

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E071 OF 2024

FRANCIS RAOPETITIONER

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST

RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2ND

RESPONDENT

JUDGMENT

A: Petitioner's case

1. On 11th March 2023, the petitioner was driving his motor vehicle, Toyota Prado registration number KAR 860H along 3rd Parklands avenue. As he approached Amani Plaza entrance, he was involved

in a road accident with a motor cycle registration number KMFY 766S.

2. The accident was reported at Parklands Police Station. Police officers were called to the scene of accident for investigations and at the scene, the petitioner overheard the officers say that he should not be let free without offering something yet he was driving a big car. This was followed with constant threats of arrest and prosecution on diverse dates. The petitioner did not however give a bribe to the police.

3. The police recommended to the 2nd respondent that the petitioner be prosecuted which the petitioner asserted was out of malice. According to the petitioner, he was on various dates between April

2023 and February 2024 informed that he was to be arraigned in court but this did not happen until after he had filed this petition. He was then arraigned on two counts of driving without due care and attention contrary to section 49(1) of the Traffic Act in Milimani MCTR/E1276/2024.

4. The petitioner asserted that although there was an alternative avenue of seeking compensation from his insurance company and police officers had advised that it be explored first, criminal prosecution was commenced in violation of article 157(11) of the Constitution. The petitioner argued that the criminal proceedings are based on frivolous, vexatious and trumped-up charges because he refused to bribe police officers which amounts to abuse of the legal

process and is against the interest of administration of justice system.

5. The petitioner argued that the respondents' actions if not stopped will lead to a violation of his right to fair trial. The petitioner further argued that the respondents' actions violated articles 10(1), 49, 50, 157(11), 232(1) (2), 244 and 245 (2) (b) of the Constitution; section 6 of the ODPP Act and section 10(4) (b) of the National Police Service Act.

6. The petitioner cited articles 49, 50 and 157 of the Constitution and the decisions in *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another* (Interested parties) [2021] eKLR; *Wycliffe Oparanya Ambetsa v Director of Public Prosecutions* [2016] eKLR; *Jirongo v Soy*

Developers Ltd & 9 others [2021] eKLR and *Maina & 4 others v Director of Public Prosecutions & 4 others* [2022] KEHC 15 (KLR) for the position that the delay in instituting prosecution had violated his rights.

7. The petitioner submitted that he was made to appear before the police for over one year and was every time informed that he would be arraigned which did not happen until he filed this petition. According to the petitioner, the respondents did not adhere to the national values and principles in article 10 of the Constitution and is therefore entitled to general damages. Reliance was placed on the decision in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others* [2021] KECA 328 (KLR).

8. The petitioner urged the court to consider that he was subjected to a harrowing experience of appearing before the police for over one year who purported to be conducting investigations over the traffic offence after he declined to pay a bribe.

9. The petitioner maintained that the respondents' actions amounted to an abuse of the criminal justice process, an infringement of his rights and amounted to abuse of constitutional powers vested on the DPP. The petitioner sought several declaration and orders to invalidate the prosecution and compensation.

B: Respondents' case

10. The respondents opposed the petition through a replying affidavit sworn by No. 86433 PC Allan Ojwang. The respondents asserted through PC

Ojwang, that on 11th March 2023 at around 2100 hrs the accident standby personnel received information regarding an accident along 3rd Parklands Avenue near Amani Plaza. Police officers visited and processed the scene and later booked the accident in the OB. PC Ojwang was detailed to investigate the accident; interrogated witnesses and obtained documentary evidence relevant to the case.

11. Investigations established that the motorcycle rider had a right of way and that the petitioner did not exercise due care and attention. The petitioner was summoned by the police to assist in investigation. According to the respondents, it took some time before the petitioner was arraigned in court because the victims of the accident sustained serious injuries and were still receiving medical

treatment which delayed recording of their statement and getting medical records. After concluding investigations, the police file was forwarded to the 2nd respondent for review and decision.

