

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E269 OF 2021**

**MARK ADEMBA OKUMU .....**  
**PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup>**  
**RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup>**  
**RESPONDENT**

**AND**

**PATRICK MWANGANGI MAKAU.....1<sup>ST</sup> INTERESTED**  
**PARTY**

**PETER CHUMO.....2<sup>ND</sup> INTERESTED**  
**PARTY**

**JUDGMENT**

*Petitioner's case*

1. The petitioner is the Technical Director of Haji Motors Limited (the garage), an automotive garage. On 3<sup>rd</sup> August 2013, the 1<sup>st</sup> interested party's vehicle Registration Number KBJ 249C a Toyota Harrier was taken to the petitioner's garage for repairs. The vehicle was received in and a standard check-in form signed confirming that the vehicle had been received for repairs. The petitioner stated that the vehicle was dully repaired and the person who delivered the one Benedict Musyimi was notified but did not collect the vehicle.
2. The vehicle had not been collected by 2019 and as a result, the Garage incurred expenses which included paying for insurance for the premises where the vehicle was parked; employing a guard to secure the vehicle, among others.

3. On 22<sup>nd</sup> March 2019, the Garage decided to dispose of the vehicle by invoking section 7 of the Disposal of Unclaimed Goods Act and instructed its advocates to advertise the vehicle in the Kenya Gazette for sale as uncollected goods. The advocate advertised the vehicle on 14<sup>th</sup> June 2019 in Gazette Notice No. 5287.

4. On 9<sup>th</sup> July 2019, the advocate instructed Virmir Auctioneers to sell the vehicle by public auction as an unclaimed asset after issuing a seven-day notice in the daily newspaper which was done. Thereafter, the petitioner received a Notice to Compel Attendance before a Police Officer for allegedly committing an offence of stealing a vehicle contrary to section 278A of the Penal Code. The notice summoned the petitioner to the Directorate of

Criminal Investigations Offices in Athi River, Machakos County even though the alleged offence was committed along Mombasa Road, within Nairobi County.

5. On 7<sup>th</sup> July 2021, the petitioner's advocates wrote to the Director of Public Prosecution, (the DPP) challenging the intended institution of criminal proceedings against the petitioner for theft, to no effect. The petitioner then filed this petition challenging the intended prosecution and sought declarations and orders to halt the intended prosecution.

6. The petitioner stated that since the vehicle was delivered for repairs by, among others, a senior government official in the County Government of

Machakos he felt the prosecution was an abuse of power by a senior government official with a view to harassing him and settle personal scores.

7. The petitioner asserted that the DCI officers were abusing their investigative powers by summoning, questioning, harassing and interrogating him over a civil matter since the vehicle was sold in accordance with the law. The DCI also portrayed partiality and bias by summoning him to DCI offices at Athi River, Machakos County when the alleged offence was committed within the City County of Nairobi.

8. The petitioner contended that the DPP abused his prosecutorial powers in the Constitution; the ODPP Act and the National Prosecution Policy, by receiving and deciding to charge him based on facts relating

to a civil debt. The investigations, arrest and the charge of theft violated his rights guaranteed under articles 27, 28 and 39(1) of the Constitution and his right to sale unclaimed asset granted by section 7 of the Disposal of Uncollected Goods Act.

9. The petitioner argued that the petition meets the threshold set in *Anarita Karimi Njeru v Republic* [1979] eKLR and that he is entitled to the reliefs sought even where no actual violation had occurred but there existed an imminent threat. He relied on article 22(1) of the Constitution and the decision in *Bernard Murage v Fineserve Africa Limited & 3 others* [2015] eKLR.

10. The petitioner asserted that he needed not wait until the DPP instituted criminal proceedings against him before approaching this court for protection. He

relied on the decision in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR.

11. The petitioner maintained that the issue of ownership of the vehicle was not raised by the respondents in their pleadings. Rather, the main issue in contention is on his arrest and the intended prosecution thus, the court should not delve into the issue of ownership of the vehicle since it was not raised in the pleadings except by the interested parties. Reliance was placed on the decisions in *Okiya v Njenga & 7 others (sued as the registered trustees of the Agricultural Society of Kenya) & 19 others* [2022] KEHC 74 (KLR); *Methodist Church in Kenya v Fugicha & 3 others* [2019] KESC 59 (KLR) and *Republic v Public Procurement Administrative Review Board; Rhombus Construction Company*

*Limited (Interested Party) Ex Parte Kenya Ports Authority & another* [2021] KEHC 12864 (KLR).

