



**Mwangi v Director of Public Prosecutions & 4 others; Kinuthia
(Interested Party) (Petition E368 of 2023) [2024] KEHC 14446 (KLR)
(Constitutional and Human Rights) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E368 OF 2023

LN MUGAMBI, J

NOVEMBER 21, 2024

BETWEEN

JOSIAH NICHOLAS MBATHI MWANGI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

CHIEF MAGISTRATE'S COURT (MILIMANI) 3RD RESPONDENT

CHIEF MAGISTRATE'S COURT (MAKADARA) 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

AND

CATHERINE NJERI KINUTHIA INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner filed the instant Petition on 27th September 2023. The Petition is supported by his affidavit dated 26th September 2023 and a further supplementary affidavit dated 31st October 2023.
2. The substance of this Petition is the claim by the Petitioner that the criminal complaint lodged by the Interested Party leading to arrest and intended prosecution of the Petitioner is malicious and thus a violation of the Petitioner's constitutional rights.
3. Accordingly, the Petitioner seeks the following relief against the Respondents:



- i. A declaration be issued that the arraignment, charge and prosecution of the Petitioner is tainted with ulterior motives, bad faith and against the public interest.
- ii. A declaration be issued that the arraignment, charge and prosecution of the Petitioner is an abuse of prosecutorial discretion and the court process i.e. the criminal justice process.
- iii. A declaration be issued that the Interested Party's criminal complaint was made with ulterior motives and bad faith.
- iv. An order of certiorari be issued calling into this Court, the entire proceedings in Milimani Chief Magistrate's Court Criminal Case No. E045 of 2023 Republic Versus Isaiah Nicholas Mbathi Mwangi for purposes of it being quashed; and by the same Order the proceedings be subsequently quashed.
- v. A declaration that a 'Decision to Charge/Prosecute or not to Charge/Prosecute' within the meaning of Sections 5 (4) (e) and 23 (1)(a) of the [Office of the Director of Public Prosecutions Act, 2013](#), amounts to an administrative action within the meaning of section 2 of the [Fair Administrative Action Act](#).
- vi. A declaration that the 1st Respondent's action of charging/prosecuting the Petitioner without taking into account the matters raised by the Petitioner, as expressly pleaded (above), the 1st Respondent failed to take into account relevant considerations and thus subjected the Petitioner to an unfair administrative action, and thus violated Article 47 of [the Constitution](#) and the [Fair Administrative Action Act](#).
- vii. A declaration be issued that if the prosecution mounted by the 1st Respondent is allowed to proceed, the Petitioner's right to call/adduce evidence, as guaranteed by Article 50 (2)(k) of [the Constitution](#), is threatened with violation as the Petitioner's intended evidence and witnesses cannot be availed; for lack of clarity of the events of 2018.
- viii. A declaration be issued that a trial where an accused person is impaired in the exercise of his rights to adduce and challenge evidence, is not a fair trial within the meaning of Articles 25 and 50 of [the Constitution](#); and amounts to a deprivation of the right to access justice as guaranteed by Article 48 of [the Constitution](#).
- ix. Damages be awarded to the Petitioner, as against the 2nd and 3rd Respondents, for subjecting the Petitioner to an unfair administrative action.
- x. Costs of and incidental to, these proceedings be borne by the 1st and 2nd Respondents and by the Interested Party.
- xi. Any other relief that this Court may deem fit and just to grant in the interests of justice and/or that may become apparent and necessary in the course of these proceedings.

Petitioner's Case

4. The Petitioner depones that he was married to the Interested Party for a period of 7 years before their marriage was finally dissolved in Divorce Cause No. E012 of 2021 – Josiah Nicholas Mbathi Mwangi vs Catherine Njeri Kinuthia in the year 2022.
5. The Petitioner asserts that at the conclusion of their marriage, the Interested Party threatened to make his life difficult if he did not give her Ksh.10,000,000 which claim he supported by annexed WhatsApp screenshots marked 'JNMM3'. He alleges that his failure to give out this sum of money caused the Interested Party to lodge multiple false criminal complaints against him.



