



REPUBLIC OF KENYA

**IN THE COURT OF KENYA AT ELDAMA RAVINE (SUB-
REGISTRY)**

CONSTITUTIONAL PETITION NO. E001 OF 2024

IN THE MATTER OF ARTICLES 2(1), 2(5), 2(6), 3(1), 12(1), 20(1), 20(2), 20(3) (h), 20(4), 21(1), 21(4), 22(1), 23(1), 23(3), 25(c), 47(1), 47(2), 48, 50(1), 50(9), 156(4), 157(4), 157(6) (a), 157(10), 157(11), 159(1), 159(2) AND 245 (4) OF THE CONSTITUTION KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 47(1) & (2), 48, 50 (1) & (9) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 4 & 12 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTIONS 24 (c) & (h) OF THE NATIONAL POLICE SERVICE ACT NO.11A OF 2011

AND

IN THE MATTER OF SECTIONS 5 (a) & (b) (i), 6, 26 & 27 OF THE
DIRECTOR OF

PUBLIC PROSECUTION ACT NO.2 OF 2013

AND

IN THE MATTER OF SECTIONS 4 (c), (d), (g), (m) & (n) OF THE
NATIONAL

PROSECUTION POLICY

AND

IN THE MATTER OF SECTIONS 23-26 OF THE VICTIM PROTECTION
ACT NO. 17 OF 2014

AND

IN THE MATTER OF THE FAILED INVESTIGATION AND
PROSECUTION OF MAULID KIPROP KASSIM, KENNEDY KIPTOO
SAMBU AND ROY KIPKORIR KEMBOI

BETWEEN

MOSES RONO CHANGWONY MOI.....PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE..... 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS..... 2ND RESPONDENT

THE HONOURABLE CHIEF JUSTICE.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..... 4TH RESPONDENT

JUDGMENT

Background

1. The Petitioner, Moses Rono Changwony Moi, claims violation of his constitutional rights arising from the failed investigation and prosecution of three suspects — Maulid Kiprop Kassim, Kennedy Kiptoo Sambu, and Roy Kipkorir Kemboi — in relation to a burglary incident at his shop in Naitili Village, Eldama Ravine, on 3rd February 2018.

Constitutional and Statutory Provisions Invoked

2. The petition is grounded on a wide array of constitutional provisions including Articles 2, 3, 12, 20-23, 25(c), 47, 48, 50, 156, 157, 159, and 245 of the Constitution, as well as statutory provisions under the Fair Administrative Action Act, the National Police Service Act, the Director of Public Prosecutions Act, the National Prosecution Policy, and the Victim Protection Act.

Petitioner's Claim and Allegations

3. The Petitioner alleges that his fundamental rights under Articles 47, 48 and 50 were violated by the 1st to 4th Respondents. He claims that the police failed to conduct proper investigations, and the prosecution was hastily and poorly handled, leading to dismissal of the criminal case (Eldama Ravine PMCR No. 261 of 2018) at the first hearing due to non-appearance of witnesses.

4. He further avers that a revision application filed at Kabarnet High Court (HCR Review No. 7 of 2018) was also withdrawn by the ODPP without cause despite the petitioner's persistent efforts to assist the authorities. He faulted the trial magistrate for dismissing the case prematurely and denying the Petitioner, as a victim, the right to be heard and to justice.

5. Respondents' Alleged Failures

a) The 1st Respondent (IG of Police) Failed to investigate the case thoroughly, reassigning the investigating officer on a critical day, and not enforcing warrants of arrest.

b) 2nd Respondent (DPP): Failed to prosecute diligently, withdrew a valid revision application without explanation, did not direct proper investigations, and

acted in contravention of the Constitution and prosecution policy.

c) 3rd Respondent (Chief Justice): As the Head of Judiciary, is accused of failing to ensure judicial accountability, especially in relation to the conduct of the trial magistrate.

d) 4th Respondent (Attorney General): Accused of failing to ensure compensation mechanisms for crime victims under the Victim Protection Act were availed to the petitioner

6. The Petitioner seeks the following reliefs

a) Declarations that his constitutional rights were violated.

b) A finding that the criminal case dismissal and review withdrawal were unlawful.

c) Special damages totaling Kshs. 1,046,111 for stolen/damaged goods, treatment, travel, and legal costs.

d) General, aggravated, and exemplary damages for constitutional violations and psychological/emotional distress.

