



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CONSTITUTIONAL PETITION NO. E009 OF 2023

**IN THE MATTER OF ALLEGED VIOLATION, INFRINGEMENT
OF AND/OR THREAT TO RIGHTS OR FUNDAMENTAL
FREEDOMS UNDER ARTICLES 27(1,2,4 & 5), 28, 29(a & b)
AND 50 OF THE CONSTITUTION**

SOLOMON MULANDA TAWAYI 1ST
PETITIONER

VITALIS OTISA 2ND
PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST
RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND
RESPONDENT

SIMON KUSINA MWAYA 3RD
RESPONDENT

THE ATTORNEY GENERAL 4TH
RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioners vide their Petition dated 13th July 2023 seeks the following reliefs:
 - I. *A declaration be and is hereby issued that investigations on the Petitioners by the DCI and the DPP's intention to institute criminal proceedings against the Petitioners on robbery with violence violates their constitutional rights and is an abuse of the process of the court and therefore unlawful, null, and void ab initio.*
 - II. *An order of prohibition be and is hereby issued prohibiting the 1st and 2nd Respondents from proceeding with the intended criminal prosecution against the Petitioners herein in respect to robbery with violence charges.*
 - III. *An order of prohibition be and is hereby issued against the 1st and 2nd Respondents from investigating, recommending the prosecution or commencing any prosecution of the Petitioners in respect of robbery with violence charge.*

1V. That the Respondents be compelled jointly and severally to compensate the Petitioners for infringing his fundamental rights.

V. The costs of this Petition be provided for.

The Petitioners' Case

2. The Petition herein is predicated on the provisions of articles **27 (1, 2, 4 & 5), 28, 29 (a & b) and 50** of the Constitution.
3. The 1st Petitioner swore an affidavit in support of the Petition and stated that he is the Assistant Chief of Mwera Sub-Location, having been appointed on 5th April 2019 and confirmed on 5th May 2020. The 2nd Petitioner, Mr. Vitalis Otisa, was similarly appointed as Assistant Chief of Shamoni Sub-Location on 23rd August 2016.
4. The deponent averred that on 27th November 2022, they received reports of a defilement incident involving a 13-year-old minor, who was subsequently examined at Ikhanji Dispensary and found to be three months pregnant. On 2nd December 2022, the Petitioners traced and arrested the suspect, one Simon Kusina Mwaya (the 3rd Respondent), who is an uncle to the minor, and surrendered him to Kabras

Police Station, where he was booked under OB No. 02/03/12/2022.

5. The Petitioner further deponed that on 3rd December 2022, the Petitioners were summoned by the officer in charge of crime at the said police station, Ms. Brenda Wangusi, who informed them that the 3rd Respondent had lodged a complaint alleging that the Petitioners assaulted and robbed him of Kshs 100,000/=. The deponent noted that the 3rd Respondent was released on a cash bail of Kshs 20,000/= in unclear circumstances without the authority of the Officer Commanding Station (OCS).
6. He further averred that on 9th December 2022, the 3rd Respondent was arraigned at Butali Principal Magistrate's Court in Sexual Offence Case No. E097 of 2022, where he was charged with incest and committing an indecent act with a child, contrary to Section 20(1) of the Sexual Offences Act, and the criminal case remains pending.
7. Despite this, the deponent contended that the 1st and 2nd Respondents had decided to prosecute the Petitioners on charges of robbery, conspiracy to defeat justice, and interference with witnesses, which the Petitioners believe are baseless, malicious, and part of a scheme by the 3rd

Respondent and his family to frustrate the sexual offence case.

