



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**PETITION NO. E014 OF 2021**

**RASHID MOHAMMED ECHESA.....PETITIONER**

**VERSUS**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The background to this matter, according to the petition, is that the petitioner was the Chief Agent for one of the candidates in the Matungu Constituency by-election that was held on 4<sup>th</sup> March 2021. He went to Khalaba Polling Station in that capacity, where he had information that an agent for his candidate had been locked out. He made enquiries at the polling station, from people not disclosed in the petition and verifying affidavit, as to why that had happened, and he was informed that there were instructions from above. The respondents then went to the media saying that he should surrender, and he presented himself at the Mumias Police Station on 6<sup>th</sup> March 2021. He was taken to Kakamega Police Station that evening and locked up. He was later transferred to Nairobi Area Police Station. He was later taken to Gigiri Police Station, and later to Kiambu law courts on 7<sup>th</sup> March 2021, under Kiambu Criminal Miscellaneous Application No. 97 of 2021, where the State was directed to present a charge sheet against him in two days' time. No charge was presented within that time, and he was released on cash bail. He expresses surprise that he has now been presented with a charge sheet at Kakamega. He complains that he is being punished for no reason, and the respondents were abusing the court process. He says he suffered great loss hiring advocates in Nairobi and Kakamega. He says he was being taken in circles from one police station to another, and from one court room to another. He asks the court to stop the respondents from presenting him at Kakamega to take pleas and make reference to the Kiambu matter.

2. In the petition, he alleges violation of the Constitution. He points at his right to a fair trial, as contemplated in Article 49 and 50 of the Constitution, and says it has been violated. He claims that the respondents were using the due process of court to settle political scores. He seeks a declaration that the maintenance of a prosecution based on the incident of 4<sup>th</sup> March 2021 over alleged assault and election offences is an abuse of the criminal justice system, and a contravention of his rights of freedom and security of the person, right to movement and the right to secure protection of the law. He also seeks that his arrest and intended re-arrest were oppressive, malicious and an abuse of the justice system.

3. He has attached a copy of his appointment as Chief Agent, an Oath of Secrecy with respect to that election, and a document showing the bond he posted with respect to the Kiambu matter.

4. The response on behalf of the 3<sup>rd</sup> respondent is by Peter Kiprop, an Assistant Director of Public Prosecutions. He states that the petitioner was arrested on 5<sup>th</sup> March 2021 in Kakamega, and was escorted to the headquarters of the 1<sup>st</sup> respondent for further investigations, due to the nature of the offences and the public interest the matter had attracted. He was presented at Kiambu in Kiambu Criminal Miscellaneous Application No. 97 of 2021, which he states was for the purpose of investigations, and which investigations have since been completed. No charges were preferred against him, at Kiambu, and the file in Kiambu Criminal Miscellaneous Application No. 97 of 202 was closed. The 3<sup>rd</sup> respondent directed that the petitioner be charged at Kakamega, since the offences he was alleged to have committed were allegedly committed there, and most of the witnesses were based there. The charges were registered in Criminal Case No. E001 of 2021. He avers that there is no other case pending before any other court relating to the same. He submits that under Article 157(6)(a) of the Constitution, the 3<sup>rd</sup> respondent has power to institute criminal proceedings against any person before any court in respect of any offence alleged to have been committed. He argues that the 3<sup>rd</sup> respondent is well within its rights to institute the charges against the petitioner in Kakamega. He further submits that under Article 157(10) of the Constitution, the 3<sup>rd</sup> respondent did not require the consent or authority of anyone to commence

criminal proceedings, and is subject to no direction or control of any person or authority. He submits that the petitioner has not demonstrated any arguable case of breach of his rights or violation of constitutional provisions.