7. The petition proceeded by way of written Submissions.

PETITIONER'S SUBMISSIONS

8. The Petitioner framed three issues for determination:

- a) **Whether his constitutional rights were violated**
- b) **Whether he is entitled to damages**
- c) **Who should bear costs of the petition**

9. The petitioner submitted that his rights under Articles 47 (fair administrative action), 48 (access to justice), and 50(1) & (9) (fair hearing and victim protection) were violated by the respondents' failure to properly investigate and prosecute the criminal case and review application. He relied on the case of *Republic v. Abdi Ibrahim Owl [2013] KEHC 2122* and *Dry Associates Ltd v. CMA [2012] eKLR* to underscore professional responsibility of justice sector actors.

10. He further submitted that victims are also entitled to **fair trial rights**, citing *Francis Karioko Muruatetu v. Republic [2017]* and *Githiga v. Kiru Tea Factory [2023]* and argued that denial of a fair hearing invalidates a decision (*Nancy Musili v. Joyce Katisi [2018] eKLR*). Under Article 23(3) and Sections 23 & 26 of the Victim Protection Act, he sought compensation for:

- a. Stolen/damaged property
- b. Medical costs for his children
- c. Travel and legal expenses

11. He cited that case *NSSF v. Sifa International Ltd [2016]* on pleading and proof of special damages. In respect to general damages, he relied on *Peter M. Kariuki v. AG [2014] eKLR* and *Citizens Against Violence v. AG [2023]*, requesting Kshs. 10,000,000. For **exemplary damages** (Kshs. 5,000,000), he relied on *Obongo v. Kisumu Municipal Council (1971)* and *Rookes v. Barnard (1964)*. For **aggravated damages** (Kshs. 5,000,000), he cited *MWK & another v. AG [2017]*, noting the psychological harm and emotional distress suffered. On costs, argued they are discretionary and should be awarded due to the public law nature of the claim and the state's failure to protect a victim of crime.

2nd Respondent's Submissions (ODPP)

12. The 2nd Respondent opposed the petition on ground that they were duly represented in both the trial and revision proceedings, and that they made reasonable efforts to serve and secure attendance of the accused persons. Further that only one accused was absent at the hearing of the revision application on 6th December 2018 and Warrants were sought to ensure appearance.

13. The Respondent further submitted that the withdrawal of the revision application in *Kabarnet HCR Rev. No. 7 of 2018* was lawful, done with leave of court, and consistent with *Article 157(6)(c) & (10)* and *Section 25(1)* of the ODPP Act.

14. The 2nd Respondent submitted underscored the independence in prosecutorial discretion under Article 157(10) and denied acting under any external influence or in bad faith.
15. The 2nd Respondent further argued the Petitioner did not exhaust internal remedies available, such as the ODPP's Complaints & Compliments Division, or the Malalamishi online complaints system and no prior notice of intention to sue was served on their office before the petition was filed and that the attached notice (MRCM9) is dated after the amended petition.
16. The 2nd Respondent cited the doctrine of constitutional avoidance and decisions like *United Millers Ltd v. KEBS [2021]*, *Anarita Karimi Njeru v. Republic*, and *Mumo Matemu v. Trusted Society* to argue that the Petitioner failed to set out precise constitutional violations and the petition therefore lacks the necessary correlation between respondents' actions and the alleged rights violations.
17. In conclusion, the 2nd Respondent submitted that the Petitioner had not established a violation of his constitutional rights and urged dismissal of the petition with costs.

ANALYSIS AND DETERMINATION

18. The Petitioner seeks declaratory and compensatory reliefs arising from the alleged violation of his constitutional rights by the respondents in connection with the investigation, prosecution, and judicial handling of a criminal case *Eldama Ravine PMCR Case No. 261 of 2018* and revision case number *Kabarnet HCR No. 7 of 2018*. From the pleadings and submissions, the following three issues arise for determination:-
- a. Whether the Petitioner's constitutional rights were violated
 - b. 2. Whether the Petitioner is entitled to
 - c. Who should bear the costs of the Petition