6. He stated that the Interested Party filed a criminal complaint that the Petitioner had committed forgery in an Affidavit sworn on 13th August 2018 which had purported that the Interested Party had resigned from the Directorship of Nimba Technologies.
7. The Petitioner asserts that the Interested Party concealed the fact that she was formerly married to the Petitioner and together they had registered the company during the subsistence of their marriage hence the appropriate forum to resolve an issue of matrimonial property was by a civil court.
8. The Petitioner depones that he was arraigned in Court under Criminal Case No. E045 of 2023 Republic Versus Isaiah Nicholas Mbathi Mwangi without being questioned him or being accorded a chance to record his statement concerning the complaint taken.
9. He disclosed that on the day of his arraignment, the said Investigating Officer in conjunction with the Interested Party, called the media to cover the case which was reported in the African Times News on 25th January 2023 under the title 'A serial fraudster' and in Uzalendo news on 20th January 2023.
10. The Petitioner states that soon upon being released on cash bail on 25th January 2023, he received a call from a police officer based at Villa Police Post summoning and informing him that the Interested Party had lodged a complaint against him in respect assault that had occurred in 2018.
11. As a result, he proceeded to Court on 27th January 2023 and obtained anticipatory bail vide Milimani HCCC Misc. Criminal Application No. E028 of 2023.
12. Thereafter, on 7th September 2023, the police at Villa Police Station further summoned him on the charge of arson and malicious damage to property. He was subsequently released on a police cash bail.
13. Consequently, the Petitioner avers that the Interested Party's claims against him were lodged for an ulterior purpose contrary to the objective of the criminal justice system. Considering this, he asserts that the continuance of Criminal Case No. E045 of 2023 is an abuse of the Court process.
14. Furthermore, he contends that during the divorce proceedings at Kiambu Chief Magistrates Court, the Interested Party never raised the claim of assault and the other offenses. For this reason, he claims that his arrest and charge were unfair and malicious as they were not founded on any factual basis. He is apprehensive thus that if this Court does not intervene he will continue to suffer unnecessary woes at the bidding of the Interested Party.
15. Equally, he contends that while the 1st Respondent enjoys the power to prosecute charged persons, this mandate ought to be guided by the dictates of *the Constitution*. In this matter, he asserts that the 1st Respondent in proceeding to lodge the criminal prosecution based on the Interested Party's sham claims, failed to adhere to the provisions of Article 157 of *the Constitution*.

1st Respondent's Case

16. In response to the Petition, the 1st Respondent filed its grounds of opposition dated 13th February 2024 on the premise that:
 - i. The application together with the petition are not only misconceived and bad in law but also incompetent as have failed to set out with reasonable degree of precision that which the Petitioner complains, the provisions said to have been infringed or violated and the manner in which they are alleged to have been infringed or violated as was enunciated in the celebrated case of Anarita Karimi -Versus-Republic (No.1) (1979 1 KLR 154 and Mumo Matemu - Versus-Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012(2013)eKLR.



- ii. Due process had been followed in preferring the charges against the Petitioner since a formal complaint had been lodged against him by the interested party with the 2nd Respondent who then called the Petitioner and interrogated him. He was also duly informed about the complaint then the file forwarded to the 1st Respondent who upon perusal and in exercising its powers under Article 157(6) of *the Constitution* preferred the mentioned charges, based on the evidence availed.
- iii. The application and Petition is frivolous and vexatious as it is only meant to derail the hearing of the said preferred charges. Further it should be noted that there exists adequate safeguards within *the Constitution* and the Criminal Procedure Code to ensure that the Petitioner's fundamental rights and freedoms are guaranteed and upheld.
- iv. Neither Article 47 nor Article 49 or Article 50 of *the Constitution* have been offended as far as preferring the charges against the Petitioner is concerned. This is since the Petitioner's side of the story had been considered before the decision to charge him was arrived at, similarly, the Petitioner had been involved in all the processes right from the time the complaint was lodged by the Interested Party at the police station to the time the charges were preferred and presented in court.
- v. The Application amounts to an abuse of the court process as it fails to appreciate that criminal matters or complaints of criminal nature do not have time limitation, further, matters averred by the Petitioner largely forms what should be his defence in the criminal charges thus, the application should be dismissed with costs.

