



**Langat v OCS Kuresoi & 2 others (Miscellaneous Application  
112 of 2020) [2023] KEHC 22458 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22458 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION 112 OF 2020**

**SM MOHOCHI, J**

**SEPTEMBER 18, 2023**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (6) OF  
THE CONSTITUTION OF KENYA,**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE  
CONSTITUTION SUPERVISORY JURISDICTION AND PROTECTION OF  
FUNDAMENTAL RIGHTS AND FREEDOM OF INDIVIDUAL, HIGH  
COURT PRACTICE AND PROCEDURES RULES**

**AND**

**IN THE EXERCISING SUPERVISORY JURISDICTION OVER  
CRIMINAL PROCEEDINGS.**

**IN THE CHIEF MAGISTRATES COURT AT MOLO (SEXUAL OFFENCES  
(SO) CASE NO. 87 OF 2019: REPUBLIC VS PHILIP KIMUTAI LANGAT**

**BETWEEN**

**PHILIP KIMUTAI LANGAT ..... EXPARTE APPLICANT**

**AND**

**OCS KURESOI ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS (DPP) ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT AT MOLO ..... 3<sup>RD</sup> RESPONDENT**



## RULING

1. Since the enactment of the [Sexual Offenses Act](#) 2006, controversy has persisted on the application of the law, while the long sentences continue posing systemic challenges to the penal system.
2. The drama giving rise to this judicial review are that; The *ex-parte* applicant was a teacher at Mawingu Secondary School in Kuresoi North Until June 2018 when he was accused of “befriending a form four, girl student (JC) and impregnating her resulting in his dismissal from employment in June 2019. The *ex-parte* applicant has contested his dismissal from employment.
3. The *ex-parte* applicant filed the notice of motion dated September 17, 2020 seeking the following orders: -
  - a. Spent
  - b. Spent
  - c. This honourable court do issue order declaring, the criminal charges in Molo Chief Magistrates Court sexual offences case No 87 of 2019: Republic v Philip Kimutai Langat be stayed pending final determination of this application.
  - d. The criminal charges in Molo Chief Magistrates Court sexual offences case No 87 of 2019: Republic v Philip Kimutai Langat be permanently stayed.
  - e. Costs of the application be provided for
4. The notice of motion dated September 17, 2020 is brought under section(s) 362 and 364 of [Criminal Procedure Code](#), cap 75 article(s) 22(d), 23(1), 25(c), 27(1), 47, 39, 50 (b) (), 159 (2) (d) and 165 (3) (a) (b) (6) (7) of [Constitution](#) of Kenya and part I of the Constitution of Kenya (supervisory jurisdiction and protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. and all other enabling provisions of the law). The application is supported by the *ex-parte* applicant’s affidavit sworn on even date.
5. The *ex-parte* applicant, contends that, *vide* a letter dated May 16, 2018, from the Principle of Mawingu Secondary School in Kuresoi, was accused of befriending and impregnating, one JC, a form four student. On October 12, 2018, he was interdicted and disciplinary proceedings conducted whereby dismissal was recommended by the Teachers Service Commission, a decision which the *ex-parte* applicant appealed against and is under review.
6. A DNA test was conducted on the child born and the report dated April 11, 2019 excluding the *ex-parte* applicant as biological father. That pursuant to an inquiry No 2/2019 recommended by the Office of the Director of Public Prosecutions, criminal charges were preferred against JC, Jane Rono, Wilson Cheruiyot and Hassan Soi in Molo criminal case No 1243 of 2019 for conspiracy to defeat justice and interfering with witnesses and giving false information to the Teachers Service Commission and the police. The principle was further charged with abuse of office.
7. The *ex-parte* applicant added that he was charged in Molo Chief Magistrates Court sexual offences case No 87 of 2019 and warrants of arrest were issued to the effect. He believes the charges in Molo SO/87/2019 are malicious fabricated and aimed at harassing him.
8. The 2<sup>nd</sup> respondent opposed the application and filed their response sworn by PC Hannah Kola on October 5, 2020. She was the Investigation officer in Molo SO/87/2019. She sates that she investigated