12. The respondents asserted that the decision to charge the petitioner was made in accordance with article 157(6), (10), (11) of the Constitution and the National Prosecution Policy and the petitioner was arraigned on 16th February 2024 in Milimani Traffic Case E1276 of 2024. The respondents maintained that investigations were conducted in accordance with the law; that the 2nd respondent did not abuse his office and there was no violation of the law or rights and fundamental freedoms.

13. The respondents relied on article 157 (4), (6) and (11) of the Constitution and the decisions in *Pauline Raget Adhiambo Agot v DPP and 5 others* [2010] eKLR and *Republic v Commissioner of Police & another Ex-parte Michael Monari & another* [2012] eKLR for the position that the 2nd respondent was undertaking a lawful duty.

14. The respondents maintained that there was compliance with the principles of natural justice since the petitioner was given an opportunity to present his version of the incident thus, there was no violation of the Constitution; the law or rights and fundamental freedoms. The respondents relied on the decision in *R v. Chancellor Clt Cambridge*, (1723) 1 Stra. 577 Led Raynn 1334 8 Mod 145.

15. The respondents again relied on the *Monari case* for the position that investigations established that there was a reasonable suspicion that an offence had been committed prompting the recommendation for the prosecution of the petitioner.

16. The respondents further cited the decisions in *Cascade Company Limited v Kenya Association of Music Production (KAMP) & others* [2015] eKLR and *Maina & 4 others v Directors of Public Prosecutions & 4 others* [2022] KEHC 15 (KLR) for the position that the petitioner has not demonstrated how the respondents acted contrary to public interest; interest of the administration of justice or failed to prevent and avoid abuse of the legal process.

17. The respondents again relied on the decisions in *William and Others v Spautz* [1993] 2 LRC 659 at 667; *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR and *Anarita Karimi Njeru v Republic* [1979] eKLR to contend that the petitioner had not set out with precision the manner in which the respondents infringed his fundamental rights and freedoms.

C: Determination

18. I have considered the pleadings; arguments by parties and the decisions relied on. The issue for determination is whether the investigations and the decision to prosecute the petitioner violated the petitioners' rights and fundamental freedoms and should therefore be stopped.

19. The petitioners' case is that his vehicle was involved in road traffic accident with a motorcycle rider which was reported to the police. Traffic police officers visited the scene and he overheard them say they would not let him free given the vehicle he was driving which he understood to mean they wanted a bribe. The police took over one year to charge him in court and only after he had instituted this petition. The petitioner argued that he was charged because he declined to pay a bribe and therefore the decision to charge and prosecute him was in bad faith and in violation of article 157(11) of the Constitution and a violation of his rights and fundamental freedoms.

20. The respondents on their part argued that they acted in accordance with the Constitution and the law; there was no violation of rights and

fundamental freedoms and that the delay to complete investigations was because the victims were still receiving medical attention which delayed recording of statements from them.

21. Police officers under the command of 1st respondent undertake investigations pursuant to powers conferred on them by the National Police Service Act to investigate any reported crimes. In that respect, the 1st respondent's officers discharge statutory mandates in the performance of their functions when investigating complaints made.

22. In that regard, the 1st respondent's officers have to exercise their powers and discharge their functions subject to the constitutional safeguards of human rights and fundamental freedoms

guaranteed by the Constitution. The 1st respondent's officers can investigate complaints of a criminal nature with a view to ascertaining whether a crime has been committed but must do so in compliance with the Constitution and the law. Should investigations conclude that a crime has been committed, the investigation file is forwarded to the 2nd respondent to make a decision on whether the evidence gathered is sufficient to mount a prosecution.

23. If investigations conclude that an offence was committed and the 2nd respondent agrees with the conclusion, a decision is made to prosecute in accordance with article 157(6) of the Constitution which confers on the 2nd respondent constitutional mandate and discretion to initiate, continue and or

terminate criminal prosecutions. If, However, the 2nd respondent concludes that there is no sufficient evidence, the file is closed and that is the end of the matter, each side having discharged its constitutional and or statutory mandate.

24. The 2nd respondent in exercising this discretion, does not require consent from anybody or authority. Article 157(11), however, demands that when the 2nd respondent is exercising his powers, he should do so 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).