2nd, 3rd, 4th and 5th Respondent's Case

- 17. The 2nd Respondent, filed its response through CPL Edith Mbaka in a Replying Affidavit sworn on 15th February 2024.
- 18. Recapping the Petitioner's and Interested Party's marital status, she avers that during the subsistence of their marriage they registered a company called Nimba Technologies where both were Directors.
- 19. She states that on 5th November 2022, the Interested Party lodged a complaint at Parliament Police Station vide OB No.28/5/11/2022. The Interested Party alleged that in 2018, the Petitioner forged her signature in the said Company registration. In effect, he had the Interested Party's name removed as a Director by the Registrar of Companies.
- 20. It is further stated that the Interested Party had initially lodged another complaint against the Petitioner at Villa Police Station in 2018 vide OB No.14/22/7/2018. The Interested Party alleged that the Petitioner had assaulted her and set her house on fire. The Petitioner was summoned in the matter and later on released on a cash bail of Ksh.100,000.
- 21. Following the Interested Party's complaint, the 2nd Respondent through the investigating officer at the time, CPL John Mwai, wrote to the Registrar of Companies on 14th November 2022 requesting to be issued with the status report of Nimba Technologies.
- 22. In response, the Registrar of Companies on 29th November 2022 informed that both the Petitioner and the Interested Party are directors of the company and that no changes of directors had been done since the company was incorporated.
- 23. In a further letter dated 2nd December 2022, they were informed that on 23rd August 2018, an application through the eCitizen platform had been lodged seeking action on the resignation of the



Interested Party. This application was supported by a letter of resignation, minutes and an affidavit, all dated 13th August 2018.

24. With this information, the Petitioner was summoned to issue his side of the account, before the matter was forwarded to the 2nd Respondent. He was thereafter on 19th January 2023, charged with five counts of forgery contrary to Section 345 as read with 349 of the Penal Code in Criminal Case No. E045 of 2023.
25. She avers that the Petitioner on 11th September 2023 lodged a grievance with the 2nd Respondent claiming that the Interested Party's complaint was malicious owing to her ulterior motive.
26. To further ascertain the matter, the investigating officer wrote to the Registrar of Companies again on 16th October 2023 seeking a further status report on Nimba Technologies. In response on 20th November 2023, they were informed that an application had been lodged from the Petitioner's eCitizen account seeking change of Directors of the Company. The transaction was paid through a mobile phone number that showed the names, Joyce Wangu. Ownership of this phone number by Joyce Wangu was confirmed by Safaricom during the investigation.
27. Moreover, the investigating officer also wrote to the police doctor on 3rd January 2023, seeking to have the Interested Party's P3 form relating to her assault claim, authenticated. The police doctor affirmed its genuineness.
28. It is alleged that contrary to the Petitioner's claim, the 2nd Respondent's investigations were conducted in a professional, unbiased and impartial manner and hence due process was followed.
29. Furthermore, these Respondents filed Grounds of Opposition dated 21st February 2024 on the basis that:
 - i. The 3rd and 4th Respondents be struck off from this Petition for misjoinder.
 - ii. The claim against the 3rd and 4th Respondents be struck off for being frivolous, vexatious and an abuse of the court process.
 - iii. The Petitioner's application does not disclose a cause of action against the 3rd and 4th Respondents and, for this reason, the 3rd and 4th Respondents ought to be struck out of the Petition since they are not involved in the initiation of Criminal Proceedings.
 - iv. The 3rd and 4th Respondents were only performing their official duties and exercising their powers under and within *the Constitution* and statutory provisions.
 - v. The instant Application as drafted is intended to circumvent and delay the wheels of justice in criminal proceedings against the Petitioner in Milimani Criminal Case No. E045 OF 2023, Republic versus Josiah Nicholas Mbathi Mwangi.
 - vi. Order 1 Rule 10 (2) of the Civil Procedure Rules provides that: "the court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out."
 - vii. The twin test for determining the question of who is a necessary party in a suit was established in the case of *Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others* [1998] eKLR where the Court stated that "For determining the question of who is a necessary party there are two tests. First, there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and it should not be possible to pass an



effective decree in the absence of such a party." This test was further reiterated by this court in *Kizito M. Lubano versus KEMRI Board of Management & 8 Others* [2015] eKLR.