12. The petitioner went on to argue that the vehicle was disposed of in accordance with the provisions of the Disposal of Uncollected Goods Act and the vehicle could not therefore have been stolen. Any aggrieved party should have sought civil remedies.

13. The petitioner urged the court to make an appropriate order to prevent his prosecution for an offence he was alleged of committing. The impending prosecution would be improper and irregular and against public interest since it was being influenced by malice. The DPP would be acting ultra vires and in abuse of office. The petitioner relied on the decisions in *Cyrus Shakhlanga Khwa*

*Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR; *Paul Stuart Imison v The Attorney General & 2 others* (Petition No. 57 of 2009) and *Commissioner of police & Director of Criminal Investigations Department & another v Kenya Commercial Bank Limited & 4 others* [2013] eKLR.

14. The petitioner contended that he had proved violation of his constitutional rights and the court should grant the reliefs sought. He relied on the decisions in *Gulabrao Baburao Deokar v State of Maharashtra & Ors* (2013) 13 SCC 542; *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR; *City of Vancouver v Ward* [2010] 2 SCR 28 and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR.

*1<sup>st</sup> respondent's case*

15. The DPP opposed the petition through grounds of opposition, contending that the petition lacks clarity and precision; discloses no cause of action and the orders sought are not tenable.
16. The DPP cited article 157 of the Constitution its mandate and section 24 of the National Police Service Act on the mandate of the police and asserted that the petition is premature since investigations were ongoing.
17. The DPP argued that since the petitioner had not been arrested or charged, there was no breach of the Constitution; the law or rights and fundamental freedoms. The DPP relied on the decision in *Kelly*

*Kases Bunjika v Director of Public Prosecutions (DPP) & another* [2018] eKLR.

18. The DPP again relied on section 24 of the National Police Service Act and the decisions in *Rhodah Mutete Mutuku v Inspector General, National Police Service & 2 others* [2019] eKLR; *Republic v Commissioner of Police & another Ex-Parte Michael Monari & another* [2012] eKLR and *Muema Mativo v Director of Criminal Investigations & 2 others; HFC Limited (Interested Party)* [2021] eKLR for the contention that the notice compelling attendance before a police officer to shed light on the claims of theft was within the law and the principles of natural justice. The DPP urged the court to exercise restraint and allow state institutions to execute their mandate.

19. The DPP again argued that the petition offended the doctrine of ripeness since it was instituted merely on anticipating arrest and prosecution. The DPP relied on Black's Law Dictionary 10<sup>th</sup> Edition page 1524 and the decisions in *Kiriro wa Ngugi & 19 Others v Attorney General & 2 others* [2020] eKLR and *National Assembly of Kenya & another v The Institute for Social Accountability & 6 others* [2017] eKLR.

20. The DPP maintained that he had not received the investigation file from the DCI for directions. The petitioner did not demonstrate the efforts he had made to reach out to him for purposes of clarifying any issues regarding the exercise of his mandate under article 157 (4) of the Constitution, a violation of the doctrine of exhaustion. Reliance was placed

on article 159 of the Constitution and the decisions in *Geoffrey Muthiga Kabiru & another v Samuel Muguna Henry & 1756 others* [2015] eKLR and *Anthony Miano & others v Attorney General & others* [2021] eKLR.

21. The DPP maintained that the order of prohibition sought would be an affront to article 157 (6), 10 of the Constitution. He relied on the decision in *Douglas Maina Mwangi v Director of Public Prosecutions & another* [2013] eKLR and *Republic v Service & 2 others; Resilient Investments Limited & 3 others (Interested Party); Limited (Exparte)* [2022] KEHC 43 (KLR). The DPP maintained that in the absence of illegality, irrationality or impropriety, the petition should be dismissed with costs.

*1<sup>st</sup> interested party's case*

22. The 1<sup>st</sup> interested party (Patrick Mwangangi Makau) opposed the petition through his replying affidavit and that of Benedict Musyimi.

