



REPUBLIC OF KENYA



**Kamau & 12 others v Republic (Miscellaneous Criminal Application
E047 of 2022) [2023] KEHC 21007 (KLR) (1 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CRIMINAL APPLICATION E047 OF 2022**

CM KARIUKI, J

AUGUST 1, 2023

BETWEEN

ANN WANGARI KAMAU 1ST APPLICANT
LUCY MUTHONI 2ND APPLICANT
SIMON GAKUNGA WANGECHI 3RD APPLICANT
PRICILLA WANJIKU WANJIRU 4TH APPLICANT
JOHN MAINA GITHAIGA 5TH APPLICANT
HARRISON MAINA MIIRI 6TH APPLICANT
ELIJAH NJUGUNA MIIRI 7TH APPLICANT
DAVID NJURU KARIUKI 8TH APPLICANT
MARK RURII TIOKO 9TH APPLICANT
EVANS WAWERU KARIUKI 10TH APPLICANT
EDWARD MWANGI WANJIKU 11TH APPLICANT
PAUL NJUGUNA NGETHE 12TH APPLICANT
ALVIN WANGUI NJOGORGE 13TH APPLICANT

AND

REPUBLIC RESPONDENT



RULING

1. By a notice of motion dated 5/12/2022, the thirteen (13) Applicants seek via the firm of Sigilai Joel & Co. Advocate the declaratory orders, among other things, in the following matters, namely:

Criminal Case files

- a. E974 /2022 Pending on 19/7/2023
 - b. E1744/2022 Withdrawn
 - c. E691/2022 Finalized
 - d. E1288/2022 Pending – warrant of arrest in force
 - e. E1614/2022 Finalized
 - f. E1831/2022 Finalized
 - g. E1055/2022 Finalized
 - h. CR.2567/2021 Finalized
 - i. E1713/2022 Pending on 12/9/2023
 - j. E1758/22 Withdrawn
 - k. E1617/22 Finalized
2. That the Nyahururu CMC criminal file numbers E974/22, E1617/22, E1744/22, E691/22, E1288/22, E1614/22, E1831/22, E1055/22, E2567/2021, E1713/22 and E1758/22 be availed before the Court for perusal and scrutiny.
 3. That the Court be pleased to find out and also declare that all of the cited cases are pending fresh hearings and trial on account of the pendency of or awaiting the Government analyst report on a substance sent there for analysis.
 4. That the Court be pleased to find out and also declare that in the Report's pendency, the cases were prematurely brought to Court, and/or the investigations still need to be completed. Consequently, the Prosecution cannot fully comply with the provisions of Article 50 of the Constitution regarding the supply of witness statements or documentary exhibits. So the accused persons cannot be accorded time and material to prepare for the defence.
 5. The Court be pleased to declare that as a result of the said acts done without proper evidence or exhibits, the accused persons' rights and freedoms under the Constitution have been violated, threatened, and or curtailed, such as the rights to liberty, association, economic rights being held in custody or remand, deny of justice, delayed justice, legitimate expectation and being arraigned without any iota of evidence contrary to the law.
 6. The Court be pleased to declare the charges or criminal cases a travesty of justice, illegal, unconstitutional, null and void ab initio, and of no consequences whatsoever.
 7. The Court be pleased to terminate the said cases and such other similar cases forthwith and thereby order the release and discharge of all the accused persons and applicants, setting them at liberty not



unless otherwise held and the cash bail, if paid, be released to the depositors and sureties discharged if any.

8. Plus, costs

9. Grounds supported them.

- i. The following cases were brought to Court on diverse dates and years and had been pending in Court for reasons varying from the accused persons being arrested, prosecuted, and charged before the Prosecution or ODPP are ready to prosecute the cases, having merely suspected the accused persons of owning psychotropic substances or cannabis sativa or bhang and having no report under section 77 or 78 of the Evidence Act Chapter 80 Laws of Kenya from the Government analyst or at all leading to various statutory and constitutional violations as outlined herein below.
- ii. The suspect or accused have their liberty or freedom curtailed unlawfully in having to be arrested on ascertained charge or unconfirmed charge, they are held in police custody say over the weekend, and they are arraigned in Court. They are remanded in custody for failure to get cash bail or secure a surety. They are detained as the Prosecution awaits a report from the Government analyst which can be indefinite or delayed for a long.
- iii) In the case of John Kamundia Gitau & Another -VS-Republic (1977) eKLR, the Court of Appeal bench of three learned judges held, among other things, that:-