- viii. The Court cannot be used to curtail or stop statutorily bodies or public officers from lawful exercise of power within their statutorily mandates.
- ix. The application is otherwise incompetent, misconceived, misplaced and is an abuse of the process of this Court.

Interested Party's Case

30. In like manner, the Interested Party made her rejoinder in her Replying Affidavit sworn on 1st July 2024. She started by pointing out that the Petition contained falsehoods, was misconceived and so an abuse of the Court process.
31. The Interested Party depones that during her marriage with the Petitioner, they jointly registered two companies' names: Nimba Technologies and Nimba Trading Company. She informs that she owns 400 shares in Nimba Technologies.
32. She asserts that the Petitioner in a bid to remove her as a Director from Nimba Technologies, forged the signature of an advocate in the impugned affidavit. As a result, she lodged a complaint with the police and Registrar of Companies. This led to the investigations that culminated to the instigation of Criminal Case No. E045 of 2023.
33. It is further asserted that the Petitioner has committed other offences including assault, arson and malicious damage of property which occurred in 2018. She notes that prosecution of the said offences has stalled owing to the Petitioner filing Milimani HCC Criminal Misc. Application No. E028 of 2023 *Josiah Nicholas Mbathi vs DCI and 2 others*. In the matter, the Petitioner raised the same issues raised herein.
34. The Interested Party thus contends that the instigated prosecution which is in itself a legal process also has the authority to ascertain the legitimacy or lack thereof of her complaints. Considering this, it is alleged that the issues raised herein cannot be subject to the jurisdiction of this Court as the same would be tantamount to prosecuting the criminal case. It is accordingly argued that the instant suit is an attempt to frustrate the Interested Party's pursuit of justice.

Parties' Submissions

Petitioner's Submissions

35. The Petitioner through J.W. Wachira Advocates filed submissions dated 9th April 2024 where the key issues were outlined as:
 - “ whether the 1st and 2nd Respondents decisions to investigate and prosecute the Petitioner is an abuse of their powers and court process as motivated by ulterior motives and whether the Petitioner is entitled to the relief sought.
36. Counsel reiterating the Petitioner's averments, submitted that owing to the malicious basis of the Interested Party's claim, the intended prosecution ought to be halted. It is argued that the charges preferred against the Petitioner are made in bad faith and only intended at punishing and extorting him. The Respondents are further accused of not taking into account the fact that the claim is purely a matrimonial property issue and so a civil claim. Consequently, the Respondents instigation of the criminal process is said to be an abuse of power and the Court process.



37. To buttress this claim, Reliance was placed in R vs. *Attorney General exp Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001* where it was held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

38. Like dependence was placed in Director of Public Prosecutions V Martin Maina & 4 Others [2017] eKLR.

39. Counsel additionally pointed out that the Interested Party’s assault claim was lodged 6 years later. It is argued that this runs afoul the Petitioner’s right to access a fair hearing. This is because the witnesses he intends to call cannot be found and he cannot also recollect what happened in 2018. It was as well stressed that the Interested Party had failed to raise the issue of assault during their divorce proceedings. The Interested Party’s claims are thus argued to be an afterthought actuated by malice in an attempt harass the Petitioner with the assistance of the 1st and 2nd Respondents.

40. Reliance was placed in Jeremiah ole Dashii Pallangyo v Attorney General, Director of Public Prosecutions, Inspector General of the National Police Service, OCS Athi River Police Station & Francis Wangombe Wachira [2021] KEHC 9635 (KLR) where it was held that:

“That leads to the issue whether the prosecution was actuated by malice. Malice, as stated hereinabove, can either be express or can be gathered from the circumstances surrounding the prosecution. Although malice means a wrongful act done intentionally without a just cause or excuse, to prosecute anyone for an improper motive can be evidence of malice and as was appreciated in R vs. Attorney General exp Kipngeno Arap Ngeny (supra) a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose.”

41. Comparable dependence was placed in Meixner & Another vs. Attorney General [2005] 2 KLR 189, Njiru T/A Njiru Boniface & Co Advocates v Inspector General of Police & 2 others [2015] eKLR, Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others [2019] eKLR and Republic v Director of Public Prosecutions & 2 others ex-parte Mildred Mbuya Muli & 3 others [2015] eKLR.