23. Mr. Makau stated that he was the registered owner of the vehicle and that the petitioner had misrepresented facts. Mr. Makau asserted that sometime in 2016, he took the motor vehicle to the petitioner's garage for repairs, in the company of Benedict Musyimi. The vehicle was checked it in and he explained the problem to the petitioner which the petitioner termed complex but promised to repair the vehicle once spare parts were imported from Dubai.

24. The petitioner promised to notify Mr. Makau once repairs were complete and the charges payable. Mr. Makau stated that he believed the petitioner because the motor vehicle was bought from the UAE and therefore spares parts would easily be available there.

25. Mr. Makau asserted that he visited the garage on many occasions, made phone calls and at times sent Benedict Musyimi with written notes but each time the petitioner gave excuses that he had not yet received spare parts from Dubai and requested Mr. Makau to be patient. The petitioner would at times not respond to calls.

26. Mr. Makau contended that he later discovered that the excuses were not genuine since the

petitioner never gave him information or evidence on importation of spare parts; repairs of the vehicle; charges and when to test drive and collect the vehicle.

27. According to Mr. Makau, the petitioner was usually not at the garage during a number of visits and he would not respond to phone calls. On each visit, Mr. Makau found the vehicle parked unattended. The petitioner did not explain reason for the inability to repair the vehicle.

28. Mr. Makau stated that sometime in 2019, he visited the garage to check on the progress of the repairs but vehicle was not at the garage. On enquiring from the petitioner on the whereabouts of the vehicle, the petitioner informed him that the

vehicle had been sold after overstaying at the garage. This came as a shock because the petitioner had not updated him about the repairs; had notified him that the vehicle was ready for collection, how much were the charges or that the vehicle would be auctioned.

29. Mr. Makau asserted that the only reason why the vehicle remained at the garage for some time was because the petitioner kept on giving excuses that spare parts were yet to arrive from Dubai. Mr. Makau maintained that the petitioner did not serve him with a notice of the intention to dispose of the vehicle. Mr. Makau took the view, that the petitioner did not comply with the provisions of the Disposal of Uncollected Goods Act because he did not give notice and ask him to take delivery of the vehicle.

The petitioner did not also give notice of intention to sell the vehicle or any money payable in order to secure release of the vehicle.

30. According to Mr. Makau, the petitioner's action violated sections 4(1), 6 and 7 of the Disposal of Uncollected Goods Act and his constitutional right to property.

31. Mr. Makau maintained that the Check In/Out Form the petitioner attached was not for his vehicle and some of the particulars for the vehicle model and engine number are different from what was indicated in his Logbook. After establishing that the vehicle was missing, he got confidential information from one of the petitioner's employees that the

vehicle was sold to a person residing within Kitengela area.

32. On 10<sup>th</sup> May 2021 at around 9.30 the vehicle was spotted at a parking lot outside a supermarket within Kitengela town. Mr. Makau reported the matter to Athi River police station and provided ownership documents which lead to the impounding of the vehicle. Witness statements were recorded and it was upon completion of investigations that the petitioner was to be arrested and arraigned in court.

33. Mr. Makau argued that the petitioner having not demonstrated that he repaired the vehicle, notified him and asked that the vehicle be collected and how much was to be paid for the repairs, there would be

no lawful reason to dispose the vehicle as uncollected goods.

34. Mr.Makau maintained that the 2<sup>nd</sup> respondent's decision to investigate the petitioner with the possibility of the 1<sup>st</sup> respondent prosecuting him was not irregular; unfair or made in bad faith. They were carrying out their mandate as stipulated under articles 157 (6) (a) and 243 of the Constitution and sections 24(e), 28 and 5 (b) of the National Police Service Act. Reliance was placed on the decisions in *Thuita Mwangi & 2 others v Ethics & Anti- Corruption and 3 others* [2013] eKLR and *Republic v Commissioner of Police and another Exparte Michael Monari & another* (supra).

35. Mr. Makau maintained that by virtue of articles 157 (10) and 243 of the Constitution read with section 6 of the ODPP Act, the DPP is an independent offices subject only to the Constitution and the law and he is free to undertake his functions without control from any person or authority as long as the mandate is discharged in accordance with the Constitution, the law and the interest of justice. The petitioner failed to demonstrate that mandate was being discharged outside the Constitution or the law. Reliance was placed on the decision in *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR.