(i)Whether the Petitioner's constitutional rights were violated

19. The Petitioner contends that his rights under Articles 47(1) & (2), 48, 50(1) & (9) of the Constitution were infringed due to failure by the 1st and 2nd Respondents to conduct proper investigations and diligent prosecution in *Eldama Ravine PMCR Case No. 261 of 2018*, and the abrupt withdrawal of revision case number *Kabarnet HCR No. 7 of 2018*. He attributes blame to the 3rd Respondent for judicial actions that allegedly denied him a fair hearing, and to the 4th Respondent for failure to facilitate victim compensation.
20. The 2nd Respondent has acknowledged its role in the criminal proceedings, including attempts to secure the

attendance of the accused persons, obtaining warrants of arrest, and filing a revision application. It asserts that the eventual withdrawal of the application was lawful and within its constitutional and statutory mandate under Article 157(6) (c), (10) and Section 25(1) of the ODPP Act. It further invokes prosecutorial independence and contends that no unlawful motive has been demonstrated by the Petitioner.

21. The core of the Petitioner's complaint relates to perceived institutional neglect which culminated in the collapse of a criminal trial and failure of the review process. While the Court recognizes that the criminal justice process must uphold the rights of victims as provided under Article 50(9) and the Victim Protection Act, prosecutorial and investigative functions are discretionary. In this regard, the independence of the ODPP, guaranteed under Article 157(10), must be respected unless the exercise of such discretion is shown to be capricious, irrational or actuated by malice — which threshold the Petitioner has not met.

22. Additionally, while the trial magistrate's dismissal of the criminal case at first hearing may raise concerns, it is not pleaded that the Petitioner appealed or lodged a judicial complaint, nor is there evidence of misfeasance attributable to the 3rd Respondent.

23. On whether there was a breach of *Article 47* on fair administrative action, the Petitioner faults the respondents for lack of explanation and delay. However, the material placed before this Court shows that there were court proceedings over time, and a letter of dissatisfaction was written by the ODPP. That the outcome was not in favour of the Petitioner does not, in itself, amount to a violation of Article 47, absent proof of procedural unfairness or abuse of discretion.
24. Further, the Petitioner did not exhaust available internal redress mechanisms such as those outlined by the 2nd Respondent (ODPP Complaints Division or *Malalamishi* system), nor did he serve notice of intention to sue before filing the amended petition.
25. Accordingly, and guided by the principles in **Anarita Karimi Njeru v Republic [1979]**, the Petitioner has not established with reasonable precision how each respondent specifically violated his rights under the Constitution.

(ii) Whether the Petitioner is entitled to damages

26. The Petitioner prays for special damages of Kshs. 1,046,111, and general, aggravated, and exemplary damages totaling Kshs. 20,000,000. He relies on Article

23(3) of the Constitution and Sections 23 and 26 of the Victim Protection Act, asserting psychological harm and financial losses.

27. As held in **Peter M. Kariuki v AG [2014] eKLR** and **Citizens Against Violence v AG [2023]**, public law damages are available for unconstitutional acts. However, such damages are not available as a matter of course and must be founded on a demonstrated violation of constitutional rights.

28. In the instant case, although the Petitioner has particularized some losses and distress, the Court has found no actionable violation by the respondents. Further, special damages must not only be specifically pleaded but also strictly proved, as held in *NSSF v Sifa International Ltd (2016) eKLR*. The evidence on record does not establish a nexus between the alleged losses and unlawful conduct on the part of any respondent. Consequently, the claim for both special and general damages is unmerited.

(iii) Who should bear the costs of the Petition

29. The general rule is that costs follow the event, but courts retain discretion especially in constitutional litigation,

particularly where matters raise public interest or clarify constitutional norms. In this case, although the Petitioner has not succeeded, he raised legitimate concerns regarding the administration of justice and victim treatment. However, the failure to exhaust available remedies and the lack of clear pleading weigh against him. From the foregoing, I hereby direct that each party bear their own costs.

30. **FINAL ORDERS:-**

- a. The petition herein is hereby dismissed.
- b. Each party to bear own costs.

Judgment delivered, dated and signed Virtually at Kabarnet
this **2nd Day of October**, 2025.

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RACHEL NGETICH
JUDGE

In the presence of:

- Ms. Omari for ODPP/ 2nd Respondent.
- Mr. Kipkoech for the Petitioner.
- CA, Elvis.