42. Accordingly, Counsel argued that the Petitioner’s constitutional rights were violated by the 1st and 2nd Respondents’ conduct. As such Counsel argued that the Petitioner was entitled to the relief sought.

1st Respondent’s Submissions

43. Senior Principal Prosecution Counsel, Kerongo Maatwa, on behalf of the 1st Respondent filed submissions dated 24th June 2024.



44. Counsel relying on the Anarita Karimi Case (supra) stressed that a court before pronouncing itself in view of Articles 23 of *the Constitution* for petitions brought under Article 22 of *the Constitution*, must ascertain the set principles are met. In this case, the Court established that:
- “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”.
45. This principle was further echoed in Mumo Matemu -Versus-Trusted Society of Human Rights Alliance (2013) eKLR.
46. Counsel reiterating the facts of this case asserted that the Interested Party’s complaints contrary to the Petitioner’s allegations, were properly documented and investigations conducted to ascertain her claims. The Petitioner was subsequently informed of the complaint and allowed to share his side as made manifest in the 2nd Respondent’s affidavit. Moreover, the 1st Respondent upon perusal of the file concurred with the 2nd Respondent’s conclusion and made the recommendation for the Petitioner to be charged.
47. Bearing this in mind, it was argued that the Petitioner had failed to demonstrate with specificity the impropriety of the procedure that was carried out by the Respondents, from receiving the complaint to instigating the criminal prosecution. Furthermore, that the Petitioner had failed to point out any omissions on the part of the Respondents in carrying out their mandate, to justify intervention by this Court.
48. In closing, Counsel emphasized that the issues raised by the Petitioner could properly be addressed by the trial court. As such, Counsel urged the Court to decline the Petitioner’s invitation to sit as the trial court in this matter.

2nd, 3rd, 4th and 5th Respondents’ Submissions

49. Principal State Counsel, Eve Mbede in the submissions dated 21st February 2024 highlighted the main issues as:the inclusion of the 2nd to 5th fails for misjoinder; the claims against these Respondents fail for being frivolous, vexatious, and an abuse of the court process; whether the Petition discloses a cause of action against these Respondents and whether their official duties can be regarded as engaging in unfair administrative action and whether the Petition meets the standard for enjoining a necessary party in a suit.
50. Counsel begun by stating that the joinder of these Respondents especially the 3rd and 4th Respondents was improper. Counsel pointed out that the impugned suit, Criminal Case No. E045 of the 2023 is yet to proceed to trial. The only process that was undertaken was plea taking.
51. Regardless the action of the 3rd Respondent taking the Petitioner’s plea was said to be a legal process hence cannot be deemed to be in violation of constitutional rights. Equally, this applies to the 4th Respondent who issued the Petitioner’s anticipatory bail in view of the Interested Party’s assault claim. As such Counsel argued that the Petitioner had not established the nexus between his case and these Respondents. It was contended thus that these parties should be struck off from the Petition for misjoinder.



52. Correspondingly, that the claims against these Respondents fail for being an abuse of the Court process. This is because no cause of action was established against them by the Petitioner. Reliance was placed in *DT Dobie & Co (K) Ltd Versus Muchina*, [1982] KLR where the Court of Appeal held that:
- “An action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.”
53. Besides, Counsel asserted that the 3rd and 4th Respondents mandate flow from *the Constitution*. Fundamentally that, Article 160(5) of *the Constitution* makes it clear that no judicial officer, shall be liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.
54. Lastly, Counsel relying in *Werrot and Co.Ltd* (supra) submitted that the Petitioner had not met the standard for joining a necessary party. First, because there is no right or relief attributable to the 3rd and 4th Respondents in the Petition and secondly, the Petitioner’s main claim revolves around prosecution which fall outside the 3rd and 4th Respondents mandate. Considering this, it was argued that the Petitioner’s joinder fails and hence these Parties should be struck off. Equally the Petition lacks merit.