25. The law is settled that where police are undertaking investigations over a crime or the 2nd respondent is exercising his constitutional mandate and discretion conferred on his office, courts should rarely interfere with the mandate of the offices. (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).

26. The constitutional text in article 157(10) is clear that the intention was to enable the 2nd respondent carry out his constitutional mandate without interference from anybody or authority. The Court will not direct the 2nd respondent how to exercise his constitutional powers. It will not also interfere with exercise of that mandate unless there is clear

evidence of 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).

27. Every person has a right under article 22 of the Constitution to approach the court where there is a claim that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Where an application has been instituted, article 23(1) read with article 165(3) of the Constitution confers on the court jurisdiction to determine the issue while 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 is 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.

28. In order for the court to enforce fundamental rights and freedoms, a petitioner has to demonstrate to the satisfaction of the court, violation of his rights and fundamental freedoms. Should the court find violation, it invokes article 23(3) of the Constitution to grant appropriate relief. 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.”

29. I have considered the petition, response and arguments by parties. The petitioner's grievance is that investigations against him took over one year which was in violation of his rights and the police wanted a bribe which he declined and therefore the decision to prosecute him was made in bad faith and in violation of article 157(11) of the Constitution.

30. The petitioner's argument, if I understand it, is that the decision to prosecute him was done with ulterior motive, a claim the respondents denied, arguing that they acted in good faith and in compliance with the Constitution and the law. In the respondent's view, the petitioners had not demonstrated violation of his rights and fundamental freedoms.

31. Courts have consistently stated that a claim for violation of rights and fundamental freedoms is first, a matter of fact, and once facts establish violation, it then becomes a question of law that a petitioner has to prove to the satisfaction of the Court that indeed, rights have been violated or threatened in contravention of the Constitution and or the law.

32. In *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR; [2014] KESC 53 (KLR), the Supreme Court observed:

[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.

33. The Supreme Court was saying 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.

34. The petitioner's complaint is on both investigations and the decision to prosecute him. The 1st respondent's officers were exercising their mandate under the law and had an obligation to investigate any possible commission of a crime in the discharge of that statutory mandate. There was no evidence that police investigations were conducted in violation of the Constitution or the law. The petitioner merely alleged that police officers demanded a bribe from him. The petitioner did not however show that he reported the issue to the

appropriate body responsible for fighting corruption or to senior police officers over the demand of a bribe.

35. Regarding delayed investigations, the respondents stated that this was due to the fact that the victims were still undergoing treatment so that it took long to get their statements and medical records, a fact the petitioner did not dispute. On the argument that there was the alternative of following up the issue with the insurance, the short answer to this is; the issue was about violation of traffic laws which did not exclude prosecution and not a tort.

36. On the part of the 2nd respondent, he made a decision to charge and the petitioner did not show that the 2nd respondent did anything in violation of the Constitution, the law or rights and fundamental

freedoms. The petitioner's claim that the decision to prosecute him was made in bad faith and ulterior motive, was not demonstrated.

37. The petitioner can demonstrate this fact during trial since it would require calling of evidence to demonstrate bad faith or ulterior motive thus, a matter to be determined by the trial court. 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 the 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.

38. A petitioner cannot allege of violation of rights and fundamental freedoms merely because the police and or the DPP are discharging their constitutional and statutory mandates. A petitioner has to do more and, in particular, demonstrate that in exercising their respective mandates the police or the DPP were doing so in violation of the Constitution, the law or rights and fundamental freedoms. Anything short of that, would not be the basis for halting investigations or prosecution as doing so would amount to interfering with the mandate of those institutions.

39. A party claiming violation of rights and fundamental freedoms must discharge the burden placed on him/her and demonstrate violation and the manner of such violation. It was not enough for the petitioner to argue that his rights were violated

or threatened. He was required to show that the respondents were acting contrary to constitutional provisions in the Bill of Rights that protect rights and fundamental freedoms or failed to act as required by the Constitution or the law. This he failed to do.

40. Consequently, the conclusion the court comes to, is that the petition has no merit. It is declined and dismissed. Each party shall bear their own costs.

**Dated and delivered at Nairobi this 28th day of
October 2025**

**E C MWITA
JUDGE**