



REPUBLIC OF KENYA



**Kariuki v Director of Public Prosecution; Karanja (Interested Party) (Constitutional Petition E022 of 2021) [2023] KEHC 21060 (KLR) (3 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21060 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CONSTITUTIONAL PETITION E022 OF 2021**

**PM MULWA, J**

**AUGUST 3, 2023**

**BETWEEN**

**DANIEL KIMANI KARIUKI ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**AND**

**SYLVIA WAMBUI KARANJA ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The petitioner, Daniel Kimani Kariuki is a resident of Fourways within Kiambu County, a director of Bebadis Company Limited (hereafter known as ‘the company’), and the fiancée of the complainant in Kiambu Criminal Case No. 1591 of 2018.
2. The respondent is the Director of Public Prosecution established by Article 157(1) of the *Constitution* of Kenya and mandated to institute and undertake criminal proceedings.
3. Sylvia Wambui, the Interested Party is the complainant in Criminal Case No. 1591 of 2018 and also a director of Bebadis Company Limited.
4. The petitioner filed the Petition dated 28<sup>th</sup> June 2021 with the annexed supporting affidavit together with the Amended Notice of Motion dated 7<sup>th</sup> December 2022 and the list of documents challenging the constitutional duty of the respondent, in which the petitioner had been charged in Kiambu Criminal Case No.1591 of 2018 with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code.



5. The petitioner avers the respondent intends to amend the charge sheet and include three (3) counts on the account of stealing by the petitioner, for making fraudulent withdrawals on two separate accounts from the company's Bank Account 1340267658222 held with Equity Bank and the personal account of Sylvia Wambui. According to the petitioner, he was not accorded a fair hearing in the proposed alleged accusations.
6. In the petition the issue in dispute emanates from the management disputes of the company.
7. The petitioner seeks the following orders in the petition;
  - a. A declaration that the investigation and intention to charge and prosecute the Petitioner in Criminal Case No. 1591 of 2018 is discriminative and an infringement of the petitioner's constitutional rights.
  - b. An order of *Certiorari* to quash the intended amended charge sheet in criminal 1591 of 2018.
  - c. An order prohibiting Kiambu Chief Magistrate's court from further proceeding with the criminal case no. 1591 of 2018.
  - d. An order prohibiting the respondent from further prosecuting or preferring for prosecution criminal case no 1591 of 208 in its present form or a variation of the charge sheet.
  - e. Costs of the petition be borne by the respondent.
8. The interested party filed a Replying Affidavit sworn on 5<sup>th</sup> January 2023, wherein she depones that the application is brought in bad faith and is a malicious tactic aimed at avoiding the criminal charges preferred in Kiambu criminal case no. 1591 of 2018. That the respondent is mandated, after investigations, to prosecute criminal charges without the consent of either party once it has established reasonable suspicion of a person.
9. She stated that the circumstances giving rise to the new criminal charges are the complaints made at the DCI regarding the fraudulent withdrawal of funds by the petitioner from the company's Bank Account, and the assault by the petitioner. That the granting of the conservatory orders will frustrate, instead of advancing the rule of law and be prejudicial to the interested party's case.
10. The respondent filed a Notice of Preliminary Objection and the grounds of opposition both dated 5<sup>th</sup> December 2022, stating that the court lacks the jurisdiction to issue conservatory orders against the respondent in prosecuting criminal case no. 1591 of 2018, as it is in contravention of the provisions of Article 157 (6)(a), (9), (10) and (11) of the *Constitution*. That the orders sought by the petitioner seek to oust, bar, and control the independent prosecutorial powers of the Respondent.
11. It was contended by the respondent that it is common practice that the prosecution may prefer a lesser or a minor charge pending the conclusion of the investigations. That the respondent is vested with the duty to prove the amended charges against the petitioner to the required standard. The institution of criminal proceedings and amendments of charges cannot be construed to mean abuse of the process or actuated malice. There is no prejudice to be caused to the petitioner who will be called to plead to the charges.
12. The court directed that parties file written submissions in respect of the Amended Notice of Motion. Upon compliance the parties proceeded to highlight their submissions.