Interested Party’s Submissions

55. On 3rd July 2024, Chimei and Company Advocates filed submissions for the Interested Party and outlined the issues for discourse as: whether filing of the complaint and subsequent institution of CMCR E045 of 2023 violated the Petitioner’s rights and whether the Petition is merited.
56. To begin with, Counsel relying in *Kinoti & 7 others* (supra) stated that the criminal justice system was created to prevent crime and to create a peaceful and law-abiding society. In other words, it is a system aimed at maintaining law and order and to also maintain the social solidarity of the society. It is on this premise that the Interested Party lodged her complaint.
57. It was noted from the Interested Party’s affidavit that the Petitioner’s actions of fraudulently attempting to remove her from their Company was unlawful and is founded under Section 34 as read with Section 349 of the Penal Code. As such this claim is not a matrimonial issue as averred by the Petitioner.
58. Moreover, Counsel pointed out that as per the 2nd Respondent’s affidavit, it was evident that the police conducted the requisite investigations before handing over the file to the 1st Respondent for advice. Reliance was placed in *Diamond Hasham Lalji & another v Attorney General and 4 others* [2018] eKLR where it was observed that:
- “Thus, the exercise of prosecutorial discretion enjoys some measures 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.”
59. Counsel in view of this argued that the Petitioner had failed to show whether the 1st and 2nd Respondent in performing their mandate had failed to adhere to the set procedure in law. To this end, Counsel stated that the Petition lacks merit and thus should be dismissed to pave way for the definitive conclusion of Criminal Case No. E045 of 2023.



Analysis and Determination

60. It is my considered view only two major issues arise for determination in this matter which are as follows:

- i. Whether the Petitioner's arrest and intended prosecution by the 1st and 2nd Respondent violated his constitutional rights.
- ii. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petitioner's arrest and intended prosecution by the 1st and 2nd Respondent violated petitioner's constitutional rights.

61. As a starting point for the Petitioner to prove this claim against these Respondents, he must satisfy the constitutional benchmark for instituting constitutional petitions. This means that a party that alleges violation of his or her rights must plead with reasonable precision the manner in which the rights were violated. This standard was laid down in the celebrated case of Anarita Karimi Njeru case (supra) and reaffirmed by the Court of Appeal in Mumo Matemu case (supra) where it was held 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.”

62. This was as well appreciated by the Court in *Husus Mugiri vs Music Copy Right Society of Kenya & another* (2018) eKLR where it noted that:

“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.”

63. A further requirement is that allegations made in a constitutional petition must be established by evidence. The claim of violation must be demonstrated with proof.

64. In this regard, the Court in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR observed as follows:

“62. Section 107 (1) of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Sub-section (2) provides that “when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked:

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”



Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Bristestone Pte Ltd vs Smith & Associates Far East Ltd*:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

65. Further, a Petition like the instant one that assails the mandate of a public body or organ of the State, it is upon the Petitioner to prove or demonstrate that the body abused its mandate or exercised it capriciously. In *Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others* [2019] eKLR observed:

“The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.”

66. Further, in *Justus Mwenda Kathenge vs. Director of Public Prosecutions & 2 Others* [2014] eKLR the Court held that:

“It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11):

- a. he has acted without due regard to public interest,
- b. he has acted against the interests of the administration of justice,
- c. he has not taken account of the need to prevent and avoid abuse of Court process.

These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st Respondent. I say so taking into account the following decisions where the issue has been addressed.”

67. The Court of Appeal in *Diamond Hasham Lalji* (supra) stated:

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.”
68. In Philomena Mbete Mwilu vs Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR the 5-judge bench noted as follows:

“...Should there be credible evidence that the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, then a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled.

244. To be underscored is that judicial review of the foundational basis of a charge should only be undertaken when an applicant has first established that there are reasonable grounds that the challenged proceedings are a vehicle for a purpose other than a true pursuit of criminal justice. To allow a willy-nilly and casual review of the foundational basis of criminal charges would be to turn judicial review proceedings into criminal mini-trials, a prospect that anyone keen to stop a criminal trial would relish.”

69. Be that as it may, where there is a justifiable reason a Court may intervene. The Court in Kuria & 3 Others Vs. AG (2002) 2 KLR 69 as cited with approval in Raymond Kipchirchir Cheruiyot & another v Republic [2021] eKLR expounds on this as follows:

“ 30. Further in Kuria & 3 Others Vs. AG (2002) 2 KLR 69 the court emphatically stated thus:

“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 tolls for personal score-settlings or vilification of issues not pertaining to that which the system was even formed to perform..... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.