8. He asserted that the intended prosecution is an abuse of power, amounts to oppression, and is a misuse of the criminal justice process designed to intimidate the Petitioners into abandoning the pursuit of justice for the minor victim. He maintained that the Respondents' actions are unlawful, illogical, unfair, and contrary to public policy, the Constitution, and the law.
9. In view of the above, the Petitioners surmise that they fell victim to the following violations of their Constitutional Rights and Fundamental Freedoms:
 - I. To the extent that the 1st and 2nd Respondents are pursuing criminal charges against the Petitioners in circumstances where the foundation of the alleged offences lacks merit and the Petitioners are not receiving equal protection and benefit of the law, the Respondents have violated Article 27(1) of the Constitution. The unequal treatment amounts to discrimination and abuse of state powers.
 - II. To the extent that the Respondents intend to charge the Petitioners without providing clear, factual, and sufficient

information to support the charges, and without respecting the procedural safeguards required by Article 50(2) of the Constitution, the Respondents have violated the Petitioners' right to a fair trial. The charges are based on vague and unsubstantiated facts, contrary to the constitutional requirement that an accused person must be informed of the charge with sufficient detail to answer it.

- III. To the extent that the Respondents' actions, including attempts to embarrass, humiliate, and criminalize the Petitioners without proper basis, are aimed at demeaning their character and integrity, the Petitioners' right to human dignity under Article 28 has been violated. The Respondents' conduct demonstrates malice and abuse of prosecutorial discretion.
- IV. To the extent that the 1st Respondent (DPP) is acting beyond the powers granted under Article 157(11), including directing actions that appear to target the Petitioners unlawfully and oppressively, the DPP has violated the constitutional limits of prosecutorial discretion. The Petitioners are thereby denied equal

protection under the law and subjected to arbitrary decision-making.

- V. The cumulative effect of all the above contraventions constitutes a serious abuse of legal process and an infringement of the Petitioners' fundamental rights and freedoms. The Respondents have collectively acted unfairly, unreasonably, and in an oppressive and unconstitutional manner.

Petitioners' Submissions

10. The Petitioners submit that they are public officers serving as Assistant Chiefs who, in the course of duty and in pursuance of allegations of defilement, arrested the 3rd Respondent. They contend that the intended prosecution for the offence of robbery with violence is not only unfounded but constitutes an abuse of prosecutorial power. They aver that the decision to charge them impairs their rights and fundamental freedoms, including equal protection before the law, right to fair trial, right to dignity, and protection against arbitrary abuse of power. They allege that the intended prosecution has no factual basis and is actuated with malice.
11. They rely on Article 22(1) of the Constitution to affirm their right to redress when their rights have been violated or

threatened. They contend that the 1st and 2nd Respondents filed no replying affidavits to gainsay the averments made in the Supporting and Supplementary Affidavits, thus the Petitioners' factual depositions remain unchallenged.

12. In support of this argument, the court held in **Daniel Kibet Mutai & 9 Others v Attorney General [2019] eKLR** that sworn depositions that are not rebutted must be taken as true. The Petitioners submit that a similar position was taken in **Kennedy Ofieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited [2010] eKLR**, where the court emphasized that grounds of opposition without a replying affidavit do not amount to a valid denial of factual claims.
13. The Petitioners contend that the criminal process is being misused for purposes of retaliation, harassment, and intimidation - this is due to arresting the 3rd Respondent. It is submitted that the predominant purpose of the intended prosecution is contrary to the objectives of the administration of justice. They further submit that the DPP's discretion to prosecute is not absolute and, therefore, must have due regard for the provisions of Article 157(11) of the Constitution.

14. Reliance is placed on ***Kuria & 3 Others v Attorney General [2002] 2 KLR 69***, where it was held that courts must not remain passive when criminal proceedings are being used to achieve an ulterior motive. The Petitioners argue that the court has a duty to intervene where the prosecutorial process is used for improper purposes. They further cite ***Ndarua v R. [2002] 1 EA 20***, where it was held that courts have inherent power to prevent abuse of the legal process.
15. The Petitioners further cite the case of ***Commissioner of Police & Director of Criminal Investigations Department & Another v Kenya Commercial Bank Limited & 4 Others***, in which the Court of Appeal underscored the DPP's overriding obligation to ensure that proceedings are not abused and are conducted in accordance with the law.
16. On the issue of compensation, the Petitioners cite ***Thomas Oluoch v Lucy Muthoni Stephen & Another (Nairobi HCCC No. 1729 of 2001)***, in which the court held that a state officer who maliciously initiated a prosecution in bad faith could not be protected by judicial immunity. The Petitioners submit that the 1st Respondent has failed to tender any evidence as to the decision to prosecute. So, the

charges in contemplation could be said to be unlawful and malicious.