- a complaint of defilement by the *ex-parte* applicant and found him culpable. That the *ex-parte* applicant was at large and thus warrants of arrest were issued against him. She found out later that the complainant had been charged in Molo criminal case No 1243 of 2019. The Regional Coordinator South Rift directed withdrawal of Molo criminal case No 1243 of 2019. She adds there was sufficient evidence to prefer charges against the *ex-parte* applicant.
9. By his supplementary affidavit dated June 29, 2022, the *ex-parte* applicant denies being summoned to record any statement on defilement charges and added that in the hearing he was subjected to another DNA test whereby the report dated March 1, 2021 excluded him as the father of the child. He further adds that the withdrawal of criminal case No 1243 of 2019, on October 5, 2020 after 3 witnesses had testified on allegations of insufficient evidence was premature and un-procedural as it locked out key witnesses.
  10. Accordingly, the *ex-parte* applicant contends it is important for the court to examine the Magistrate's Court records in SO No 87 of 2019 and criminal case No 1243/2019, as well as the evidence presented in court to satisfy herself on the following fundamental questions: -
    - a. How the 2nd respondent arrived at its decision to withdraw charges in criminal case No 1243/2019 despite the existence of overwhelming *prima facie* evidence?
    - b. How did the 2nd respondent arrive at its decision to charge the applicant in SO No 87 of 2019 despite the existence of exonerating evidence?
    - c. How did the 3rd respondent give orders directing the 2nd respondent to withdraw criminal case No 1243/2019 without examining *prima facie* evidence on record, including my oral testimony?
    - d. Why did the 2nd and 3rd respondents withdraw criminal charges in criminal case No 1243/2019 while the applicant was taking a plea in court 4 in SO No 87 of 2019?
    - e. Why did the 2nd and 3rd respondents fail to give me reasons for withdrawing criminal charges in criminal case No 1243/2019, only for the to produce a letter in the replying affidavit?
    - f. Was the institution of criminal charges in SO No 87 of 2019 a result of unduly coercing the applicant to drop charges in criminal case No 1243/2019, and when it was not forthcoming, they used provision of section 87(a) of the [Criminal Procedure Code](#) to defeat the administration of justice?
  11. The 1<sup>st</sup> and 3<sup>rd</sup> respondent also opposed the application and filed grounds of opposition dated November 22, 2022, to wit the 1<sup>st</sup> and 3<sup>rd</sup> respondent's actions were anchored in law and this court cannot interfere with the proceedings in Molo SO/87/2019.
  12. The application was canvassed by way of written submissions.
  13. The *ex-parte* applicant in his submissions submitted that his rights as a victim under section 20 of the [Victims Protection Act](#) were violated when he the court allowed his arrest even before finishing testifying. That the decision to opt to withdraw criminal charges in criminal case No 1243 of 2019 was marred with illegalities, was un-procedural and arbitral as it locked out crucial witnesses and evidence. He added that the 2<sup>nd</sup> respondent was usurping its mandate under the [Constitution](#) and section 4 of the [ODDP Act](#). The 1<sup>st</sup> respondents acted on vengeance and coercion. He further submitted that this court would be aiding a miscarriage of justice if it allows SO/87/2019 to proceed.
  14. It was the 2<sup>nd</sup> respondent's submission that a complaint was made, investigations conducted and charges preferred, against the *ex-parte* applicant. The 2<sup>nd</sup> respondent further submitted that, it was



within its constitutional mandate under article 157 to institute criminal proceedings against the *ex-parte* applicant. Further, that a DNA test is not among the ingredients that are supposed to be proved in a defilement case. The 2<sup>nd</sup> respondent was executing its powers under article 157(1) of the [Constitution](#) in deciding to withdraw criminal case No 1234/2019 of 2019. That SO/87/2019 was before a court of competent jurisdiction and this court should not intervene but rather let the matter proceed.

15. The 1<sup>st</sup> and 3<sup>rd</sup> respondents did not file written submissions.

### **Analysis And Determination.**

16. The court observes that the *ex-parte* applicant has moved court invoking a special jurisdiction under the [Constitution](#) for judicial review as well as criminal review jurisdiction under the [Criminal Procedure Code](#). This is impermissible in law as the reliefs and remedies thereon are different, the court shall scrutinize and evaluate the matter in all respect.
17. While the submissions gravitated to giving detailed evidence and facts, the same ought to have been in the *ex-parte* applicant's affidavits, parties should constantly ensure that submissions target the bulls eye of the issues while articulating matters of law and why the reliefs sought should thus be allowed.
18. This court constantly bears in mind that a court sitting on a judicial review is only concerned with the process leading to the making of the decision and the court should not go into the merits of the decision itself. In [Municipal Council of Mombasa v Republic, Umoja Consultants Ltd](#), Nairobi civil appeal No 185 of 2007(2002) eKLR, the Court of Appeal held that:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review”.

19. The *ex-parte* applicant have sought not sought explicitly, orders for prohibition and *certiorari*. However, the reading of the motion reveals that he craves that from the Court that The criminal charges in Molo Chief Magistrates Court sexual offences case No 87 of 2019: Republic v Philip Kimutai Langat be permanently stayed. The Court of Appeal held in [Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge](#) civil appeal No 266 of 1996 inter alia as follows as regards the nature of the order of prohibition:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure



from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...”