5. In response to that affidavit, the petitioner states that after his arrest at Mumias, he learned that a file had been opened and a charge registered at Mumias law courts, being Mumias CMCRC No. E138 of 2021. While that was still pending, he was removed to Kakamega Police Station, and later to Nairobi, by a contingent of over sixty police officers. He avers that the Mumias court had directed that he be presented before that court in Mumias CMCRC No. E138 of 2021, but that order was not heeded to. He states that he was law abiding as he had presented himself to the police. He avers that he was treated differently from the Senator for Kakamega, who faced more serious offences, and who had been charged immediately before the Kakamega court, and released the same day. He avers that he was harassed because he belonged to an unpopular political party. He said that he ended up spending nights in police cells from 5<sup>th</sup> March 2021 to 10<sup>th</sup> March 2021, when he was released by the Kiambu court. He avers that his constitutional right to freedom of movement and from arbitrary arrest were violated. He avers that his being shuttled from place to place was in abuse of power by the police.

6. The 4<sup>th</sup> respondent by way of grounds of opposition dated 21<sup>st</sup> July 2021, averred that the petition is filed to curtail the legitimate exercise of power and authority by the respondents under Articles 157, 245(4) and 259 of the Constitution. It is submitted that the petitioner has not demonstrated that the respondents acted *ultra vires* their investigatory powers and the intended prosecution. It is also submitted that the petitioner has not demonstrated in any manner how the respondents have violated his constitutional rights, for he has not cited the constitutional provisions purportedly violated.

7. The Motion, dated 24<sup>th</sup> May 2021, was amended, and the amended version filed in court on 22<sup>nd</sup> June 2021. It amends prayer 2, so as to seek conservatory orders with respect to prosecution in respect of Kakamega CMC Election Offence Case No. 1 of 2021.

8. Directions were given on 23<sup>rd</sup> June 2021, for disposal of the matter by way of written submissions. Conservatory orders were granted, by consent of the parties.

9. Parties have complied, for written submissions were filed by the petitioner and the respondents, complete with copies of the judicial decisions that they rely on. I have carefully read through them and noted the arguments made.

10. The foundation of the matter before me is the originating pleading, the petition. It identifies only two Articles of the Constitution which have allegedly been violated, Articles 49 and 50, which relate to fair trial. I would not say that the petitioner has elaborated in elegant terms the complaint that he makes with respect to the two provisions, but his affidavits shed some light.

11. Article 49 is about the rights of an arrested persons. It provides as follows:

48.  
49. (1) An arrested person has the right— Access to justice. ...  
*Rights of arrested persons.*

(a) *to be informed promptly, in language that the person understands, of—*

(i) *the reason for the arrest;*

(ii) *the right to remain silent; and*

(iii) *the consequences of not remaining silent;*

(b) *to remain silent;*

(c) *to communicate with an advocate, and other persons whose assistance is necessary;*

(d) *not to be compelled to make any confession or admission that could be used in evidence against the person;*

(e) *to be held separately from persons who are serving a sentence;*

(f) *to be brought before a court as soon as reasonably possible, but not later than—*

(i) *twenty-four hours after being arrested; or*

(ii) *if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;*

(g) *at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and*

(h) *to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.*

(2) *A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not*

*more than six months.*

12. The petitioner has not sought to clearly pinpoint the aspects of Article 49 that were violated or contravened. Upon his arrest at Mumias on 4<sup>th</sup> March 2021, he was transferred to Nairobi, where he was presented in court at Kiambu, according to him, the following day, for the purpose of complying with the twenty-four-hour rule, and for permission of the court to have him held for a longer period in custody pending investigations. That plea was granted in Kiambu Criminal Miscellaneous Application No. 97 of 2021. He was granted bail, and when the respondents were ready with the charges against him, he was brought to Kakamega to be charged in Kakamega CMC Election Offence Case No. 1 of 2021. Looking globally at his petition and the affidavits, the petitioner has not demonstrated how his rights guaranteed under Article 49 of the Constitution were violated.

13. The only discernible complaint, which runs through his affidavits, is that upon his arrest he was moved from Mumias, to Kakamega, to Nairobi and eventually Kiambu. He has not demonstrated how that amounted to a violation of his rights. The 1<sup>st</sup> respondent was under no legal obligation to hold him at any particular police station, or in any particular locality. The petitioner did not point me to any law which would have required the 1<sup>st</sup> respondent to do so. None of the parties has attached a copy of the charges that are intended to be brought against the petitioner, but it would appear that they are election-related. The election was conducted on 4<sup>th</sup> March 2021. The petitioner appears to have had been actively involved as Chief Agent for the candidate sponsored by his party. He describes himself as a career politician, and a former Cabinet Secretary. He would appear to be a person of some clout in Mumias, and that would explain the actions of the 1<sup>st</sup> respondent to hold in custody away from the locale. It cannot be said that the 1<sup>st</sup> respondent acted unreasonably, from security and strategic considerations.