.....

34. In Kuria & 3 Others vs. AG (supra) the court held that:-



“...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial.”

70. In this petition, the overriding grievance by the Petitioner is against the continuation of the forgery case pending before the Chief Magistrate at Milimani and a renewed push to have him charged with assault over a complaint filed by interested Party allegedly six years ago of which the Petitioner has now been summoned with a view to preferring further criminal charges. The Petitioner argues that the criminal case and the renewed push to revive the assault six years later is in bad faith and is meant to extort him following the conclusion of the divorce proceedings.
71. The Respondents and the Interested Party have refuted the assertion by the Petitioner and insisted that the institution of criminal case is based on professional and unbiased investigation contrary to the allegations by the Petitioner.
72. The fact that the Petitioner and the Interested Party had been husband and wife is not disputed. That their marriage was dissolved through divorce proceedings in a judgment delivered by Kiambu Court on 24th June, 2022 is also not in question. Naturally, there may be feelings of animosity between the Petitioner and Interested Party due to perceptions of emotional betrayal. The Court must therefore be conscious of this background as it examines complaints or disputes that involve the two.
73. The issue of the alleged assault being a baseless claim made for ulterior motives by the Interested Party was raised by the Petitioner who claims it amounts to abuse of the criminal justice process. The Petitioner alleges as follows in paragraph 14, 15 and 16 of the Supporting Affidavit to the Petition that was sworn on 20th September, 2023 as follows:
 14. That later on I was summoned by police constable at Villa Police Station again on 7th September, 2023 on trumped up charges of assault, arson and malicious damage to properties which allegedly took place in 2018 against the Interested Party herein. I was later released on police cash bail of Kshs 100,000/-.”
 15. That if the interested party was sincere with her multiple allegations, she would have reported the same at the same time in one police station and she would not have attempted to extort money from me.



16. That it is clear the police through the Interested Party are out to harass, intimidate and incarcerate me out of trumped complaints that the Interested Party has resorted to making. The complaints and the subsequent charges are not genuine but malicious made out of vendetta emanating from dissolution of marriage.”
74. In the Judgment delivered by the Court in the divorce case, Kiambu CM’s Court Divorce Cause Number E012 of 2021; the Court mentioned the issue of assault which had allegedly been occasioned against the Interested Party (Respondent then in those proceedings) by remarking thus:
- “I note the Petitioner failed to provide documentary evidence to prove particulars of adultery and cruelty as pleaded in the Petition. The respondent on her part did avail P3 Form to prove particulars of cruelty specifically on physical abuse.”
75. The issue of alleged assault of the Interested Party may thus not be a fabrication as the Petitioner wants this Court to believe because it had featured in the divorce proceedings between them then. However, what is baffling this Court is why the prosecution of the Petitioner was not undertaken since 2018 when the alleged assault was reported and its only in 2023 that the police appear invigorated to press the charges yet there is no attempt to even explain the prolonged pause on their part?
76. In the responses by the Respondents, particularly the 1st and the 2nd Respondent had no reason whatsoever for the delayed prosecution of the Petitioner for this assault. The only reason that the 1st Respondent mentions dismissively is that criminal cases have no time limitation. In other words, applying the common law doctrine ‘nullum tempus occurit regi’ (which means no time runs against the King) in matters crime. This can be picked from the grounds of opposition dated 13th February, 2024 by Kerongo Maatwa for the 1st Respondent where he states:
- “The Instant Application amounts to an abuse of the Court Process as it fails to appreciate that criminal matters or complaints of criminal nature do not have time limitation, further, matters averred by the applicant largely forms what should be his defence in criminal charges thus, the application should be dismissed with costs”
77. While this position by the Director of the Public Prosecution may be true in principle, a delay that negatively impacts on the fair trial and occasions injustice cannot pass the Constitutional muster laid down in Article 50(2) (e) which provides that :
- “Every accused person has the right to a fair trial, which includes the right:
- e. to have the trial begin and conclude without unreasonable delay.”
78. Although *the constitution* does not fix the specific timelines as to when a prosecution or trial should begin and conclude, it lays down the principle that prolonged delays are prejudicial to achieving a fair trial. Consequently, this Court has a duty to assess impact of delay in the light of facts and circumstances of this case.
79. In *Jirongo vs Soy Developers Ltd & 9 others*; the Supreme Court stated as follows on the impact of delay arising from lengthy investigations:
- “The question of delay with respect to the lodging of criminal prosecutions has been addressed by our courts in several matters. The leading persuasive decisions on the subject are the High Court cases of *Githunguri v Republic* (1986) KLR 1 and *Republic v Attorney General & another ex parte Ng’eny* (2001) KLR 612 which both Superior Courts relied on.