20. The court in discussing the requirements for an order of *certiorari* stated:

“...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

21. The *ex-parte* applicant was therefore required to establish the prosecution acted illegally, irrationally or that there was procedural impropriety in arriving at its decision. In the Ugandan case of *Pastoli v Kabale District Local Government Council & others*, (2008) 2 EA 300 at pages 303 to 304 thus:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Babikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

22. It must be understood that the 2<sup>nd</sup> respondent shall not require the consent of any person or authority for the commencement of criminal proceedings. Article 157 (10) of the *Constitution* of Kenya clearly states that:

“The Director of Public Prosecutions 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 the direction or control of any person or authority.”

23. Article 157 (11) of the *Constitution* of Kenya requires that the 2<sup>nd</sup> respondent in performing its duties shall have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process while exercising its powers.



24. However, where it is clear that the 2nd respondent- in exercising its discretion, is only keen on achieving certain extraneous goals other than those legally recognized under the Constitution and the Office of the Director of Public Prosecutions Act, then it can be concluded that there has been abuse of the legal process and in such instances, the court would be entitled to intervene and end such wrongful exercise of discretion. (*Republic v Director of Public Prosecutions & 2 others Ex-parte Praxidis Namoni Saisi* [2016] eKLR).
25. On the other hand, and in exercise of its criminal revision jurisdiction the court directed the proceedings in Molo Chief Magistrates Court sexual offences case No 87 of 2019 be typed for scrutiny.
26. Revisionary jurisdiction of the high stems from the broader supervisory jurisdiction of the High Court conferred under article 165(6) of the Constitution, thus:
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
27. And, under article 165(7) of the Constitution: -
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
28. In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence; In my view, the words in 165(7 article) of the Constitution,  
 ...and may make any order or give any direction it considers appropriate to ensure the fair administration of justice” widens the scope and purpose of revisionary jurisdiction; hence, the terms used in section 362 of the CPC, should be seen and interpreted within the expanded scope as commanded of construction of existing law in section 7 of the Transitional Provisions in the Sixth Schedule of the Constitution. See also section 362 of the CPC cited below:
29. Section 362 empowers the High Court to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
30. Some of the remedies the court may grant in a revision are provided in section 364 (1) of the Criminal Procedure Code that:
- “(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
- b. in the case of any other order other than an order of acquittal, alter or reverse the order.
- c. in proceedings under section 203 or 296(2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate Court has granted bail to an accused



person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.”

31. Permanent staying of proceedings was not an envisioned remedy under the revision jurisdiction and as such the court duty was to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
32. The court has considered the proceedings relating to Molo Chief Magistrates Court sexual offences case No 87 of 2019 from the registration date on the July 18, 2019 when summons were issued, the court notes that the charge sheet emanated from Kuresoi Police Station. The fact that the *ex-parte* applicant was a complainant in another case CR1243/2019 before the same court was notified to the trial court on the October 9, 2019 and the dates fixed were aligned with the case CR1243/2019 to enable enforcement of warrants and there was nothing wrong with the directions of the trial court.
33. The *ex-parte* applicant eventually appeared in court on the September 21, 2021 when he was placed under arrest a time which he had already filed this instant motion.
34. No attempt was ever made by the *ex-parte* applicant to raise any of his concerns to the trial court.
35. Trial commenced on the February 10, 2021 and until the September 2, 2021 whereby two prosecution witnesses had testified. No concerns of any nature have been brought before the trial court to warrant a review and the record does not in any way invite the court for any revision.
36. Back to the judicial review remedies sought, this court is of the considered view that defilement can occur even where impregnation is not proved to have resulted. The continued pre-occupation of the negative DNA finding does not absolve the *ex-parte* applicant from the allegations against him.
37. The decision by the 2nd respondent to prosecute the *ex-parte* applicant is beyond reproach and that the *ex-parte* applicant has all the opportunity to defend himself in the trial.
38. The late submissions inviting this court to either review the order of withdrawal and restore Molo Criminal Case No 1243 of 2019 could not be undertaken as the same was not in the original motion. The *ex-parte* applicant may apply separately on the same, for this court to call for the trial file for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed. This can be done by simply writing a letter to the court.
39. In light of the foregoing, it is my finding that the *ex-parte* applicant’s application dated September 17, 2020, lacks merit and the same is dismissed. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**MOHOCHI S.M.**

**JUDGE OF THE HIGH COURT**