## Petitioner's submissions

13. The petitioner's case is that the interested party was his fiancée with whom they lived together and were also directors of the company, and were both signatories to the company's bank accounts held with Equity Bank. The interested party on 4<sup>th</sup> September 2018 initiated changes in the shareholding of the company without the consent of the petitioner. He filed a complaint at Muthaiga police station vide OB No. 35/17/09/2018 on the fraudulent activities of the interested party. He was arrested on 18<sup>th</sup> September 2018 under the guise of assaulting the interested party. On 20<sup>th</sup> September 2018 he filed another complaint in Kiambu police station under OB No. 58/20/09/2018 against the interested party for theft of computers from the house at Fourways and also for theft and destruction of the company's property and documents and theft of cash.
14. The petitioner alleges his complaints were not acted upon and/or investigated and he filed a complaint with the respondent against the officer commanding Muthaiga police station. No action was taken prompting the petitioner to file Nairobi HCCC E115 of 2018 *Bebadis Company Limited, Daniel Kimani Kariuki and Ruth Wanjiru Maigua v Sylvia Wambui Karanja and Anor*, where an injunction was issued against the interested party for initiating fraudulent changes in the company. In spite of all this, the petitioner was arrested and charged with the offence of assault causing bodily harm, and now the respondent intends to amend the charge sheet and include other charges of theft.
15. According to the petitioner the decision of the respondent to charge him was a violation and infringement of his rights. That he was not accorded an opportunity to be heard concerning the allegations in counts II and III of the intended amended charges, that his evidence was disregarded, and that his right to information and documents has been infringed.
16. According to the petitioner this court is vested with the jurisdiction to issue the orders sought. And that in the absence of a replying affidavit by the respondent the averments in the petition stand uncontroverted as the grounds of opposition only address issues of the law. He cited the case of *Daniel Kibet Mutai & 9 Others v Attorney General* (2019) eKLR where the court cited with approval the case of *Peter O. Nyakundi & 68 Others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & Anor* (2016) as follows: -

“...as stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averments by the Petitioners that they were victims of the post-election violence. Grounds of Opposition which was filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath.”
17. It was submitted that the respondent and the interested party failed to adhere to the court orders of 21<sup>st</sup> November 2018, in Nairobi HCCC no. E115 of 2018, which placed an injunction on the interested party from dealing with the company and thus contravened the provisions of Article 157 of the *Constitution*. Further that interested party is illegally in possession of the petitioner's documents and laptop, stolen from the house.
18. The petitioner urged the court to find the petitioner has made out a case against the respondent and issue the orders sought and that the interested party also failed to controvert the petitioner's averments.

## Respondent's submissions

19. The respondent filed submissions on 2<sup>nd</sup> March 2023, and counsel submitted that the respondent was exercising its constitutional mandate enshrined under Article 157(6) of the *Constitution* when it



preferred charges against the petitioner. The orders sought violate Article 157 (6) (a), (9) (10) and (11). It was contended that the mandatory duty of the DPP was emphasized by the court in the case of Kipoko Oren Tasur v Inspector General of Police and 5 others (2014) eKLR thus: -

“The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior courts, except in the clearer of circumstances in which violation of the fundamental rights of the individual facing trial is demonstrated.”

20. It is also submitted that the court is not to interfere with the constitutional mandate of the respondent unless it is proved the DPP failed to comply with the provisions of Article 157(11) of the Constitution. That the petitioner failed to disclose any violation of his rights.
21. It was submitted that the decision to amend the charge sheet was based on a complaint received at the DCI for a fraudulent transaction of Kshs. 900,000/= from the company’s Equity Bank Account No. 1340267658222 and Kshs. 70,000/= from the complainant’s personal bank account That after conclusion of the investigations there was probable cause to charge the petitioner.
22. Counsel submitted that the amendment of a charge sheet is allowed under Section 214(1) of the Criminal Procedure Code. The matter at the trial court is yet to proceed and the petitioner will be given a chance to ventilate his case - see M N v Republic (2017) eKLR.
23. It was further submitted the orders sought are not merited as the matter can be canvassed by the trial court, and the petitioner is attempting to control the powers of the police to investigate.
24. In conclusion, counsel submitted the orders sought are untenable, and pleaded that the petition be dismissed.

### **Interested Party’s submissions**

25. Mr. Otwal, counsel for the interested party submitted that the preliminary objection is merited and urged the court to uphold the same. The petitioner seeks to ouster the powers of the DPP, which is an abuse of the constitutional process. The decision by the DPP to prosecute is in accordance with the Constitution and the law.
26. It was further stated criminal proceedings did not violate the petitioner’s rights as he will be given a chance to defend his case. That the petitioner failed to precisely state the rights infringed.
27. On the issue of whether the orders sought ought to be granted counsel joined issue with the submissions of by the respondent’s counsel and urged the court to find the petitioner had failed to demonstrate that his rights had been infringed and that the petition be dismissed.