“Although there may be suspicion against the appellants, we are not satisfied that their guilt has been proved beyond a reasonable doubt. Suspicion, however strong, cannot supply a basis for inferring guilt when proof of guilt cannot be inferred beyond a reasonable doubt on all the evidence. ”
- iv) The said behavior goes contrary to legitimate expectation as justice delayed is justice denied.
- v) The same cycle of woes is worsened for the innocent until proven guilty accused persons who cannot be supplied with all documentary exhibits in their respective cases early in time or to prepare their defenses contrary to Article 50 of the Constitution.
- vi) The same cycle of woes is worsened for the innocent until proven guilty accused persons whose other liberties and constitutionally guaranteed rights like the environment of one's choice, water, health suffers even psychologically, shelter, life, food of choice, education, social life suffers, entertainment, relationship with spouses or family or right to work and economically uplift self are technically suspended to their detriment.
- vii) The protracted trial causes them untold misery, depression, anxiety and uncertainty, and mental torture. When it finally comes, it may turn out negative or never will ever come. So it's a travesty of justice and trampling under the foot of the accused constitutionally guaranteed rights, not to mention lost opportunities for self-progress.
- viii) The said abuse of the statutory law and the Constitution is akin to a holding charge in which it has been held to be illegal, null, and void.
- ix) The act of preferring the charges based on evidence seeking or in total suspicion or guesswork or in total unpreparedness amount to a mob justice and personal vendetta and injustice of punishing and afflicting innocents before sentencing is done.



- x) The scarce resources in our congested prisons end up being stretched beyond the limit in subsistence, maintenance, space, marital rights, rights of children, shelter, and cleaning, and the Government policy of decongesting prisons gets abused or slighted or disdained. The remaindees would rather plead guilty to the fictitious charges than suffer or be afflicted while innocent.
 - xi) The effect of article 50 of the Constitution is only for the Prosecution to charge when they are ready to, especially if accused persons plead guilty and are held in custody awaiting the Report, which may take ages to be availed.
 - xii) It amounts to prison or bondage of sorts when an accused person out on bond or bail keeps wasting precious time attending Court and suffers financially in fare expended or at mentions and hearings which never take off, they are not engaged in meaningful employment or opportunities to earn, and they may pay legal fees in vain or get fired from scarce jobs or employment because of absenteeism in attending Court both for mentions and hearings.
10. Nothing was attached as listed in the grounds or even the affidavit that any parties swore.
11. The state replied to Officer Walter O Ngano on 22/12/2022
12. He averred that:
- a. In some cases, the basis of the instant Application, the reports are ready, and the matters are at an advanced stage, with some being at the defense stage.
 - b. That the Report regarding E475/22 — Republic v Margaret Njoki Ndungu dated 20th April 2022 is ready, and the matter is fixed for hearing on 18th January 2023. (Attached and marked 'WON - 1' is a copy of the Report dated 20th April 2022).
 - c. That the Report regarding E691/22 - Republic v John Maina, in which the accused is charged with Trafficking Narcotic Drugs, dated 18th August 2022, was already produced with the matter fixed for further hearing on 29th December 2022 before Court 3.
 - d. That the Report regarding E974/22 - Republic v Ann Wangari, in which the accused is charged with Cultivating Prohibited Plants, dated 5th August 2022, is ready, and the matter is fixed for hearing on 15th December 2022 before Court 5. (Attached and marked "WON - 2" is a copy of the Report dated 5th August 2022).
 - e. That while the Exhibit Memo regarding E1055/22 - Republic v Evans Waweru, in which the accused is charged with Possession of Bhang, was received at the Government Chemist on 2nd November 2022, the Report is not yet ready. (Attached and marked "WON - 3" is a copy of the Exhibit Memo).
 - f. That the Report in respect of E1288/22 - Republic v Harrison Maina & Elijah Njuguna in which the accused are charged with Possession of Bhang, dated 19th December 2022, is ready and the matter is pending hearing before Court 4. (Attached and marked "WON - 4" is a copy of the Report dated 19th December 2022).
 - g. That the Report regarding E1614/22 - Republic v David Mburu, in which the accused is charged with Possession of Bhang, was already produced with the matter fixed for a defense hearing on 19th December 2022 before Court 3.



