



**Ochola v Lumumba & 3 others (Petition E036 of 2023) [2024] KEHC 11708 (KLR)
(Constitutional and Human Rights) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E036 OF 2023
LN MUGAMBI, J
OCTOBER 3, 2024**

BETWEEN

NICHODEMUS DENISHE OCHOLA PETITIONER

AND

BASEMATH ADHIAMBO LUMUMBA 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 4TH RESPONDENT

JUDGMENT

1. The Petition dated 8th February 2023 is supported by the Petitioner’s affidavit in support of even date. It is further supported by the supplementary affidavits dated 6th March 2023, 4th May 2023, 10th July 2023 and 4th August 2023 respectively.
2. The gist of the instant Petition is that an investigation and intended prosecution against the Petitioner by the 2nd, 3rd and 4th Respondents at the behest of the 1st Respondent is in violation of his constitutional rights under Articles 27 (1) & (2), 28, 29(a) of *the Constitution*.
3. Accordingly the Petitioner seeks the following relief:
 - i. A Declaration that the intended prosecution infringes on the Petitioner’s fundamental rights and amounts to an abuse of the Respondents’ constitutional mandate.
 - ii. This Court be pleased to issue an order of prohibition, prohibiting the Respondents from causing the apprehension of the Petitioner, considering and/or preferring any criminal charges against the Petitioner in any Court.



- iii. Any other relief that the Court deems fit and expedient to so grant.
- iv. Costs of this Petition to be awarded to the Petitioner.

Petitioner's Case

4. The Petitioner states that he has been a police officer and thus an employee of the 2nd Respondent's since 15th July 1985. He is currently serving as a Senior Superintendent and in charge of the operations center at Vigilance House. He avers that during his career tenure, he has never been cited for any disciplinary action. He avers that he was married to the 1st Respondent but they are currently separated.
5. The Petitioner asserts that since their separation, the 1st Respondent has been using the 2nd Respondent's officers to harass, intimidate and threaten him. This is despite having not committed any crime or charged with any.
6. He deposed that the 1st Respondent reported him to the Embakasi and Migori Police stations but he is yet to be charged or summoned in connection with the said complaints. He adds that the 1st Respondent also incited her lover, one Valentine Mokamba Ogero, to make a false statement against him at the 4th Respondent's headquarters.
7. To aggravate the situation further, he stated that the 1st Respondent went on to also report him to the Independent Policing Oversight Authority (IPOA) although no claim has been levelled against him by the Authority yet.
8. Considering these facts, he contends that the 1st Respondent's actions reveal an ill intent and a malicious motive. He further asserts that the 3rd and 4th Respondents' have been tracking his phone and movements thus causing him immense fear.
9. The Petitioner is aggrieved that the 2nd, 3rd and 4th Respondents are utilizing their power at the instigation of the 1st Respondent to silence him on issues connected to a matrimonial dispute. In particular he avers that the 1st Respondent's complaint concerns the following: that he spoken ill of her mother; accused her of infidelity; denied her access to monies acquired from his rental properties; that he was not willing to share the matrimonial property with her; that he had assaulted her and furthermore was spreading rumors that her sister died of HIV/AIDS.
10. He is apprehensive that if this Court does not intervene, the 3rd and 4th Respondents will cause him great harm and loss of his livelihood. He stated that the false accusations are offensive to his stellar reputation and character as he is exposed to ridicule. Moreover, he contends that his fundamental rights will continue being infringed upon by the Respondents if this Court does not intervene.

1st Respondent's case

11. The 1st Respondent in response filed her replying affidavit sworn on dated 9th May 2023. The 1st Respondent an officer administrator at Kenya Plant Health Inspectorate (KEPHIS) stated that she had been in a customary marriage with the Petitioner since November 2010. She stated that she left her matrimonial home on 1st February 2022 due to the abuse endured throughout the subsistence of her marriage.
12. She depones that owing to the breakdown of her marriage, the Petitioner sought a refund of the dowry and all the monies advanced to her parents during their marriage.
13. She further deposed that the Petitioner has subjected her to continuous harassment, stalking, issuing of threats including death threats and intimidation. She reveals that this has caused her immense



psychological torture and fear for her life. These threats have been extended to her family members, friends and colleagues as evidenced in the annexures attached to her affidavit.

