



**Mbithi v Director of Public Prosecutions (Criminal Petition  
E103 of 2023) [2024] KEHC 15465 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15465 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL PETITION E103 OF 2023  
EM MURIITHI, J  
DECEMBER 5, 2024**

**IN THE MATTER OF CHAPTER FOUR – BILL OF  
RIGHTS OF THE CONSTITUTION OF KENYA, 2010  
AND  
IN THE MATTER OF ARTICLE 19, 20, 21 22 &  
23 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**NICHOLAS MUTIE MBITHI ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**JUDGMENT**

1. By a Petition dated 20112023, the Petitioner seeks specific reliefs that:
  1. A declaration that the institution of the proceedings in Meru Chief Magistrate Criminal Case No. E1525 Of 2023 Republic Vs Nicholas Mutie Mbithi contravene the petitioner’s right to fair judicial process under Article 48 & 50 of *the Constitution*.
  2. A declaration that the dominant purposes for the institution of the Criminal proceedings in Meru Chief Magistrate Criminal Case No. E1525 Of 2023 Republic Vs Nicholas Mutie Mbithi is to achieve a purpose other than what is intended namely frighten, intimidate and oppress the petitioner in order to withdraw as surety.
  3. An order of Permanent stay of Meru Chief Magistrate Criminal Case No. E1525 Of 2023 Republic Vs Nicholas Mutie Mbithi.



4. An award of damages for infringement of the Petitioner's right under Article 27, 28, 29, 48 & 50 of *the Constitution*.
5. Costs of the petition.

### **The Petitioner's case**

2. The Petitioner is a Contractor and the managing director of Bekin International Limited, a company incorporated in Southern Sudan and duly licensed to engage in general supplies and logistics management. Festus Kiswili Kalulu, the accused in Meru Chief Magistrates Criminal Case No. E1201 Of 2023 Republic Vs Festus Kalulu Kiswili, is his friend, age mate and tribes mate. In 2021, the accused engaged him to construct a bungalow in his rural home, which was completed later in the same year as shown by the exhibited photographs. The building costs for the construction of the bungalow was about Ksh. 4 Million which payment was done through his phone No. 0723489652. After the completion of the construction, he left for South Sudan until August 2023 when he learnt of the arrest of the accused. He quickly came back to the country to stand surety for him using his title deeds to Parcel Nos. Kibaunikalawa119 And Kibaunimalunda495. The accused's subsequent release from custody on 15112023 was the beginning of his transgressions. On 16112023 at around 4.00 pm while he bid the accused good bye, he was accosted at the gate by officers from DCI Meru, who had trailed him the previous day, and quickly whisked into their land cruiser. The officers retorted that he had used fake titles to secure the release of the accused and threatened him with dire consequences unless he stood down as a surety for the accused. The Respondent's agents arrested and charged him with 2 counts of Conspiracy to defraud and Cheating contrary to sections 315 and 317 of the Penal Code. The Petitioner's rights under Articles 27, 28, 29 and 47 of *the Constitution* shall be infringed if the Respondent is allowed to proceed and persecute him. He is a law-abiding citizen and the Respondent's act is an abuse of the process of the criminal justice system. The dominant purpose of the criminal charge is to intimidate, oppress and deal with him on account of standing surety for the accused to ensure that he drops his bond so that the accused is back in the cells.
3. The Petitioner swore a further supporting affidavit on 7122023 in support of the petition.

### **The Respondent's case**

4. The Respondent opposed the Petition vide a replying affidavit sworn by Masila E. Masila, its Principal Prosecution Counsel on 18102024. He avers that the arraignment of the Petitioner in Meru Criminal Case No. E15252023 Republic versus Nicholus Mutie Mbithi was done upon completion of the investigations. The decision to charge the Petitioner was reached after the Respondent had duly analyzed the facts in the police file and established that a cognizable offence had been disclosed based on the evidentiary and public interest threshold. That decision was lawful, legal and devoid of malice as it was based on an honest belief founded upon reasonable grounds, which led to the irresistible conclusion that the Petitioner was probably guilty of the crime imputed. There was reasonable and probable cause for the intended prosecution of the Petitioner and the Respondent did not invoke the provisions of Article 157(10) of *the Constitution* and Section 6 of the *Office of the Director of Public Prosecutions Act, 2013*, out of vengeance or ill will. The Petitioner was arrested on 16.11.2023 and presented in court on 17.11.2023 in respect of Meru Criminal Case No. E15252023, however the plea taking was deferred to 21.11.2023 at the instance of the Petitioner's advocate. The Petitioner then took plea and he was placed in custody pending the determination of his bond. Upon the arraignment and deferment of the plea, the Petitioner recorded his statement and tendered his documents to exonerate himself on the proposed charges. Based on the aforesaid material provided by the Petitioner which had not been supplied to the Respondent before the decision to charge had been made, the Respondent