- h. That the Report regarding E1617/22 - Republic v Lucy Muthoni & Simon Gakunga, in which the accused is charged with Possession of Bhang, was already produced with the matter fixed for defense hearing on 19th January 2023 before Court 1.
 - i. That the hearing regarding E1713/22 - Republic v Paul Njuguna is fixed for 11th January 2023 before Court 4, when the Report is expected to be ready.
 - j. That the hearing regarding E1744/22 - Republic v Priscilla Wanjiru, in which the accused is charged with Trafficking Narcotic Drugs, is fixed for 30th January 2023, when the Report is expected to be ready.
 - k. That is the Report regarding E1758/22 - Republic v Alvin Njoroge. In which the accused is charged with Possession of Bhang dated 28th November 2022 is ready with the matter fixed for hearing on 28th December 2022 before Court 3 (marked WON -4(i)
 - l. That the Exhibit Memo in respect of E1831/22 - Republic v Mark Rurii in which the accused is charged with Possession of Bhang was received at the Government Chemist on 2nd December 2022, just three days before the instant Application was filed, and there has not been a delay in the same. (Attached and marked "WON - 5" is a copy of the Exhibit Memo).
 - m. That the Report regarding E2567/2021 - Republic v Edward Mwangi, in which the accused is charged with Cultivation of Prohibited Plants, dated 18th January 2022, is ready and pending production with the matter fixed for hearing on 29th December 2022 before Court 3. (Attached and marked "WON - 6" is a copy of the Report dated 18th January 2022).
 - n. That I have been advised by Peter Eusebius Omayo Omooria, Senior Assistant Director of Public Prosecutions (SADPP) within the Office of the Director of Public Prosecutions (ODPP), which advise I verily believe to be true, that investigations and or disclosure, including of documentary evidence to be relied on in criminal trials in Kenya, is a continuous process which continues until the close of the Prosecution's case.
 - o. That one has further been advised by Peter Eusebius Omayo Omooria, Sadpp, which advise I verily believe to be true, that admission of exhibits is a matter in the province of the trial court, which is empowered to make appropriate orders in respect of their production including delay, if any, which is denied.
13. The parties were directed to canvass applications via submission

Applicant Submissions

- 14. All accused persons herein are charged separately with offenses under the *Narcotic And Psychotropic Substances Control Act* No.4 of 1994. Some are in custody, and others are out on bond, having pleaded not guilty to the charge.
- 15. The Application before you is brought under Articles 22,23,25,50 and 159(2) of the *Constitution*. The gist of the Application is a violation of the constitutional rights of the accused persons as to liberty and the presumption of their innocence until proven guilty, access to justice, and the right to have their cases heard and determined expeditiously without undue delay and unwarranted violations of their rights by the Prosecution.
- 16. The provisions of Article 50 of the *Constitution* on the right to be supplied with the witness statements and exhibits to enable them to prepare their defense is hampered by their arrest and detention,



- arraignment, and being charged in Court without any expert or scientific Report on whether or not the substance they are alleged to have been in possession of and so forth is indeed what it is claimed to be.
17. It's a cardinal principle of the Constitution, the adversarial system litigation, the statutory law, and criminal Prosecution that lodging an official complaint commences all prosecutions and investigations are done. Criminal culpability regarding men's re a actus is established before the suspects are arrested, prosecuted, or charged in a court of law.
 18. The Act of hurried arrest and detention in police custody, deprivation of fundamental rights on mere suspicion, as well as the arraignment in Court without any scientific proof or legitimacy or certainty, is a travesty of justice that the Court must frown upon and make orders that will uphold the rights of the accused persons so that they are not remanded in custody, confined for a day or two awaiting the Report. Similarly, since a trial cannot proceed and be expedited or concluded in the absence of a report, the accused who cannot raise bail or bond will have to languish in remand or congested and deplorable conditions in prison/custody in an endless wait for the Report not to mention the wastage of precious judicial time in and scarcity of resources in the remand, adjourns and has to keep mentioning the matter.
 19. The accused or arrested persons' fundamental rights should not be suspended, curtailed, or suppressed with impunity or no reasonable cause.