36. The affidavit by Mr. Benedict Musyimi reiterated the facts stated in Mr. Makau's affidavit; confirmed that Mr. Makau was the owner of the vehicle; how

the vehicle was delivered for repairs and that the vehicle was not repaired.

*2<sup>nd</sup> interested party's case*

37. The 2<sup>nd</sup> interested party (Peter Chumo) filed an affidavit in response to the petition. Mr. Chumo stated that he is the current owner of the vehicle having bought it on 1<sup>st</sup> November 2019. The vehicle was taken away from him by the DCI officers from Athi River on 19<sup>th</sup> May 2021 and he had nothing to do with the alleged theft of the vehicle. He urged the court to determine the matter expeditiously to secure his fundamental rights and freedoms.

38. The 2<sup>nd</sup> respondent (DCI) did not take part in these proceedings.

*Determination*

39. I have considered the pleadings; arguments by parties and the decisions relied on. The issue for determination is whether the investigations and possible arrest and prosecution of the petitioner violated the petitioner's rights and fundamental freedoms thus, calling for halting of the actions.

40. The petitioners' case is that the vehicle was delivered for repairs but overstayed and it was disposed of under the Disposal of Uncollected Goods Act. Despite this fact, Mr. Makau reported the matter to the police who then issued a notice to the petitioner to report at Athi River DCI officers which the petitioner felt was a violation to his rights and fundamental freedoms and filed this petition to stop the investigations and possible prosecution.

41. The DPP, the 1<sup>st</sup> respondent, argued that the petition is premature since the investigation file had not been forwarded to him and no decision had been made to prosecute the petitioner. Mr. Makau supported the position taken by the DPP, arguing that the petitioner unlawfully sold his vehicle which he had taken to the petitioner for repairs and the matter was reported to the police for investigations. A decision was yet to be made and the police and DPP have constitutional and legal mandate to discharge. According to Mr. Makau, the petitioner did not demonstrate that the respondents were acting in violation of the Constitution, the law or rights and fundamental freedoms and that the decision to charge and prosecute him was to be made in bad faith and in violation of article 157(11) of the Constitution or his rights and fundamental freedoms.

42. Mr. Chumo's position was that he purchased the vehicle from the petitioner and the vehicle was towed to Athi River police station. His plea was that the petition be determined without delay.

43. The Directorate of Criminal Investigations falls under the command of the Inspector General of Police and is headed by a director who is answerable to the Inspector General. Under section 24 of the National Police Service Act, one of the functions of the National Police Service is to investigate crimes. Section 35 further gives the directorate of criminal investigations the mandate to detect and prevent crime and apprehend offenders.

44. The police therefore undertake investigations pursuant to powers conferred on them by the

National Police Service Act to investigate any reported crimes. In that respect, police officers including those under the directorate, discharge statutory mandates in the performance of their functions when investigating complaints made on commission of crimes. Police officers have however to exercise their powers and discharge their functions subject to the constitutional safeguards of human rights and fundamental freedoms guaranteed by the Constitution, since article 244 requires that police comply with constitutional standard of human rights and fundamental freedoms.

45. It is only after investigations conclude that a crime has been committed, that the investigation file is forwarded to the DPP to make a decision on

whether to charge the culprit or not based on the evidence gathered. If investigations conclude that an offence was committed the file is forwarded to the DPP to make that decision in accordance with article 157(6) of the Constitution which confers on the DPP constitutional mandate and discretion to initiate, continue and or terminate criminal prosecutions. In exercising this discretion, the DPP does not require consent from anybody or authority. Article 157(11), however, demands that the DPP exercise his powers in a manner that has regard to public interest, interests of administration of justice and prevents and avoids abuse of the legal process. (See *Director of Public Prosecutions v Martin Mina & 4 others* [2017] eKLR). Should investigations conclude that there is no sufficient evidence, the file is closed ending the matter at that point.

46. The law is also settled that where police are undertaking investigations over a crime or the DPP is exercising his constitutional mandate and discretion conferred on his office, courts should rarely interfere with the mandate of these institutions. (See *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another* [2015] eKLR and *Paul Ng'ang'a Nyaga v Attorney General & 3 others* (2013) eKLR).