14. She is aggrieved that the Petitioner, a senior police officer, is abusing his power by using police resources and his juniors to monitor her activities through tracking her phone numbers and her movements at work and at home. She stated that she lodged a complaint with IPOA to investigate the Petitioner but IPOA is yet to update her on the progress of the complaint.
15. She depones that, due to the Petitioner's increased threats and intimidation, she proceeded to report the matter to the Deputy Inspector General of Police. Her case was then referred to the Internal Affairs Unit by the 3rd Respondent for investigations.
16. She avers that at the end of the Unit's investigations, the Petitioner was found liable for his conduct which was determined to be criminal in nature. The 3rd Respondent's forwarded the file to the 2nd Respondent who then directed the 3rd Respondent to charge the Petitioner.
17. Contrary to the Petitioner's assertions, she contends that her role in the process has been that of a complainant and that she has no power or authority to influence the 2nd, 3rd and 4th Respondents' in carrying out their mandate.
18. She points out that the Petitioner who was well aware of her complaints at Embakasi and Migori Police Stations was never summoned by these police who she believes are in collusion with him. She adds that the Petitioner has made false averments in his Petition in a bid to portray himself a victim.

2nd, 3rd and 4th Respondents' Case

19. These Respondents' in opposition to the Petition filed their grounds of opposition dated 3rd March 2023 on the basis that:
 - i. The Petition does not rely on an iota of proof and has zero annexures to support any of the vague yet damaging allegations leveled against the 2nd, 3rd and 4th Respondents.
 - ii. The Office of the 2nd Respondent is an independent Constitutional Office charged with the mandate of State Prosecution and thus in making the decision to charge or not charge an individual the office of 2nd Respondent is under the strict direction of its Director not the 1st Respondent.
 - iii. The Office of the 3rd and 4th Respondents are duty bound to investigate any offence(s) reported to it and thereby establish the veracity of such complaint(s).
 - iv. The office of the 3rd Respondent is a Constitutional office in charge of the National Police Service of Kenya and is charged with maintaining law and order within the Republic.
 - v. The 4th Respondent is a Constitutional entity mandated with the collection of criminal intelligence and is not under the control of the 1st Respondent.
 - vi. By his own admission, the Petitioner is gainfully employed by the Office of the 3rd Respondent as a high-ranking and decorated Senior Superintendent in the Kenyan Police Service stationed at the Police headquarters.
 - vii. In the 5th Paragraph of the Petition, the Petitioner claims that the 1st Respondent is using officers of the Director of Public Prosecutions, to harass him which is preposterous as the officers of the 2nd Respondent do not interact with members of the public in a manner to harass



them, instead the 2nd Respondent's officers only interact with investigation officers and not suspects under investigations. The Petitioner is therefore put to strict proof thereof.

- viii. The Petitioner in the 9th paragraph of his Petition claims that the officers of the 3rd and 4th Respondent are tracking his movements and digging out information from his personal phone number(s) yet does not provide any proof to substantiate the same. We put him to strict proof thereof.
- ix. The Petitioner in the 10th Paragraph of his Petition claims that he is apprehensive that officers of the 3rd and 4th Respondent are likely to hold him incognito thereby occasioning him great harm and even a loss of his livelihood. There is no provision in the law that allows the offices of the 3rd and 4th Respondent to hold a suspect incognito, and if the Petitioner has in his long illustrious career spanning more than three decades at the office of the 3rd Respondent witnessed any such act we would request him to table such evidence before this Court and allow us to hold any officers of the 2nd, 3rd and 4th Officers accountable for such actions. We put the Petitioner to strict proof thereof.
- x. In response to the 14th Paragraph of the Petition the offices of the 2nd, 3rd and 4th Respondent are important Constitutional offices that are mandated with protecting the rights of the general public, it is unfathomable that the office holders of these high Constitutional offices are being used by the Petitioner's wife to settle what are seemingly domestic issues.
- xi. This Court is a house of record that is moved by evidence, not a single iota of evidence is tabled by the Petitioner to support his claims.
- xii. It is in the public interest that complaints made to the police are investigated and Constitutional agencies and offices are allowed to enforce their mandate.
- xiii. The Petitioner makes sensational claims but does not prove even one of his allegations.
- xiv. The Petitioner does not explain with specificity any of his rights being infringed.
- xv. We oppose the award of costs to the Petitioner.
- xvi. We vigorously oppose the granting of any of the orders sought by the Petitioner.
- xvii. The Petitioner will not be prejudiced in any way if the orders sought are not granted.

