



Nyaga v Director of Public Prosecutions; Samuel (Interested Party) (Criminal Petition E016 of 2021) [2023] KEHC 19738 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL PETITION E016 OF 2021**

EM MURIITHI, J

JULY 6, 2023

**IN THE MATTER OF CHIEF MAGISTRATE’S CRIMINAL CASE NO. E. 1560
OF 2021 AT MAUA, REPUBLIC V DICKSON NTHIGA NYAGA RESPECTIVELY**

AND

**IN THE MATTER OF ABUSE OF POLICE POWERS AND ARBITRARY
ARREST AND CHARGING OF DICKSON NTHIGA NYAGA (ACCUSED)**

AND

**IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND
GUARANTEES OF MR. DICKSON NTHIGA NYAGA ESPECIALLY
ARTICLES 25, 27, 28, 29, 47, 48, 49 AND 50 OF THE CONSTITUTION**

BETWEEN

DICKSON THIGA NYAGA PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

AND

SUSAN MUTHANJE SAMUEL INTERESTED PARTY

JUDGMENT

1. By a petition dated 15/12/2021, the Petitioner seeks specific reliefs that:
 - a. A declaration that the fundamental rights and freedoms guaranteed to your petitioner especially under articles 25, 27, 28, 29, 47, 49 and 50 of the Constitution have been contravened by the Respondent.



- a) That the trial against your Petitioner in respect to the complaint by Susan Muthanje Samuel, the Petitioner's wife, specifically in Criminal Case No. E1560/2021; R v Dickson Nthiga Nyaga at Maua Law Courts be terminated and your Petitioner be set free of any further related trial.
- b. That the costs of the Petition be provided for.
- c. That this honorable court be pleased to make further orders as it may seem just and fit to grant.

Petitioner's case

2. The Petitioner was arrested on 28/8/2021 and charged with the offence of unlawfully assaulting Susan Muthanje Samuel thereby occasioning her actual bodily harm Contrary to Section 251 of the Penal Code. There is an intended prosecution of the Petitioner in criminal case No. E1560/2021; R v Dickson Nthiga Nyaga at Maua Law Courts, and the plea taking has severally been deferred to clarify on 2 conflicting letters drafted by the Respondent. On 5/2/2020, senior prosecution counsel, PM Namiti directed the SCCIO, Igembe North to withdraw criminal case No. 3209/2019 R v Dickson Nthiga Nyaga where the Interested Party is still the complainant. Despite the prosecution counsel's directive that the investigating authorities should henceforth stop conducting any other and/or further investigations involving the same parties, the Respondent wrote to the SCCIO, Igembe South recommending the Petitioner's prosecution over assault of the Interested Party. It is absurd that despite the Petitioner's complaint of assault by the complainant in the company of a police officer C.P.L Njue Njagi, the same was blatantly ignored by the Respondent in their recommendation of 20/8/2021. The Respondent is currently working at the behest of the complainant herein which is an injustice and this Court ought to protect the Petitioner. The prosecution is only intended to give the Interested Party unfair advantage over pending matrimonial disputes between the parties, and the complainant is only interested in ensuring that the Petitioner is fired as a TSC teacher. The Respondent has a duty to use the criminal process for the bona fide purpose and not capriciously, arbitrary or unfairly as is the case herein, and criminal process can and should never be used to settle civil disputes pending in court or interfere with a fair legal process.
3. The Petitioner filed a supplementary affidavit on 17/4/2023 in support of his petition.

The Respondent's case

4. The Respondent opposed the petition vide its replying affidavit sworn on 30/9/2022 by B.N Nandwa, the prosecution counsel. She avers that after perusing a police file of criminal case No. 3209/2019 for the offence of malicious damage to property from SCCIO Igembe North, the Respondent advised that the matter be withdrawn. After receiving a complaint from the Interested Party with regards to the case of assault, the Respondent advised that the Petitioner be arrested and charged with the offence of assault. The decision to prosecute the Petitioner was made independently by the Respondent based on the evidence obtained by the police. She accuses the Petitioner of failing to demonstrate how his rights and fundamental freedoms under Articles 25, 27, 28, 29, 47, 48, 49 and 50 were violated by the Respondent. By dint of Article 157(6) of the [Constitution](#), the Respondent is mandated to 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.
5. The Respondent acted in accordance with the powers conferred upon it by the law, and the Petitioner has failed to demonstrate that the actions taken by the Respondent overstepped its statutory mandate. The exercise of the constitutional powers under Article 157 of the [Constitution](#) by the Respondent



does not abrogate, breach, infringe or violate any provision of the Constitution , and thus the petition should be dismissed with costs.