47. Article 157(10) is clear that the intention was to enable the DPP discharge his constitutional mandate without interference from anybody or authority. The Court will therefore not direct the DPP on how to exercise his constitutional powers. The court will also not interfere with exercise of his mandate

unless it is demonstrated that there is clear violation of the Constitution, the law or a party's rights and fundamental freedoms. (*Francis Anyango Juma v The Director of Public Prosecutions and another* [2012] eKLR).

48. Article 22 of the Constitution gives every person the right to approach the court where there is a claim that a right and fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, while article 23(1) read with article 165(3) of the Constitution confers on the court jurisdiction to determine the issue. Article 23(3) grants the court jurisdiction to grant an appropriate relief to redress denial, violation or infringement of, or threat to, a right or fundamental freedom. The essence of such relief should be to ensure that the

rights enshrined in the Constitution are protected and enforced. (*Fose v Minister of safety and Security* (CCT 14/1996) [1997] ZACC 6.)

49. A petitioner who alleges that his rights and fundamental freedoms have been violated or are being violated or threatened, has to demonstrate to the satisfaction of the court, violations. It is only when the court finds violation or threat to violate rights and fundamental freedoms that it invokes article 23(3) of the Constitution to grant appropriate relief. This is so because as the Constitutional Court of Uganda stated in *Tinyefuze v Attorney General of Uganda* (Constitutional Petition No. 1 of 1996) [1997] UGCC 3, “if a petitioner succeeds in establishing breach of a fundamental right, he is

*entitled to the relief in exercise of constitutional jurisdiction as a matter of course."*

50. In this petition, the pleadings and arguments by parties demonstrate that petitioner's grievance stems from a notice the police issued requiring him to appear before Athi River DCI officers for purposes of responding to a claim that had been reported by Mr. Makau regarding the vehicle. The police had not arrested the petitioner; had not completed investigations and had not forwarded the investigation to the DPP. In other words, the DPP had not made a decision to prosecute the petitioner. The petitioner could not therefore allege that the DPP had acted in violation article 157(11) of the Constitution or his rights and fundamental freedoms.

51. The petitioner's argument that the report was made at Athi River police station yet the vehicle was within the jurisdiction of the City County of Nairobi is a matter of fact that he could raise with the investigating officers who could easily refer the matter to the appropriate police station if that were the case.

52. In any case, there being no decision to prosecute, the petitioner cannot argue that there is ulterior motive, bad faith or abuse of prosecutorial powers in violation of the Constitution or rights and fundamental freedoms. This is because there is no guarantee that the police will recommend prosecution and the DPP will approve the recommendation.

53. A claim for violation of rights and fundamental freedoms is first, a matter of fact, and once facts establish violation, it becomes a question of law that a petitioner has to prove to the satisfaction of the Court that rights have been violated or are threatened with violation in contravention of the Constitution and or the law. See In *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR; [2014] KESC 53 (KLR), for the position that:

*[349]...Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her*

*grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.*

54. The Supreme Court meant that a party claiming violation of rights and fundamental freedoms should plead with precision, the constitutional rights violated, the provisions infringed and demonstrate the manner of violation so that there is a link between the alleged violation, the rights infringed and the constitutional provisions involved in order to

put the respondent on notice over the petitioner's claim so as to respond appropriately.

55. The petitioner's complaint is on investigations which had merely commenced and were not complete and he cannot tell what the outcome of the investigations would be. Since police officers were exercising their statutory mandate and had an obligation to investigate any possible commission of a crime, there is no evidence that investigations were being conducted in violation of either the Constitution, the law or rights and fundamental freedoms. The petitioner merely alleged violations without demonstrating how the police were violating the Constitution, the law or rights and fundamental freedoms.

56. The issues the petitioner raised being factual, can be established during trial since it would require evidence to demonstrate bad faith or ulterior motive. As the Court of Appeal stated in *Director of Public Prosecutions v Martin Maina & 4 others* [2017] eKLR, it is not the duty of the High Court in Judicial Review proceedings to evaluate the sufficiency of evidence in envisaged criminal proceedings as that is the function of the trial Court or the High Court in a criminal appeal. A Judicial Review Court should not usurp the functions of a trial court, except in the clearest of the cases.

57. In the circumstances, this court is not persuaded that the petition is merited. Consequently, the

petition is declined and dismissed with costs to the 1<sup>st</sup> respondent and 1<sup>st</sup> interested party.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of October 2025**

**E C MWITA  
JUDGE**