3rd and 4th Respondents' Case

20. The 3rd and 4th Respondents' in addition to the grounds of opposition filed their replying affidavit sworn on 10th May 2023 by Judith Oyiela Otsembo, the Senior Investigator working at the Internal Affairs Unit.
21. She depones that their Unit received directions from the 3rd Respondent to investigate a complaint lodged by the 1st Respondent against the Petitioner. The complaint related to an allegation of a threat to kill. Further the complaint highlighted abuse of office, police inaction, assault causing bodily harm and invasion of privacy.
22. It is stated that in the cause of the investigations, it was unearthed that the Petitioner had married the 1st Respondent in 2010. Their union lasted until February 2020 when they separated. It is noted that the 1st Respondent moved out of their matrimonial home due to domestic violence.



23. She depones that upon her leaving, the Petitioner attempted to coerce her to move back to their home which the 1st Respondent declined. She states that this was confirmed by the testimony of the 1st Respondent's mother, Judith Agola Lumumba and her brother, Dedan Kimathi Lumumba.
24. When this attempt failed, it is alleged that the Petitioner started tracking the 1st Respondent's calls to determine who she was associating. He suspected that the 1st Respondent was having an affair. This escalated to threats directed to the 1st Respondent's boyfriend, Valentine Ogero Mokamba and her colleague Mercy Achieng Odhiambo.
25. It is further deponed that the Petitioner on 12th January 2021 in the company of his brother, Jethro Jamhuri Ocholla assaulted the 1st Respondent. This was established by the 1st Respondent's report at Migori Police Station vide OB No.45/12/01/2021 which was not actioned.
26. She states as well that the Petitioner by virtue of being a Senior Police Officer used the 4th Respondent's junior officers to track and locate the 1st Respondent's and associates whereabouts. This was confirmed by officers, Wilson Koech and Ali Abdille based at the 4th Respondent's office at Thika East and Kayole respectively. They both informed that the Petitioner had approached them to track the 1st Respondent's phones. She notes that this fact was also admitted by the Petitioner when they interviewed him.
27. She depones that upon conclusion of the investigation, the Unit on 24th November 2021 forwarded Inquiry File No.67/2021 to the 3rd Respondent for perusal and advice. The 3rd Respondent then directed the file be forwarded to the 2nd Respondent for advice on the proposed criminal charges against the Petitioner.
28. She informs that the 2nd Respondent following a review of the file recommended that the Petitioner be charged with: abuse of office contrary to Section 101(1) as read with Section 36 of the Penal Code; threatening to kill contrary to Section 223 (1) of the Penal Code and assault causing bodily harm.
29. Upon receiving the 2nd Respondent's recommendations, the 3rd Respondent on 11th April 2023 directed the Unit to implement the said recommendations. As a result the Petitioner was directed on 20th April 2023 to appear before the Unit on 26th April 2023. It is however stated that before the Petitioner could be arrested, his advocates produced this Court's orders restraining them from taking any action until his Petition's mention.
30. In view of the cited averments, the 3rd and 4th Respondents' assert that the Petitioner has not adduced any evidence to demonstrate that they exceeded their mandate in commencing the inquiry against him or acted ultra vires. For this reason, the Petition is deemed frivolous and vexatious. Furthermore does not meet the set threshold for grant of orders sought.