Respondent Submissions

20. The Respondent, through the Director of Public Prosecutions (hereinafter, The DPP) in Kenya, is vested with the State powers of Prosecution, including the power to:

Institute and undertake criminal proceedings against any person before any court (other than a court martial) regarding any offense alleged to have been committed.²
21. The foregoing provision is given effect by the Office of the Director of Public Prosecutions Act³ (hereinafter, the ODPP Act), which Act among other things, guides the ODPP in the performance of his powers and functions as noted by the Court of Appeal at Nairobi (Hon. Githinji, Okwengu Mohammed, JJ. A) in Diamond Hasham Lalji & Another v The Attorney General & 4 Others⁴ in which the Court highlighted the powers of the DPP as follows:

“One of the powers given to DPP by Section 5(4) (e) of the ODPP Act is to review a decision to prosecute or not to prosecute any criminal offense. He also has power under section 5(1)(c) of the ODPP Act to formulate and keep a public prosecution policy under review... The DPP has formulated "The National Prosecution Policy" 2015, which repealed the 2007 prosecution policy. The policy. Amongst other things. Stipulates the factors to be taken into account before a decision to prosecute or not to prosecute is taken, including the Application of evidential test and public interest test and also the factors to be considered before a review of the decision to prosecute or not to prosecute is made".
22. In further exercise of the foregoing: the power to formulate and keep under review a public prosecution policy, the DPP formulated the ODPP Decision to Charge Guidelines⁵ (hereinafter, the Guidelines), which, as observed by the High Court of Kenya at Nairobi (Hon. W. Korir, J as.
23. The subject cases are E691/22, E974/22, E1055/22, E1288/22, E1614/22, E1617/22, E1713/22, E1744/22, E1758/22, E1831/22, and E2567/2021 met the Threshold Test as the available evidence at the time of charging was prima facie sufficient and there indeed is a prospect of additional evidence being the Government Analyst Reports in respect of each of the cases being available.



24. More importantly, it is trite that investigations are continuous and continue until the close of the Prosecution's case. As such, criminal proceedings don't have to be only instituted after investigations, as is erroneously suggested on behalf of the Applicants. The highest Court has restated this position in the land.

(92) Note also that the 2nd and 3rd Respondents are allowed to continue investigations or even receive new evidence once the accused has been charged and in the course of trial. The prosecutor must bring the new information and evidence to the attention of the accused and the Court to allow the accused to interrogate the new evidence and adequate time to prepare his defense.

25. In arriving at a decision, the Supreme Court quoted the decision of the High Court of Kenya at Nairobi (Hon. D.S. Majanja, J) in *George Taitumu v The Chief Magistrates Court, Kibera & 2 Others*¹² in which the Court had held among other things that:

"I would also add that DPP and the Police are not prevented from continuing investigations or receiving new evidence once the accused has been charged and in the course of trial. The prosecutor's duty is to bring the new information and evidence to the attention of the accused and for the Court to allow the accused to interrogate the new evidence and adequate time to prepare his defense. Likewise, after discharge of the accused under section 87(a) of the CPC, the Court cannot prevent further investigations into the subject of the trial."

26. Just like investigations are continuous, the presentation of evidence is continuous during the trial process, provided that the Accused has not been put to his defence. As such, accused persons facing charges related to the cultivation of prohibited plants, possession, and or trafficking of bhang, as are the Applicants, can be served with the pending Report after being charged as long as they have not been placed on their defence.

27. This position has been confirmed in *Hussein Khalid & 16 others v the Attorney General & 2 others* (*supra*), in which the Court held, among other things, that:

(91) Further, our jurisprudence is replete with authorities to the effect that the presentation of evidence is a continuous process during the trial, provided that the accused has not been put to his defense.

28. None of the alleged rights of any of the Applicants has been violated as alleged nor at all. Other than merely alleging, the Applicants have failed in their obligation to establish and particularize with specificity how any of the alleged rights have been violated and or threatened with violation.

29. In *A M v Premier Academy*,¹³ the High Court of Kenya at Nairobi (Hon. J.M. Mativo and E.C. Mwita JJ as they then were) restated, among other things, that:

The Petitioner still needs to discharge the burden of proof to the required standard. The burden of establishing all the allegations rests on the Petitioner, who is obliged to discharge the burden of proof.

30. Similarly, in *Mape Building & General Engineering v Attorney General & 3 Others*,¹⁴ the Court held, among other things, that:

46. There is no doubt that the burden of proof always rests upon the Petitioner who alleges any violation. The Petitioner must present a factual basis and the



evidence in support to enable the Court to decide whether there has been a violation...