14. He says that the Senator for Kakamega, who he alleges faces far more serious charges, arising from similar circumstances, was treated differently. He did not provide proof of the charges facing the Senator for Kakamega, and how the Senator for Kakamega was treated differently. He has not demonstrated that their circumstances were similar, so as to merit similar treatment.

15. Article 50 is on fair trial rights and principles. It states as follows:

*50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*

*(2) Every accused person has the right to a fair trial, which includes the right—*

*(a) to be presumed innocent until the contrary is proved;*

*(b) to be informed of the charge, with sufficient detail to answer it;*

*(c) to have adequate time and facilities to prepare a defence;*

*(d) to a public trial before a court established under this Constitution;*

*(e) to have the trial begin and conclude without unreasonable delay;*

*(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*

*(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;*

*(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*

*(i) to remain silent, and not to testify during the proceedings;*

*(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*

*(k) to adduce and challenge evidence;*

*(l) to refuse to give self-incriminating evidence;*

*(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;*

*(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—*

*(i) an offence in Kenya; or*

*(ii) a crime under international law;*

*(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;*

*(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*

*(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.*

*(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.*

*(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.*

*(5) An accused person—*

*(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and*

*(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.*

*(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—*

*(a) the person's appeal, if any, has been dismissed by the highest*

*court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and*

*(b) new and compelling evidence has become available.*

*(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.*

*(8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.*

*(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.*

16. Although the petitioner cites Article 50 as one of the constitutional provisions being violated, he has not sought to demonstrate how the same has been violated. He has not pointed at any of the fair trial rights listed above, and said that this is the one that the respondents have violated. The only thing he raises is that he was surprised to be charged at Kakamega. It would appear that he thought that the failure to be charged at Kiambu meant that he was not going to be charged at all. The respondents gave him no such assurance. They never intimated to him that the proposed charges were going to be dropped. The respondents were not obliged to bring charges at Kiambu, and the fact that the petitioner was not charged at Kiambu did not mean that he could not be charged anywhere else thereafter.

17. Furthermore, the fact that the respondent did not bring the charges within the period given to them by the court in Kiambu Criminal Miscellaneous Application No. 97 of 2021 did not mean that the window for bringing any charges had been closed. Police investigations and prosecutions are not controlled by the courts. The 1<sup>st</sup> and 3<sup>rd</sup> respondents are independent State agencies, whose mandates are clearly delineated in the Constitution and legislation. They are under no control or direction of any other body. The intervention by the court is permissible only where it is demonstrated that the said entities have acted outside their powers. In this case, the petitioner has not demonstrated that.

18. Article 157(4) of the Constitution provides:

*The Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of Criminal conduct and the inspector-general shall comply with any such direction.*

19. Article 245 mandates the police to investigate any offence. It states that:

*The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—*

*(a) the investigation of any particular offence or offences;*

*(b) the enforcement of the law against any particular person or persons; or*

*(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.*

20. The courts have severally and authoritatively pronounced themselves on these provisions, and highlighted the circumstances when the

High Court may intervene. In *Republic vs. The Commissioner of Police & the Director of Public Prosecution Ex parte Michael Monari & Another* [2012] eKLR (Warsame J), it was said:

*“...the police have a duty to investigate on any complaint once a complaint is made. Indeed 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. The predominant reason for the institution of the criminal cases cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene.”*

21. Overall, I have no material before me upon which I can make the declarations that the petitioner invites me to make. I shall, consequently, dismiss the petition herein. The conservatory orders, made herein on 23<sup>rd</sup> June 2021, are hereby, accordingly, discharged. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 10<sup>TH</sup> DAY OF DECEMBER, 2021**

**W. MUSYOKA**

**JUDGE**