Parties Submissions

Petitioner's Submissions

31. The Petitioner through his counsel, Swaka Advocates filed submissions dated 6th March 2023 where the issues for determination were identified as: whether the grounds of opposition filed by the 2nd, 3rd and 4th Respondents can be deemed as a proper opposition to the Petition and whether the Petitioner is entitled to the reliefs sought.
32. On the first issue, Counsel submitted that the grounds of opposition were only a statement of facts and further does not contain any supporting evidence. Additionally that the grounds of opposition



- did not cite any law relied upon. Considering this, it was argued that the Respondents' response was a nullity rendering the Petition was uncontroverted.
33. To support this argument Counsel relied in *Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited* [2010] eKLR where it was held that:
- “The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant”.
34. Comparable reliance was also placed in *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR and *Faustina Njeru Njoka v Kimunye Tea Factory Limited* [2022] eKLR.
35. Moving on to the second issue, Counsel submitted that the Petitioner had specified the alleged violations in compliance with the threshold set out in *Anarita Karimi Njeru v Republic* [1979]eKLR and later reaffirmed by the Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR.
36. Counsel further submitted that the Petitioner had demonstrated violation of his rights. In that he was in fear of the imminent arrest and criminal trial in view of a civil matter which does not warrant interference by the 2nd, 3rd and 4th Respondents. According to Counsel the Respondents had failed to interrogate the legitimacy of the 1st Respondent's claim and instead resorted to use of threats to intimidate and harass the Petitioner.
37. In support reliance was placed in *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69 where it was held that:
- “The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious.”
38. Like dependence was placed in *Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another* [2002] 2 KLR 703, *R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, Kipoki Oreu Tasur vs. Inspector General of Police & 5 Ors* (2014) eKLR, *Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012* [2013] eKLR, *Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others* [2019] eKLR, *Nakusa vs Tororei & 2 others (No 2) Nairobi HCEP No 4 of 2003* [2008] 2 KLR (EP) 565, *R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, Floriculture International Limited High Court Misc.144 of 1997, William vs Spautz* [1992] 66 NSW LR 585, *R VS. Attorney General Ex Parte Kipneno Arap Ngeny, High Court Misc. Civil Application No.406 of 2001, R. vs Attorney General Ex Parte JPL Nyaberi, High Court Misc. Civil application No.1151 of 1999, Peter Macharia Ruchachu v Director*



of Public Prosecution & another [2014] eKLR, Stanley Munga Githunguri versus Republic (1985) KLR 91 and [*Samuel Kamau Macharia & Another versus Attorney General & Another, Nairobi High Court Miscellaneous App. No. 356 of 2000.*](#)

39. Counsel in sum of these arguments was certain that, the Petitioner's intended prosecution was instigated by ulterior motives and for a purpose other than upholding the law.

1st Respondent's Submissions

40. The firm of Rachier and Amollo LLP Advocates filed submissions for the 1st Respondent dated 14th June 2023. Counsel sought to discuss: whether the Petitioner had demonstrated violation of his rights; whether the 1st Respondent had sufficient cause to seek legal protection against the Petitioner and whether this Court has the jurisdiction to prevent the prosecution of a Petitioner shown to be infringing on the rights of another person.

41. Counsel commenced by submitting that the Petition in view of the guideline set in Anarita Karimi (supra) had failed to disclose any violation of the Petitioner's right by the 1st Respondent. Equally that none of the purported particularized gross violations of [*the Constitution*](#) was against the 1st Respondent and neither was any relief sought against her. Additionally it is argued that the Petitioner had failed to prove how the 1st Respondent had violated Articles 27(1) & (2), 28 and 29(a) of [*the Constitution*](#).

42. To buttress this point reliance was placed in Dr. Rev. [*Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority Petition No. 479 of 2013*](#) where it was held that:

"The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which [*the Constitution*](#) has been violated by whom and even state the Article of [*the Constitution*](#) that has been violated and the manner in which it has been violated."

43. Like dependence was placed in [*Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others \[2013\] eKLR*](#) and [*Leonard Otieno Vs. Airtel Kenya Limited \[2018\]eKLR*](#).

44. According to Counsel moreover, the Petitioner's case is non-justiciable as does not present any real controversy for this Court to determine. This is because the Petition is based on an apprehension of his arrest which makes it premature.

45. Relying on the averments in the 1st Respondent's affidavit in the second issue, Counsel answered in the affirmative. Reliance was placed in [*Centre for Rights Education & Awareness \(CREAW\) v Attorney General & Another \[2015\] eKLR*](#) where it was stressed that:

"A party need not wait for a violation of a right or a contravention of [*the Constitution*](#) to occur before approaching the Court for relief. It appears to me that the intent behind the use of the word "threatened" in both Articles 22 and 258 was to preempt the violation of rights, or of [*the Constitution*](#)."