prudently and cautiously considered the strength of the rebuttal evidence, reviewed its earlier decision to charge and withdrew the said charges. The said withdrawal does not qualify or amount to concession to the petition. The Petitioner has not shown or demonstrated on the preponderance of affidavit evidence that there was an improper purpose on the part of the Respondent. In view of the above, the Petitioner has not made a case to warrant that his intended prosecution was in violation of his constitutional rights as guaranteed in *the Constitution*, and prays for the dismissal of the Petition.

### **The Interested Party's case**

5. The Interested Party, Morris Mutuma, the complainant in Meru Criminal Case No. E15252023 swore a replying affidavit on 30112023. He avers that Festus Kalulu Kiswili, the accused in Criminal Case No. E12012023 had been charged with others not before court with several offences ranging from stealing. The said stealing involved a web and syndicate where money would be obtained from him and disseminated to the accused accomplices via Mpesa. The Petitioner had been at large until he resurfaced to stand surety for the accused when he was apprehended, detained and processed to appear in court. The Petitioner cannot oppose his arraignment in court yet the police have ample evidence to prosecute him. The Petitioner should present the defences during the hearing of the criminal case, because there is overwhelming evidence against him. He insists that the Petitioner's arrest was not actuated by malice, and urges the court to balance his rights with those of the Petitioner, because he lost a whopping Ksh.49,000,000 which literary impoverished him.

### **Submissions**

6. On the quantum of damages, the Petitioner urges that his fundamental rights under Articles 27, 28, 29, 47 and 50 of *the Constitution* were grossly violated at the behest of the Respondent. He urges that a global award of Ksh. 5,000,000 would be adequate compensation, and relies on *Peter Ndegwa Kiai TA Pema Wines & Spirits v Attorney General & 2 Others (Civil Appeal 243 of 2017) KECA 328 (KLR)* (17 December 2021), where the Court of Appeal awarded Ksh. 5,000,000 for wanton destruction of property and violation of constitutional rights.
7. The Respondent did not file any submissions.
8. The interested Party urges that his role ended at the making of the report and he had no control whatsoever on the investigations that were carried out by the Respondent. He urges that the police took all reasonable steps to establish the nature of the Mpesa transactions after the Petitioner availed documentary evidence in support thereof. He urges that an award of Ksh. 5,000,000 would amount to unjust enrichment since the Petitioner did not approach the court with clean hands.

### **Analysis and Determination**

9. After a critical consideration of the petition together with the responses thereto, it is clear to this court that the pertinent issue for determination is whether the Petitioner's rights as afore pleaded were violated by the Respondent.
10. The Petitioner contends that the genesis for his tribulations was his insistence to stand surety for his friend, Festus Kalulu Kiswili in Meru Criminal Case No. E12012023. In rejoinder, the Respondent reiterated that its decision to charge and prosecute the Petitioner was grounded on a merit based review and evaluation of the overwhelming evidence presented by the police, and it had nothing to do with the inconsequential aspect of the Petitioner standing surety for the accused.
11. The record shows that the Petitioner was arrested on 16112023 and arraigned in court on 17112023 to plead to Conspiracy to defraud and Cheating contrary to sections 315 and 317 of the Penal Code. The



plea was, however, deferred to 21112023 and the Petitioner was remanded at Meru Police Station. The Petitioner swiftly moved this court on 20112023 on alleged violation of his rights and he was admitted to bail. The Respondent subsequently withdrew the charges against the Petitioner, and thus the issue that remains pending is the quantification of the damages payable, if any.