The Interested Party's case

6. The Interested Party swore an affidavit on 8/9/2022 in opposition to the petition. She avers that the petition is frivolous, vexatious and an abuse of the court process as it is only meant to delay and frustrate the prosecution of the Petitioner for assaulting her with a panga and inflicting injuries on her person. After being assaulted and injured by the Petitioner, she reported the matter at Maua police station and also wrote to the Respondent to have the matter investigated. The criminal case subject of this petition is therefore a product of due process of law, and the allegation that the same violates the Petitioner's Constitutional rights has no legal basis. The Petitioner has not demonstrated with particularity that his Constitutional rights have been violated to warrant issuance of the orders sought in the petition. She and the Petitioner stopped cohabiting in 2013 due to his cruelty and hostility, and the fact that they have property disputes is not an excuse for the assault. The Petitioner's conduct is an affront to Article 29(c) and (f) of the Constitution and should be treated as such by this Court. The Petitioner even evicted her from her property land parcel No. Ithima/Ntunene/3273 and damaged her property thereon, which matter is pending at Maua Law Court Criminal case No. 3209/2019.

Submissions

7. The Petitioner urges that the Respondent's wide and unfettered powers to discharge its prosecutorial duties should be exercised judiciously and not capriciously, and cites Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission & 3 Others (2013) eKLR, Kuria & o others v Attorney General (2002) 2 KLR 69, Republic v Commissioner of Police & Another Ex-Parte Michael Monari & another (2012) eKLR, Musyoki Kimathi v Inspector General of Police and 2 others (2014) eKLR, John Muritu Kigwe & Another v Attorney General & Another HCC No. 223 of 2000 (UR) and Republic v Director of Public Prosecution & Another Ex-Parte Geoffrey Mayaka Bogonko & anor (2017) eKLR. He submits that unless the court intervenes and grants the prayers sought in the petition, he will be embarrassed and eventually risk losing his livelihood at the behest of the Interested Party, who is out to settle a bitter matrimonial dispute with him.
8. The Respondent urges that the Petitioner has not stated with precision how his rights and fundamental freedoms under Articles 25, 28, 29 and 49 of the Constitution were infringed and the manner they were infringed. It urges that the Petitioner has not demonstrated how the law was unequally applied to him and how he was discriminated against. It urges that the decision to charge the Petitioner was based on the evidence on the police file and therefore it passed the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness. It faults the Petitioner for failing to show how the Respondent acted contrary to public interest, the interests of the administration of justice or failed to prevent an abuse of the legal process, and thus the petition ought to be dismissed.
9. The Interested Party submits that the Court can only interfere with or interrogate the actions of the Respondent where there is contravention of the Constitution , and cites Leonard Otieno v Airtel Kenya Limited (2018) eKLR, Paul Ng'ang'a Nyaga v Attorney General & 3 Others (2013) eKLR, James Ondicho Gesami v Attorney General & 2 Others (2012) eKLR and Republic v Commissioner of Police & another Ex-Parte Michael Monari & another (2012) eKLR. She submits that the decision to charge the Petitioner was made after conclusive investigations which revealed that the Petitioner indeed attacked the Interested Party and inflicted injuries on her, and therefore the petition ought to be dismissed with costs.



Analysis and Determination

10. After critical consideration of the petition, the responses thereto and the submissions on record together with the authorities cited, it is clear to this Court that the pertinent issue for determination is whether the intended prosecution of the Petitioner by the Respondent is an infringement of his rights under the Constitution .

The DPP's prosecutorial mandate

11. This Court takes the view that the mere fact that a person has been charged and/or is likely to be charged in court for criminal charges, does not in itself amount to a violation of a constitutional right. There is no constitutional right not to be prosecuted. It must be shown that the prosecution infringes particular constitutional rights or fundamental freedoms, in abuse of the process of the court and or it is being preferred with ulterior motive apart from genuine prosecution of an offence which is the mandate of the DPP under Article 157 of the Constitution .
12. This court has in *Japheth Kobia Maranya & Anor. v. The Director of Public Prosecution & Anor.* Meru HC JR No E003 of 2023, recently discussed the DPP's prosecutorial mandate as follows:

“ 5. As regards the powers of the police to conduct criminal investigations and the DPP to institution criminal proceedings I held in Christopher Mbugua Kiiru v Inspector General of Police & 3 others [2015] eKLR, as follows:

“17. While considering a similar application for stay of criminal prosecution, this court dealt with the discretion of the DPP and the impact of Articles 25 and 50 of the Constitution in MOMBASA HC Misc. Application No. 77 OF 2013, Republic v. Inspector General of Police and 2 Ors. Ex Parte Zelea Jakaa Akiru held that

“34. The Director of Public Prosecutions (DPP) has constitutional duty to prosecute offences under Article 157 of the Constitution and in the exercise of such mandate, the DPP may use the police investigators and prosecutors as may have happened in this case, and I would, therefore, find that the 2nd respondent acted within his powers to file criminal prosecution. The Prosecution would, of course, be expected to bring charges only where the investigations reveal an offence. However, whether the investigations leading to the arrest and charge of the applicant were properly done, if at all, will be established before the trial court in its decision whether the applicant has a case to answer or whether the prosecution proves the case beyond reasonable doubt upon full hearing in accordance with section 215 of the Criminal procedure Code. The court cannot, in exercise of its judicial review jurisdiction of Order 53 of the Civil Procedure Rules, consider the merits of the criminal charges facing the applicant and determine whether proper investigations were conducted in the alleged offence, and consequently, whether the applicant is guilty or not guilty as charged.