46. Consequently, in the last issue, Counsel submitted that the 2nd, 3rd and 4th Respondents have a constitutional mandate which they must carry out when a complaint is lodged. It is argued that these Respondents undertook their functions as envisaged under the law. Furthermore, it was argued that the Petitioner had not demonstrated that the Respondents acted outside of their constitutional mandate to warrant this Court's intervention.



47. Reliance was placed in Commissioner of Police & another v Kenya Commercial Bank Ltd & 4 others [2013] eKLR where it was held that:

“The court on the other hand is required to oversee that the DPP and the inspector general undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.”

48. Like dependence was placed in RP Kapur v State of Punjab AIR 1960 SC 866 and Cyrus Shakhlanga Khwa Jirongo v Soy Developers Ltd & 9 others [2021]eKLR.

2nd, 3rd and 4th Respondents’ Submissions

49. Prosecution Counsel, Oliver Kennedy Mureithi Kagiri filed submissions dated 20th April 2023 highlighting the issues for determination as: whether the Petition meets the threshold for a constitutional petition and whether these Respondents grounds of opposition can be deemed as a proper response to the Petition.
50. Counsel relying on the Anarita Karimi case (supra) submitted that for a constitutional petition to be competent, it must set out with precision, the Petitioner’s complaint, the specific provisions said to be infringed and the manner in which the cited provisions were infringed. This requirement was further affirmed by the Court of Appeal in Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.
51. It was argued that the Petitioner’s averments in the Petition did not set out any particulars to enable the Respondents respond effectively. In effect Counsel argued that the Petition was not pleaded with precision, noting that mere citing of constitutional provisions is not sufficient to meet the threshold.
52. On the second issue, Counsel submitted that the grounds of opposition were an appropriate response in light of Order 51 Rule 14 of the Civil Procedure Rules, 2010. This provision makes known that a Respondent who wishes to oppose any application may file one of or a combination of either, a notice of preliminary objection, replying affidavit and a statement of grounds of opposition.
53. Equally Counsel argued that there is no provision in law that requires grounds of opposition to only cite the law. Reliance was placed in Faustina Njeru Njoka v Kimunye Tea Factory Limited [2022] eKLR where it was observed that:

“A perusal of the grounds of opposition shows that the said grounds largely respond to the averments in the application, simply put they address issues of fact.”

3rd and 4th Respondents’ Submissions

54. State Counsel, Jackline Kiramana on behalf of these Respondents filed submissions dated 5th June 2023 highlighting the issues for determination as: whether the 3rd and 4th Respondents violated the Petitioner’s rights and whether the Petitioner is entitled to the remedies sought.
55. Counsel on the first issue submitted that it is the 2nd Respondent’s mandate to prosecute criminal cases and that of the 4th Respondent to investigate cases. Accordingly arrests and detentions are legal processes provided for by the law with specific constitutional safeguards. As such, the same do not amount to infringement of fundamental rights and freedoms. Reliance was placed in Republic v



Commissioner of Police & another Ex-Parte Michael Monari & another [2012] eKLR where it was held that:

“It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge or act in a reasonable manner, the High Court would be reluctant to intervene.#

56. Comparable reliance was placed in *Development Bank of Kenya Ltd v Director of Public Prosecutions & another; Giriama Ranching Company Limited (Interested Party)* [2020] eKLR and *Okiya Omtatah Okoiti v Director of Public Prosecutions; Inspector General of National Police Service & another (Interested Parties)* International Commission of Jurists (Kenya Section) (Amicus Curiae) [2022] eKLR.

57. Counsel added that the Petitioner’s rights under Articles 27(1), (2), 28, 29(a) as well as Articles 10, 19, 22, 23, 48, 73 of *the Constitution* are not absolute and subject to limitation as provided under Article 24 of Constitution.