31. In *Dennis Edmond Apaa and Others v Ethics and Anti-Corruption Commission*¹⁵, which similarly dealt with the issue of disclosure of documents by the Prosecution, and from which the Supreme Court drew an answer to questions of an alleged violation of Article 50(2)(j) of the *Constitution* relating to the right to be informed in advance of the evidence the Prosecution intends to rely on and to have reasonable access to that evidence, which right has also been indirectly raised in the instant Application, the High Court of Kenya at Nairobi (Hon. D.S. Majanja, J) held among other things that:

[27] This means the duty is cast on the Prosecution to disclose all the evidence, material, and witnesses to the defense during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial, the accused must be given adequate facilities to prepare their defense... The obligation to disclose continued and was to be updated when additional information was received.

32. It is clear from the foregoing exposition that the Applicants still need to discharge their burden to establish and prove the allegation of violating their rights under Article 50 of the *Constitution*. It is also important to note that the investigations and/or disclosure processes are unique to each case, and the compliance in addition to that depends on each case's special circumstances. With evidence that the reports have been supplied and in some of the cases already produced as evidence, a blanket order as sought by the Applicants cannot issue in respect of all the alleged criminal cases, including E691/22, E974/22, E1055/22, E1288/22, E1614/22, E1617/22, E1713/22, E1744/22, E1758/22, E1831/22 and E2567/2021, each of whose circumstances as regards investigations and or disclosure are different among other things in respect of the time.

33. Further, as was held by the Court in *Dennis Edmond Apaa and Others v Ethics and Antis Corruption Commission* (*supra*) while emphasizing that there needs to be a balance between the rights under Article 50 held that the right to be informed in advance cannot be read to mean in advance of trial:

(26) The words of Article 50(2) (j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The duty imposed on the Court is to ensure a fair trial for the accused. This right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right "to have adequate facilities to prepare a defense.

36. The Application is, therefore, without merit as no basis prayers are sought, and the same is the best fit for dismissal.

Issues, Analysis, And Determination

37 ..

38. This being a claim anchored on provisions of the *Constitution* on breach of fundamental rights and freedoms, the pleaded facts raise the issues; of whether the same meets the threshold of a constitutional petition and or whether the way the Application pleads is procedural defective to warrant the same to be struck out? If the aforesaid is in the negative, whether the Application has merit?

39. Just like the overriding objectives for the *Civil Procedure Rules* 2013, the *Mutunga Rules* 2013 came into place to facilitate expeditious, efficient, reasonable, and lawful access to justice in case of a breach or threat of one's right and fundamental freedom. This rule provided for the procedure to be followed



in case of an infringement of one's rights and freedoms, the way service of the petition was to be done, and the time frame upon which one is to file such a petition in court.

40. Form of Petition. (a) An application under Rule 3 shall be made by way of a petition as set out in Form A (for application to the High court) and Form B (for application to a Subordinate Court) in the Schedule to these Rules with such alterations as may be necessary.
41. The Petition filed under these rules may be supported by an affidavit. Documents to be annexed to affidavit or petition.
42. In *Anarita Karimi Njeru v Republic* - Miscellaneous Criminal Application 4 of 1979 has now become the locus classicus for the proposition that constitutional petitions must be drafted with reasonable precision:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

43. In the instant matter, the impugned matters to wit; E1744/2022 Withdrawn E691/2022 Finalized, E1288/2022 Pending – warrant of arrest in force(absconded), E1614/2022 Finalized, E1831/2022 Finalized, E1055/2022 Finalized, CR.2567/2021 Finalized, E1758/22 Withdrawn, E1617/22 Finalized,
44. Nine out of eleven (11) cases have been finalized in one or the other. None of the applicants /petitioners swore affidavit to set out details of complaints amounting to violations of rights or freedoms to standards set in *Anarita Karimi's case* supra. Despite parties being represented by an advocate, the proceedings were instituted via a notice of motion instead of the petition as prescribed by *Mutunga rules supra*. Further, each petitioner was charged in a separate case with different circumstances and had no relation to the other, thus a serious misjoinder.
45. In view of the above defects, the court finds that the motion cannot be sustained and thus it is struck out with no orders as to costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 1ST DAY OF AUGUST 2023.

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CHARLES KARIUKI

JUDGE

