



**Kabalachi v Director of Public Prosecution (Constitutional Petition
E022 of 2024) [2024] KEHC 14079 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CONSTITUTIONAL PETITION E022 OF 2024
LM NJUGUNA, J
NOVEMBER 13, 2024
IN THE MATTER ARTICLES 20(1)(2)(4), 21(1), 22(1), 48, 258(1)
OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
25(A)(C), 27(1)(2), 28, 29(D)(F), 50(1)(2)(P) OF THE
CONSTITUTION OF KENYA 2010
AND
ARTICLE 23(1) AS READ WITH ARTICLE 165 OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF CONSTITUTIONALITY OF SECTION 87(A)
OF THE CRIMINAL PROCEDURE CODE**

BETWEEN

ABRAHAM GORDON KABALACHI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. A notice of motion dated 16th September 2024 was filed by the petitioner/applicant seeking the following orders:



1. Spent;
2. That pending the hearing and determination of this application inter-parties there be a conservatory order staying any proceedings in Embu Chief Magistrate's Court Criminal Case Number E588 of 2024;
3. That there be a conservatory order staying any proceedings in Embu Chief Magistrate's Court Criminal Case Number E588 of 2024 pending hearing of the petition herein; and
4. Costs be provided for.

The application is premised on grounds set out on its face and in the supporting affidavit thereof.

2. Through Embu Chief Magistrate's Court Criminal Case Number E398 of 2024, the applicant was charged with the offence of unlawful wounding contrary to section 237(a) of the Penal Code. He was adjudged mentally unfit to plead owing to his fluctuating mental state. In that case, he produced medical examination reports as evidence that he was mentally unfit and was continually on treatment. The circumstances forced the respondent to withdraw the charge against the applicant under section 87(a) of the Criminal Procedure Code. The applicant deposed he has been summoned one year later to plead but his mental state has not changed.
3. He decried the long delay by the prosecution in reinstating its case against him and he stated that the delay has caused him psychological and emotional torture. That the delay is a violation of his rights and it amounts to torture and inhumane treatment. That his mental illness was triggered further by the charges and to allow the prosecution to charge a person again for the same offence amounts to a violation of the person's rights under *the constitution*. He has filed a petition raising these issues and he now seeks stay of proceedings until the petition is heard and determined. He has urged the court to consider that no new grounds have been advanced by the prosecution to warrant charging him again on the same facts.
4. In its replying affidavit, the respondent stated that both the victim and the petitioner are entitled to the rights under Articles 48 and 27(1) of *the Constitution*. That Section 87(a) of the Criminal procedure Code is not inconsistent with *the Constitution* and that the DPP was not barred from reinstating the charges. That the applicant has not provided any recent documents to show that he is still under the same medical condition or that he has deteriorated. That the applicant is not mentally incompetent as he was able to instruct his advocate, showing that he has rational understanding of the proceedings. That the mental examination report does not reveal any mental illness and on the contrary it shows that the applicant is mentally competent to take plea.
5. It argued that if the applicant is competent enough to be in charge of a police station, there is no reason why he claims to be incompetent to take plea. Regarding the findings from the medical reports, the respondent deposed that the mental conditions arising therein are treatable with medicine and counselling, and this should not hinder the proceedings. It deposed that it has not been given a chance to interrogate the alleged medical reports and, in any event, there is no provision of *the constitution* that demands that an accused person be subjected to mental assessment. That section 11 of the Penal Code creates a presumption of sanity unless the contrary is proven and if it is, then the provisions of section 162-167 of the Criminal procedure Code come into play. It urged the court to let it exercise its prosecutorial powers without the same being stifled.
6. The application was canvassed by way of written submissions.



7. The applicant submitted that if the orders sought are not granted, the issues raised in the petition will be overtaken by events yet he has rights under Articles 24, 28 and 54(1) of *the Constitution*. That he has produced medical reports to show that he is mentally unstable and is undergoing treatment but the respondent is in a rush to prosecute him. He relied on the case of *Wilson Kaberia Nkunja v. Magistrates and Judges Vetting Board & Judicial Service Commission* [2018] KEHC 9274 (KLR). He argued that he has raised a prima facie case and that the court should grant the orders sought.
8. The respondent submitted that the DPP is entitled under Article 157(6)(c) of *the Constitution*, to discontinue criminal proceedings any time before judgment and it chose to do so under section 87(a) of the Criminal Procedure Code. It relied on the case of *Titus Koome Kubai, Julius Kithinji Meeme & Paulo Kobia v Director of Public Prosecutions* [2015] KEHC 4007 (KLR) where the court found that the provision was not unconstitutional.
9. Further reliance was placed on the case of *Irene Wambui Muchai, Gladys Thitu Gakinya, Josephat Mbugua Njoroge, Francis Ndegwa Njoroge, Teresiah Wanjiru Njuguna & Mary Wanjiku Njoroge v Attorney General* [2017] KEHC 8895 (KLR) where the court examined what would amount to torture. It urged that withdrawal of charges under section 87(a) of the Criminal Procedure Code is not a bar for reinstatement of the charges. It also relied on the case of *Anarita Karimi Njeru v Republic* [1979] KECA 12 (KLR) where the court urged that a petitioner must disclose specific violations of his rights to allow the court to consider the orders sought.
10. The issue for determination is whether the proceedings in Embu Chief Magistrate’s Court Criminal Case Number E588 of 2024 should be stayed pending hearing and determination of the constitutional petition.
11. I do note that the respondent’s submissions are on the substantive issues raised in the petition and not the application for stay of proceedings. Be that as it may, the court will delve into the issue at hand at this point in time.
12. Stay of proceedings is a relief that may be granted at the discretion of the court and in the interest of justice. The nature of this relief is that it fetters one party’s rights to prosecute their case, therefore, it must be considered carefully such that justice will be served eventually. In the case of *Re Global Tours & Travel Ltd HCWC No.43 of 2000* the court held that:

“... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”
13. The court in the case of *Kenya Wildlife Service v. James Mutembei* [2019] eKLR held that: -

“...Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”
14. The applicant has filed a constitutional petition seeking to challenge the constitutionality of section 87(a) of the Criminal Procedure Code in light of articles 25(a)(c), 29(d) and 50(2) of *the*



Constitution. He also seeks, inter alia, a declaration that his rights have been infringed through the respondent's reinstatement of charges against him after withdrawal of the same. The petition raises valid constitutional issues that should be determined substantively. However, as pointed out by the applicant, if the proceedings at the trial court are not stayed, the petition will be overtaken by events. It is in the interest of justice that the order for stay of proceedings be granted,

15. Therefore, I find that the application has merit. Prayer (3) of the same is hereby allowed as prayed.

16. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Petitioner/Applicant

..... for the Respondent