1st Respondent's Case

17. In response to the Petition dated 13th July 2023, the 1st Respondent filed a replying affidavit sworn by Leina Davies. She affirmed that the police had begun investigations consequent to a complaint made by the 3rd Respondent at Kabras Police Station, bearing OB No. 14/02/12/2022. The investigations having been completed, the file and a detailed brief of findings were forwarded to the ODPP.
18. The deponent averred that the ODPP independently reviewed the file and found sufficient evidence supporting the recommendation to charge the Petitioners. According to her, the evidence presented two separate but related issues: defilement and conspiracy to defeat justice arising from the same events. These matters were dealt with separately, and decisions were made in accordance with the mandate of the ODPP.
19. She further deposed that the Petitioners' affidavit and application merely attacked the credibility of the evidence gathered, and that such matters ought to be canvassed in a trial court, not in constitutional proceedings. She asserted

that there were no existing criminal proceedings before the court as the Petitioners had not yet been formally charged. Thus, the prayers to stay prosecution were premature and unfounded.

20. The affidavit maintained that the Petitioners had not demonstrated any violation of constitutional rights or shown how the ODPP acted unlawfully, irrationally, or in abuse of process. It was stated that under Article 157 of the Constitution, the DPP acts independently, and interference by the court at this stage would amount to usurpation of constitutional functions.
21. Finally, it was deponed that the application and petition amounted to an abuse of the court process and were merely attempts by the Petitioners to avoid facing legitimate charges. The deponent confirmed the truth of the affidavit's contents based on her knowledge and information.

1st Respondent's Submissions

22. In their written submissions, the 1st Respondent submitted that the Petition challenges the mandate of the Office of the DPP, constitutionally empowered under Article 157 to institute criminal proceedings independently, without the consent of any other authority.

23. The 1st Respondent relied upon **Reuben Mwangi v DPP & 2 Others [2021] eKLR**, reiterating that the ODPP is an independent office and is not subject to direction or control by any party. Reference was further made to the decision in **Hon. James Ondicho Gesami v AG & Others, Petition No. 376 of 2011**, to the effect that once sufficient evidence exists, the DPP may prefer charges, and doing so will not amount to a derogation from human dignity. The respondent avers that the decision to charge the Petitioners was informed by an inquiry file from the investigative agency and that the evidence revealed a reasonable and probable cause to charge, as defined in **Glinski v Mclver [1962] AC 726**. The Respondent emphasized that assessing the sufficiency or merits of that evidence is the role of the trial court, not constitutional proceedings.
24. The 1st Respondent relied on **Bernard Mwikya Mulinge** (supra) to argue that courts ought not to interfere with the DPP's discretion unless illegality, irrationality, or procedural impropriety is demonstrated. Which, according to the Respondent, the Petitioners failed to do.
25. It was further submitted that the Petition lacks the required specificity and fails the threshold set in **Anarita Karimi**

Njeru v Republic (1976-1980) KLR 154, as the Petitioners did not clearly plead the alleged constitutional violations or the manner in which they occurred.

26. Regarding prohibition orders, the 1st Respondent contends that such relief cannot be granted where a decision has already been made. Reference is made to **Joseph Makau Ndambuki v City Council of Nairobi [2007] eKLR and Republic v EACC & 2 Others; Ex parte Stephen Ogaga Osiro [2020] eKLR**, to argue that prohibition is only available to stop contemplated acts, not those already executed. Since the decision to charge was made on 8th February 2023, long before the Petition was filed on 14th July 2023, the prayer for prohibition is untenable.