### **Analysis and determination**

28. I have considered the petition, the supporting affidavit, the amended Notice of Motion, the grounds of opposition, the affidavits in opposition as well as the submissions both in support and opposition to the petition. The issues for determination are:
  - i. Whether this court has jurisdiction
  - ii. Whether the petition raises a violation of the petitioner’s constitutional rights



- iii. Whether this court should grant the orders sought

### **Whether the court has jurisdiction**

29. On the issue as to whether this court has jurisdiction, the respondent filed the grounds of opposition which were supported by the interested party. They allege the petition seeks conservatory orders against the DPP from prosecuting and participating in the proceedings in Kiambu Criminal case no. 1591 of 2018 and this is aimed at ousting the DPP from conducting its constitutional mandate.
30. On the other hand, the petitioner averred that the way the prosecution is being conducted infringes on his rights under the Bill of Rights. He claims to have been denied a fair hearing before the DPP preferred the proposed charges and that the DCI Muthaiga failed to investigate his complaints and opted to charge him instead. He has cited several provisions of the Constitution violated by the respondent.
31. Article 22 of the Constitution provides for the enforcement of the Bill of Rights.
- Article 22 (1) - Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
32. Persons who feel their rights have been infringed may apply to the court seeking redress. The High Court is also vested with the power to uphold and enforce the Bill of Rights under Article 23 of the Constitution. The Article provides as follows;
- 23(1) - The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
33. In the circumstances, and being guided by the above provision of the Constitution this court finds that it is vested with the jurisdiction to entertain the petition herein.

### **Whether the petition raises a violation of the petitioner's constitutional rights**

34. The petitioner seeks the intervention of this court on the basis that his fundamental rights have been infringed by the respondent. The Articles of the Constitution alleged to be infringed are 24, 25, 29, 47, 48, and 50.
35. The court having made a finding that it is vested with the powers to hear and determine matters on infringement of the constitutional provision, and the petitioner having raised issues of the infringed constitutional provisions, this court will therefore accord the petitioner an opportunity to prove the alleged infringement of the constitutional provisions.

### **Whether the Petitioner is entitled to the reliefs sought**

36. The petitioner alleges that the respondent intends to cause his arrest, detention and prosecution without conducting independent and thorough investigations into the complaint made on 10<sup>th</sup> September 2018 over the alleged stealing of Kshs. 990,000/= from the company's bank account with Equity Bank, which is run by the petitioner.
37. On the one hand, the petitioner is under the duty to prove to this court that indeed the respondent violated his constitutional rights during his arrest and arraignment and that the intended amendment of the charges is prejudicial.



38. On the other hand, it is the duty of the Director of Public Prosecutions to prosecute crimes and guarantee that the culprits are brought to justice in accordance with the law.

39. The powers of the DPP are provided under Article 157(6) of the *Constitution*, thus:

157.

(6) - 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 clauses (7) and (8), discontinue at any stage before judgment is delivered on any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

40. This court can only interfere with the constitutional mandate of the DPP when it has been established that the decision to prosecute was arrived at illegally, irrationally and impropriety.

41. In *Selvarajan v Race Relations Board* [1976] 1 ALL ER 12 at 19, it was held that: “...in all these cases it has been held that the investigating body is under a duty to act fairly, but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it. The investigating body is however the master of its own procedure...”

42. The petitioner submits that his right to a fair hearing has been violated as he was not accorded a chance to defend himself before the DPP proposed the amendments to the charge sheet. This court finds the petitioner will be accorded a chance to defend his interest in the lower court if the respondent proceeds to amend the charge sheet. Thus, the fact that the trial has not commenced, the petitioner cannot be heard to allege violation of the right to hearing.

43. Further, the court is not persuaded that indeed the intended amendment of the charge sheet is prejudicial to the petitioner. The DPP is allowed to amend the charge sheet before the conclusion of the trial as per the provisions of Section 214 of the *Criminal Procedure Code* which provide as follows:

214 (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;



- (ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.
- (2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.
- (3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.”

44. This position was emphasized by the Court of Appeal in the case of *M N v Republic* [2017] eKLR (*supra*) where the Court said:

“It is settled that a charge sheet can be amended at any stage of the proceedings before the conclusion of the trial. However, there are safeguards set in place to ensure that the rights of an accused person are not violated by such amendments. Of relevance to this case is Section 214 (1) of the *Criminal Procedure Code*.”

45. In the circumstances therefore, this court finds the petitioner has failed to demonstrate that the prosecution and the intended amendment of the charges amounts to a violation of his constitutional rights. The petitioner will be given a chance to defend himself in the trial court and in the event that he is acquitted by the trial court he may file a suit for malicious prosecution, or if found guilty he may appeal against the decision of the trial court.

**Final Orders:**

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- a). The petition and the amended Notice of Motion lack merit and are dismissed. The declaratory orders sought are declined.
- b). Each party is to bear its own costs.

Orders accordingly.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3<sup>RD</sup> DAY OF AUGUST 2023.**

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**P.M. MULWA**

**JUDGE**