35. Under the criminal trial the applicant will be afforded all the Article 50 rights including the right to a fair trial which is, in accordance with Article 25 of the *Constitution*, not subject to limitation. If the rights of the applicant are breached in the criminal trial setting, the accused will be at liberty to lodge an appeal on the merits or file a constitutional application for their enforcement and protection. Such is not the application before the court.”
18. In my view, the High Court must in determining an application for stay or striking out of criminal proceedings consider four significant matters, namely:
- (a) the rule of law principle underpinning the discretion of the DPP to prosecute criminal cases without undue influence, direction or control by any other authority;
 - (b) the need to protect accused persons from violation of their fundamental rights and freedoms through unwarranted criminal prosecution;
 - (c) the need to ensure that the criminal process of the court is not abused to further or defeat private interests which are, or should be, the subject of civil proceedings or for other improper purposes; and
 - (d) as, an over-arching principle, the existence of fair trial guarantees for accused persons in the criminal process by virtue of Articles 25 and 50 of the *Constitution* of Kenya, 2010.
19. I have respectfully noted the concurring views of Waki, J. as he then was in *Republic vs Chief Magistrate's Court, Mombasa ex parte Ganijee & Another* [2002] 2 KLR 703, Mulwa, J. in *Kuria & 3 Others vs AG* [2002] 2 KLR 69 and Odunga J, in *Republic vs Attorney General & 4 Others ex parte Kenneth Kariuki Gathii* (2014) eKLR.”

13. The Petitioner contends that his intended prosecution in Maua Criminal Case No. E1560/2021 is solely aimed at not only ensuring that the Interested Party gains an unfair advantage over a pending matrimonial suit between the parties herein, but also that the Petitioner loses his job as a TSC teacher.

14. The Respondent and the Interested Party on the other hand contend that the decision to charge the Petitioner was reached based on the investigations conducted and the evidence collected.

Burden of proof

15. It is trite law that the burden of proving violation or threat of violation is upon the Petitioner as was established in *Anarita Karimi Njeru v Republic* (1976 – 80) 1 KLR 1272. Further to this, it is also settled that the Petitioner must express the manner in which the Respondent has violated his rights as established in *Matiba v Attorney General* [1990] KLR 666.

16. Whereas there can be no doubt that the field of investigations of criminal offences is exclusively within the domain of the police and the Respondent, this Court has the powers to halt such a process if the



intended criminal proceedings are oppressive, an abuse of the court process and amounts to a breach of fundamental rights and freedoms.

17. It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. (See *Ndarua V. R* [2002] 1 EA 205).
18. The Petitioner has not shown how the continuation of the intended prosecution will disadvantage him in the pending matrimonial cause. Besides, the Respondent directed the charge against the Petitioner of malicious damage to property to be withdrawn as it involved the same property in dispute in the matrimonial cause.

Verdict

19. Without going into the merits of the assault case which is pending at Maua Law Courts, so as not to prejudice the trial, this court finds that the Respondent's decision to charge and prosecute the Petitioner for assaulting the Interested Party is not unreasonable as it is based on the evidence on record, and not on any ulterior motive as alleged by the Petitioner.
20. The court further finds that the Petitioner has failed to demonstrate how his Constitutional rights under Articles 25, 27, 28, 29, 47, 49 and 50 of the Constitution have been and/or will be infringed if the intended prosecution is allowed to continue to its logical conclusion. Moreover, the Petitioner will be accorded an opportunity to face his accuser, the Interested Party herein in the trial court, test her evidence on cross examination, tender his own evidence and call witnesses in support thereof.
21. The court notes from the P3 form of the Petitioner that he was allegedly assaulted on the same day as the Interested Party. Although the Petitioner alleges that his assault report was not acted upon by the Respondent, he still has an opportunity to produce such exhibits in his defence before the trial court. This points to the ground of "the existence of fair trial guarantees for accused persons in the criminal process by virtue of Articles 25 and 50 of the Constitution of Kenya, 2010" alluded to in the case of *Ex Parte Zelea Jaka Akiru*, supra.

Orders

22. Accordingly, for the reasons set out above, the Court finds that the petition dated 15/12/2021 is without merit and it is dismissed.
23. There shall be no order as to costs.

Orders accordingly.

DATED AND DELIVERED THIS 6TH DAY OF JULY, 2023

EDWARD M. MURIITHI

JUDGE

APPEARANCES

M/S Mutuma & Koskei Advocates for the petitioner

Mr. Masila Principal Prosecution Counsel for DPP.