57. In *Githunguri v Republic* (supra), the court stated as follows: “In this instance the delay is said to have been nine years, six years and four years. The court has not been told why these offences have been unearthed after they remained buried for so long. What caused turning up the soil! It is too long, too much of delay. The Attorney-General is not bound to tell the court the reason but it would have made us knowledgeable if told. We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the court will be within a reasonable time as required by section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General...”

80. The Supreme Court went on to hold thus:

“It is in the above regard trite that there is no limitation of time to institute and prosecute criminal offences but as stated in *Githunguri*, where the delay has the effect of denying a suspect the legal tools to mount a credible defence, then the High Court is properly mandated by *the Constitution* to step in and stop the intended prosecution.”

81. In the instant case, neither the 2nd nor the 1st Respondent was able to explain why it has taken close to 6 years to charge the Petitioner with assault, malicious damage and arson long after the offence was allegedly committed and actually reported in 2018. The sudden revival of the assault coming immediately after the Court granted divorce to dissolve the interested party and the Petitioner’s marriage is clearly an afterthought. Besides, it unfairly disadvantages Petitioner who may not be able to mount a proper defence six years later.

82. I am however hesitant to hold a similar view in relation to the forgery case, the subject of Milimani Chief Magistrate CR E045 of 2023. A perusal of the affidavit of Cpl. Edith Mbaka, at paragraph 6 onwards makes it manifestly clear that this complaint was lodged with the police on 5/11/2022 by the Interested Party. The complaint was entered in O.B entry number 28/5/11/2022 relating to alleged forgery of the signature of the Interested Party in 2018. It is also evident that investigations in respect of that complaint were commenced in year 2022 starting with the letter ref. PARL/GEN/VOL/170 dated 14th November, 2022 when the police wrote to the Registrar of Companies seeking the status report on Directors of the Company that was the focus of the alleged forgery. The Investigations went on with more correspondences being exchanged which included the response by business registration service BRS/CR/GC/2/VOL. 4/80 of 29th November, 2022 and BRS/CR/GC/2/VOL. 4/80 of 2nd December, 2022. Further Investigations relating to the e-citizen account used in lodging the documents and the mobile line that used to make the Mpesa payments were undertaken and it is upon the conclusion of the findings of that investigation that the criminal case was commenced. This case appears premised substantially on documentary and forensic evidence. It has very little to do with witnesses’ memories. It would appear further appear that a factual foundation or basis for the same exists.

83. Furthermore, the forgery claims unlike the assault and related issues that were reported in 2018 and no action was taken until 2023; for forgery case, this matter appears to have been detected and reported in 2022, investigations commenced and were completed and prosecution approved by the DPP (1st



Respondent). I do not see any wrongdoing that has been proved by the Petitioner against the police action or the DPP to warrant a finding of unconstitutionality of their actions in relation to their conduct in the investigation and prosecution of the forgery allegations.

84. The Petitioner further claim that the matter belongs to the Civil Court is without any basis as forgery is a criminal offence hence subject to a criminal trial.
85. From the facts adduced, I am unable to fault the actions of the Respondents in so far as the prosecution of the Petitioner in Milimani Chief Magistrate Criminal Case No 045 of 2023 in concerned.
86. This Petition partly succeeds. The intended prosecution for assault, malicious damage and arson is disallowed due to the prejudicial effect the delayed prosecution might have on the fair trial of the Petitioner.
87. Nevertheless, this Court finds that Milimani Chief Magistrate Criminal Case no. 045 of 2023 is properly before the Court. The Trial Court should proceed to hear and determine the same.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024.

.....

L N MUGAMBI

JUDGE