3rd Respondent's case

27. The 3rd Respondent, Simon Kusina Mwaya, filed two affidavits in response to the Petition and the Notice of Motion dated 13th July 2023.
28. In his primary affidavit, the 3rd Respondent stated that he was a complainant in the underlying criminal matter. He alleged that he had been arrested on 2nd December 2022, by the Petitioners on a charge of defilement and taken to Kabras Police Station. Before they booked him into the

station, he alleged they intercepted him at Shikutse market with Kshs. 100,000/=, proceeds from a land sale. He alleged that the Petitioners assaulted and robbed him of the said amount. He stated that as a result of the assault, he sustained injuries such as trauma to his hips and a dislodged tooth, as well as a backache. He further said that while in custody, he made a report under OB No. 14/03/12/2022 and was given medical treatment and filled out a P3 form for injuries sustained from the assault.

29. The 3rd Respondent averred that his complaint was legitimate, and that the issue had been frustrated by the interference of some security officers, especially the DCIO in Malava who allegedly attempted to change witness statements. He deposed that even with the said interference, the DPP was of the view that sufficient evidence existed to institute charges against the Petitioners of robbery with violence.
30. In the second affidavit, the 3rd Respondent reiterated that he is improperly joined in the constitutional petition, arguing that no cause of action was disclosed against him. He nevertheless went on to describe the circumstances of the alleged robbery and assault, emphatically maintaining that it

would be unjust for the Petitioners to escape prosecution due to their social status as government officials. He asserted that the Petitioners have failed to prove that their constitutional rights were infringed upon and that the Petition was not specific but rather an elaboration of general allegations.

31. The 3rd Respondent concluded by stating that the legal process of prosecution was valid and fair, and that the Petition was an abuse of the court process meant to delay justice.

3rd Respondent's Submissions

32. The 3rd Respondent argues that the allegations against the Petitioners arise from a genuine criminal complaint in which he was violently assaulted and robbed of Kshs. 100,000/= being the proceeds from the sale of a piece of land, by the two Petitioners who are appointed Assistant Chiefs. The Respondent also says the occurrence was brought to the notice of Kabras Police Station immediately and recorded in OB No. 14/03/12/2022, and that there is medical evidence in the form of a P3 to substantiate his claims. He opines that the Petitioners are using constitutional protection in an attempt to avoid prosecution when they have not even

illustrated that the process has been abused or conducted unlawfully.

33. He submits that there is nothing to show that the investigations or the intended prosecution violate any of the Petitioners' rights under the Constitution. In his opinion, the criminal justice system operates according to the law, and the Petitioners have simply set out to avoid punishment through baseless allegations.
34. The 3rd Respondent submits that the DCI is constitutionally and statutorily mandated to investigate criminal conduct under the National Police Service Act, and the ODPP, pursuant to Article 157(10) of the Constitution, has the power to prosecute without needing consent from any authority. He emphasizes that no evidence has been placed before the court to suggest that either body has acted in excess of their mandate or with malice.
35. He maintains that investigations are not conducted in vain and are necessary to protect public interest and victims' rights. The 3rd Respondent argues that halting the investigations or prosecution at this stage would undermine the criminal justice process. He urges the court to dismiss the petition as premature, speculative, and lacking in merit,

as no trial has commenced and no rights of the Petitioners have been shown to be violated.

Analysis and Determination

36. The singular issue that emerges from the petition is whether the Petitioners have established a contravention and infringement of their fundamental rights and freedoms.
37. It cannot be gainsaid that the 1st Respondent has the power to institute criminal proceedings against the suspect based on reasonable grounds that the suspect is culpable for an offence. Article 157 of the Constitution of Kenya grants the DPP the mandate to initiate and undertake criminal proceedings against any person. This mandate, which is codified in Section 6 of the Office of the Director of Public Prosecution Act, gives the 1st Respondent unfettered powers to commence criminal proceedings independent of any person or authority, provided there are reasonable grounds to believe that the person is culpable for an offence.
38. In the case of **James Ondicho Gesami v Attorney General and two others [2012] KEHC 3308 (KLR)**, the court considered a petition seeking inter alia a conservatory order of injunction restraining the arrest, arraignment, and

prosecution of the petitioner on corruption charges. Mumbi Ngugi J, as she then was, stated thus:-

“...The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango Constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them.”

39. In the present case, the Petitioners allege that their intended arraignment and prosecution for robbery with violence is an abuse of power, abuse of the court process, and is unreasonable, unfair, and oppressive, principally because it is intended to scuttle criminal charges against the third respondent or to settle scores against them.