12. The Interested Party's role herein was purely limited to making a complaint with the police, who in turn undertook the purported investigations which culminated into the ultimate charging and prosecution of the Petitioner.
13. The court is alive to its obligation to ensure that the criminal justice system is applied bona fides for the proper and genuine purpose of enforcing the law. In *Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another* [2002] 2 KLR 703, Waki, J. (as he then was) observed that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court.... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”

14. The Petitioner has proved by uncontroverted evidence that he was lawfully contracted by the accused to construct for him a bungalow at an agreed cost of Ksh.4,000,000, which was properly sent to his Mpesa number in 2021 when the works were completed. Had the Respondent conducted a conscientious and zestful evaluation of the facts and the evidence as presented, it would have realized beforehand that the Petitioner legitimately earned the monies paid to him by the accused, and his unlawful, irrational, capricious and unjustifiable prosecution would have been obviated. Suffice to state, it was not the Petitioner's place to scrutinize the authenticity or otherwise of the source of the money paid to him by the accused.



15. The Court notes the case of Dr. *Alfred N. Mutua v The Ethics and Anti-Corruption Commission & Others, Misc. Application No. 31 of 2016*, where the Court of Appeal ruled that a threat of arrest or the arrest in itself does not amount to violation of fundamental rights and freedoms as follows:

“Is threat of arrest or arrest with reasons given a violation or threatened violation of fundamental rights and freedom? We think not. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation, arrest and prosecution might ensue...”

16. This court is clear in its mind that the Respondent’s decision to charge the Petitioner was an abuse of its powers under Article 157 of *the Constitution* because it was predominantly actuated by malice and extraneous consideration of irrelevant factors. It behoved the Respondent to conduct thorough investigations before mounting the prosecution. This court thus finds that the prosecution and the corresponding detention of the Petitioner without any probable cause from 16<sup>th</sup> to 21<sup>st</sup> of November 2023 violated his rights under Articles 27, 28, 29, 48 and 50 of *the Constitution*.
17. With the established violation of the Petitioner’s rights under the Articles of *the Constitution* aforesaid by the Respondent, the Petitioner must be reasonably compensated.
18. In the case of *Wilson Olal & 5 others v Attorney General & 2 others (2017) eKLR*, (Mativo J. as he then was), rendered himself thus: -

“It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the Constitution*. The quantum of compensation will, however, depend upon the facts and circumstances of each case. I accept in principle that constitutional damage as a relief separate and distinct from remedies available under private law is competent because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms. On the quantum of damages, award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion...I note that arriving at the award of damages is not an exact science. I am aware that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed.[82] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation is discretionary. [83] The fact that the right violated was a constitutional right adds an extra dimension to the wrong. Additionally, the award, not necessarily of substantial size, may be needed to reflect the sense of public outrage and emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case. It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively



justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. There is no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it is a philosophical and policy exercise more than a legal or logical one. [84] The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.”

19. The facts of the case of Peter Ndegwa Kiai TA Pema Wines (Supra) cited by the Petitioner are distinguishable from the facts herein as the former revolved around wanton destruction of property. There was no destruction of any property or deprivation of the right thereto in this case.

## **ORDERS**

20. Accordingly, for the reasons set out above, the Court finds merit in the Petition dated 20112023 and it is allowed in the following terms:
1. A declaration is hereby issued that the institution of the proceedings in Meru Chief Magistrate Criminal Case No. E1525 Of 2023 Reublic Vs Nicholas Mutie Mbithi contravened the Petitioner’s right to fair judicial process under Article 48 & 50 of *the Constitution*.
  2. A declaration is hereby issued that the dominant purposes for the institution of the Criminal proceedings in Meru Chief Magistrate Criminal Case No. E1525 Of 2023 Reublic Vs Nicholas Mutie Mbithi is to achieve a purpose other than what is intended namely frighten, intimidate and oppress the petitioner in order to withdraw as surety.
  3. An order of Permanent stay of Meru Chief Magistrate Criminal Case No. E1525 Of 2023 Reublic Vs Nicholas Mutie MBITHI is hereby issued.
  4. The Petitioner is hereby awarded general damages of Ksh.1,000,000 for violation of his rights under Article 27, 28, 29, 48 & 50 of *the Constitution*.
  5. The petitioner shall also have costs of the suit to be paid by the Respondents.

Order accordingly.

**DATED AND DELIVERED ON THIS 5<sup>TH</sup> DAY OF DECEMBER 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances**

Mr. Muia Mwanzia for the Petitioner

Ms. Masila E. Masila for the Respondent