58. As such, it was stated that an investigation is a legal process and the Petitioner ought to allow the 3rd and 4th Respondents discharge their constitutional and statutory mandate. To buttress this point dependence was placed in *Republic vs Chief Magistrate Milimani & Anor Ex Parte Tusker Mattress ltd & 3 others* (2013)eKLR where it was held that:

“However before going to the merits of instant application it’s important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The court must in such circumstances take care not to trespass into jurisdiction of or the court which may eventually be called upon to determine the issues hence the court ought not make determination which may affect the investigations or the yet to be conducted trial. That this court has power to quash impugned warrants cannot be doubted. However, it is upon the Ex parte applicant to satisfy the court that the discretion given to the police to investigate allegations of a commission a criminal offence ought to be interfered with.”

59. On the final issue, Counsel submitted that in light of the stated arguments the Petitioner was not entitled to the remedies sought. It was further contended that the Petitioner had failed to show that the decision to charge is tainted with illegality, irrationality and procedural impropriety. Moreover that the Petition was marred with baseless unsupported claims hence lacking in merit deserving a dismissal.

Analysis and Determination

60. From the pleadings and submissions referred to in the foregoing, the issues that arise for determination may be summarized as follows:

- i. Whether the Petition satisfies the threshold for constitutional Petitions.
- ii. Whether the Petitioner’s rights under Articles 27 (1) & (2), 28, 29(a) of *the Constitution* were violated by the Respondents; and
- iii. Whether the Petitioner is entitled to the reliefs sought.



Whether the Petition meets the threshold of a Constitutional Petition

61. A proper constitutional petition must have some essential characteristics. It should plead the constitutional provisions violated, the nature or manner of alleged violation and demonstrate the facts that are relied upon. This is what the Court in *Husus Mugiri v Music Copy Right Society of Kenya & another* [2018] eKLR emphasized when it stated thus:

“ 18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in *Anarita Karimi Njeru vs. Republic* [1979] eKLR. That is, the applicant must specify which specific provisions of *the Constitution* that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.”

62. Likewise, in *Meme v Republic* [2004] eKLR the Court stated as follows:

“Where a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant’s instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complaints without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”.

63. This test was also affirmed by the Supreme Court in *Communications Commission of Kenya* (supra) as follows:

“(349) ... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

64. I have carefully examined the instant Petition and I note that the Petition sets out the articles of *the Constitution* that the Petitioner alleges were violated in particular Article 27 (1), 157 (10) and 10 (2) (b) of *the Constitution* which he equally backs up with the factual description detailing the manner in which the petitioners complained of the were occasioned. I am thus satisfied that the Petition meets all the essential characteristics of a Constitutional Petition.



Whether the Petitioner's rights under Articles 27 (1) & (2), 28, 29(a) of the Constitution were violated by the Respondents

65. The Petitioner asserted that the 2nd, 3rd and 4th Respondents were conducting a malicious investigation instigated by the 1st Respondent and intended prosecute him in violation of his constitutional rights as set out above.
66. Article 27 (1) provides that every person is equal before the law and has equal right to protection and equal benefit of the law hence it would be against this Article to apply the law as a tool of oppression or maliciously to advance a personal interest. Further, Article 28 provides that every person has inherent dignity and the right to have dignity respected and protected, whereas Article 29 (a) guarantees the freedom and security of the person. The Petitioner had a duty to demonstrate that those rights were violated. All what the Petitioner was able to prove however was that complaints had been lodged against him with the 3rd Respondent by the 1st Respondent and investigations were ongoing and was thus apprehensive that he could be arrested and prosecuted. He alleged that the complaints were maliciously instigated due to marital differences.
67. Article 239 provides for the National Security Organs of the State of which the National Police Service is part of. Article 240 (3) creates the National Police Service. The Office of Inspector General of Police is established under Article 245 (1) Constitution as an Independent Constitutional Office where the Cabinet Secretary is allowed to give direction to the Inspector General on policy matters but hastens to state that no person may give the Inspector general directions on investigation into any particular offence.
68. The National Police Service Act, 2011 is enacted pursuant to Article 243 (4) with the object of giving effect to Article 243. Under Section 24 (e) National Police Service Act, one of the functions of the Police among other is the investigation of crimes.
69. Further Section 35 of the Act sets out the functions of the 4th Respondent are as follows:
- a. collect and provide criminal intelligence;
 - b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;
 - c. maintain law and order;
 - d. detect and prevent crime;
 - e. apprehend offenders;
 - f. maintain criminal records;
 - g. conduct forensic analysis;
 - h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;
 - i. co-ordinate country Interpol Affairs;
 - j. investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
 - k. perform any other function conferred on it by any other written law.



