (11) obligates the Director of Public Prosecutions to exercise the powers given to him having regard to;

“Public interest, the interests of administration of justice and the needs to prevent and avoid ad abuse of the legal process.”

89. Consequently, an application by the DPP in exercise of his powers either under [the constitution](#) or the statute should be shown to have been made in;

- a) The public interest or,
- b) The interests of the administration of justice and



- c) must not be otherwise an abuse of the legal process.
90. The above are the legal restrictions that a decision made by the DPP ought to comply with. Hence, where the DPP has acted appropriately within the legal parameters, his decision is not subject to question or direction by any person or authority as provided by Article 157 (10) which states: ‘
- “The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under direction or control of any person or authority”
91. The 1<sup>st</sup> Respondent does not require the permission of the court to institute the charges when satisfied as to the legal and evidential basis of preferring a charge or charges but after the institution of the charges, if the 1<sup>st</sup> Respondent (DPP) decides to terminate or abandon a Prosecution, the law only allows him to do so with the consent of the Court.
92. Why is the court’s consent important or necessary yet it is the DPP who decided and charged the accused all on his own? The role of the Court is to protect and safeguard the judicial process from any misuse or abuse. The trial court in which the prosecution is being undertaken has a duty to ensure that public confidence in the court process is maintained by ensuring the decisions it makes are well founded and adequately supported by the facts and the law and that the court is not a mere rubber stamp.
93. Whenever the DPP is making an application for withdrawal of the charges; he must thus provide that Court with sufficient reasons that can assist it to judicially evaluate the reasons and decide whether to grant or deny the application. That is the only way the Court can ascertain that parameters of public interest, interest in the administration of justice and the need to prevent abuse of legal process have been met.
94. In R Vs. Kennedy Onsarigo Sebe and 3 others, the court emphasized what needs to be considered in an application under section 87 (a) by remarking thus:
- “...The court must cast its eyes keenly on whether the DPP has had regard to public interest, interest of administration of justice and prevent abuse of legal process...”
95. And in R Vs. Leonard Sekento, the Court remarked:
- “...So in deciding the operation of Section 87 (a) & (b) of the Criminal Procedure Code, and its propriety in a particular case one has had to be concerned whether the reason selected is in conflict with the Constitution...”
96. The issue of the reasons the 1<sup>st</sup> Respondent had in withdrawing the charges against the 4<sup>th</sup> accused and if those reasons were sufficient is a matter which must have been canvassed before the lower court by the parties where it was presented and withdrawal granted. The record of what transpired in that court was not availed to me to see what transpired. I am therefore unable to know with exactness the extent of the reasons that were advanced, what the petitioner is thus asking me to do is to speculate and I strongly decline that invitation. In any case, I believe if the Petitioner was dissatisfied with the decision made considering that it now became the decision of that court once it acceded to the application of the 1<sup>st</sup> Respondent, then it should have challenged the decision itself as it was no longer the act of the 1<sup>st</sup> Respondent but the trial Court’s decision. I therefore see no merit on this ground.
97. If the discharge of the 4<sup>th</sup> Accused will prejudice the Petitioner in his defence. The Petitioner stated that the 4<sup>th</sup> accused Jane Wanjiku Kiboi was his boss at work and would have relied on her to outline



his roles or duties as an employee of the Interested Party. That he would have cross-examined her to build up his defence case. He further said that with her discharge from the proceedings, he does not know where to find her in order to call her to testify in his case if need be.

98. The 1<sup>st</sup> Respondent in his reply stated that the decision to charge is made on the basis of evidence and public interest and does not depend on whether another person has been charged or not. It is also not the duty of the court to decide on who to charge and who not to as that power rests with the 1<sup>st</sup> respondent as long as it is done lawfully, in public interest and is not an abuse of the court process.
99. The position the Petitioner is taking is clearly ill-thought-out and without any proper basis. If what he all is after is for the 4<sup>th</sup> accused to indicate the duties the Petitioner was performing as junior employee under her, must she remain as the 4<sup>th</sup> accused in order for him to do that? The Petitioner also stated that he would have wanted to cross-examine her to build a foundation for his defence, I bet it would have been more difficult if she remained a co-accused for she could even elect to remain silent and could not be compelled to say anything but out there, if the prosecution calls her as witness, the petitioner will readily cross-examine her; and if it does not, he can call her as a witness.
100. Finally, the Petitioner stated that the 1<sup>st</sup> Respondent has refused to disclose the material it relied on in terminating charges against the 4<sup>th</sup> accused. The Petitioner did not however demonstrate that he has requested for that information. In any case, that should be a matter that ought to be raised with the trial court for determination.
101. From the foregoing reasons, I find that this Petition lacks merit. Nevertheless, I am concerned about the sluggish movement of the criminal proceedings in Milimani Chief Magistrate's Court Criminal Case Number 1109/2018. The trial court should move with speed and take full charge of the case, it is my view that it has ceded too much control to the parties, it must get the case moving or have it out.
102. The upshot is that this Petition is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**L.N MUGAMBI**

**JUDGE**