70. In the case of *Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others* [2016] eKLR the Court underscored the importance of independence of police in carrying out investigations by holding thus:

“24. It is trite that the Court ought not to usurp the Constitutional mandate of the Respondents to investigate any matter that, in the Respondents’ view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the Respondents since the purpose of a criminal investigations conducted bona fide is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid... However, if the applicant demonstrates that the investigations that the investigators intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are conferred.”

71. This was echoed by the Court of Appeal in *Commissioner Of Police & The Director Of Criminal Investigation Department & another* (supra) which held:

“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged... 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.”

72. Consequently, courts rarely interfere with constitutional and the statutory mandate of 3rd Respondent unless there is a clear demonstration by way of evidence presented that the 3rd Respondent has abused, threatens to abuse or has arbitrarily used the powers conferred by the law to harass or intimidate or unfairly persecute the Petitioner.

73. In the present case, the Petitioner alleges that the 3rd Respondent is being instigated by the 1st Respondent (his wife with whom they separated) to use criminal investigation process to settle scores for what is essentially a matrimonial dispute between them.

74. I have carefully reviewed the material presented by both sides. It is however apparent that there is an evidently reasonable basis for an inquiry to those complaints despite there having been a relationship of husband and wife between the Petitioner and 1st Respondent. The Replying affidavit of the 1st



Respondent cites various instances of criminal nature including death threats that were allegedly issued to the 1st Respondent by the Petitioner after she decided to quit the union between her and the Petitioner. She annexed to the replying affidavit the text messages carrying the death threats that were allegedly sent to her from the Petitioner's phone and included statements of witnesses that attested to some of the incidents which the 3rd Respondent had taken in the process of investigating the complaint. This matter is thus not what can simply be dismissed as idle talk. It is absolutely necessary that the 3rd Respondent be allowed to carry out its statutory and constitutional mandate in order to ascertain the credibility or otherwise of this complaint through the use of investigative techniques at its disposal to verify this material and any other relevant information connected thereto in order to unravel the truth. To curtail the investigation at this stage in the light of the material displayed and considering the gravity of the allegations might impede the truth and result in injustice. In any case, other than claiming there is malice, there was no tangible evidence of malice concretely laid before the Court by the Petitioner against the 3rd Respondent.

75. Turning to the 2nd Respondent, its authority is derived from Article 157 of *the Constitution*. Specifically Article 157(6) (a) of *the Constitution* provides as follows:

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may — 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;

76. In carrying out this duty, Article 157 (10) of *the Constitution* informs that the 2nd Respondent 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. Further under Article 157(11) the 2nd Respondent in exercising the power is to pay regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

77. The Court of Appeal in *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR underscored the independence of the DPP in carrying out this mandate by holding thus:

“

“(41) Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in *Mohit v Director of Public Prosecutions of Mauritius* [2006] 5LRC 234:

“these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...”

In *Regina v. Director of Public Prosecutions ex-parte Manning and Another* [2001] QB 330, the English High Court said partly at para 23 page 344:

“At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.”



Although the standard of review is exceptionally high, the court’s discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.

(42) The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”

78. For the Petitioner’s claim to succeed, he must show that in exercise of his mandate, the 4th Respondent acted contrary to the law. The Supreme Court in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) eKLR stated:

“(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50]. This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

79. Correspondingly, in *Alice Wanjiru Ruhiru v Messiac Assembly of Yahweh* (2021) eKLR the Court noted as follows:

“

“22. I also refer to *The Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”



78. The DPP, is the 2nd Respondent herein. The Petitioner has not demonstrated that the DPP has even made the decision to prosecute him. On what basis does the Petitioner fault the 2nd Respondent for violating his rights? The claim against the 2nd Respondent has no basis. In any event, this Court cannot injunct the DPP from exercising its mandate without evidence malice or abuse of power which in this case lacking.

80. The upshot of the foregoing is that the Petition is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD OCTOBER, 2024.

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L N MUGAMBI

JUDGE