40. It is the Petitioners' case that the petition should be deemed unopposed as the Respondents did not file any replying affidavit. However, I note that the 1st Respondent filed a replying affidavit to the Notice of Motion seeking interim orders, and the said affidavit, sworn by Leina Davies, a prosecution counsel, addressed the issues raised in the petition. The said deponent also attached a copy of the

recommendations made by the 2nd Respondent to the 1st Respondent based on investigations carried out by the 2nd Respondent. Moreover, the said reply is fortified by the 3rd Respondent's response to the affidavit and the affidavits sworn in reply to the Petitioners' application for interim orders.

41. The Petitioners contend that the main trigger of the prosecution against them is the arrest and bringing the 3rd Respondent to the full force of the law and that this was a total abuse of power and arbitrary exercise of authority to achieve purposes wholly unconnected with the rule of law or the objectives of the system of administration of justice.

42. Indeed, it is well settled that whereas the DPP has wide powers in exercise of its constitutional mandate and statutory powers, he should act within the confines of the Constitution, and where it is demonstrated that he has infringed or will infringe or violate the fundamental rights and freedoms of a petitioner, the court should not hesitate to intervene. In **Commissioner of Police and the Director of Criminal Investigations Department and another v. Kenya Commercial Bank Limited and four others**

[2013] KECA 182 (KLR), the court held as follows:-

“By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution.”

43. The Respondents, through the affidavits sworn by the prosecution counsel on behalf of the 1st Respondent and the 3rd Respondent, vide an affidavit sworn by himself, have demonstrated that the 3rd Respondent lodged a complaint against the Petitioners and after investigations by the 2nd Respondent, it was established that there were sufficient grounds to have the Petitioners charged for the offence of

robbery with violence. It is not for this court to determine the veracity or otherwise of the competing claims advanced by the Petitioners and the 3rd Respondent/Complainant; that is the realm of the Magistrate's court. Mine is to determine whether there was a reasonable and probable cause. The reasonable and probable cause is well demonstrated in paragraph 11 of the 1st Respondent's replying affidavit and the letter dated 8th February 2023 attached to the petition. In the same letter, the 1st Respondent sets out the grounds upon which it decided that the Petitioners ought to be charged.

44. On their part, the Petitioners did not adduce an iota of evidence that their intended arraignment and prosecution is intended to frustrate the prosecution of Butali PMC S.O No. E097 of 2022 in which the 3rd Respondent was charged with incest. Additionally, no indication was espoused that the investigations as conducted occasioned a breach of the Petitioners' Constitutional rights. Further, the Petitioners did not proffer an explanation as to why after arresting the 3rd Respondent at Shikutse Junction, they opted to present him to Kabras Police Station 6kms away as opposed to Imbiakhalo Police Station which was only 1km away. This

lends credence to the Respondent's claims that he was assaulted and robbed by the Petitioners.

45. I have reviewed the letter dated 8th February 2023 and I believe that the same does not demonstrate any arbitrariness or capriciousness on the part of the 1st and 2nd Respondents. It is a well-tabulated and well-reasoned documentation of the chronology of events and evidence that culminated in the 1st Respondent's ultimate decision. The facts set out disclose criminal liability on the part of the Petitioners. Since the 1st Respondent has in its discretion made its decision to charge based on reasonable and probable cause, this court should exercise caution in interfering with their decision to charge. In the case of **Diamond Hasham Lalji and another v Attorney General and 4 others [2018] KECA 856 (KLR)**, the Court of Appeal held as follows :-

“Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases.

However, as the Privy Council said in Mohit v

Director of Public Prosecutions of Mauritius [2006]

5LRC 234:

“these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP’s decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...”

46. The High Court in the case of **Bernard Mwikya Mulinge v Director of Public Prosecutions and three others [2019] KEHC 9205 (KLR)** expressed itself thus:-

" 14. As has been held time and time again the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those

proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken *bona fides* since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon..."

47. Having carefully considered the Petition and the responses thereto while bearing in mind the evidence adduced, the law, and the cited authorities, I find that the Petition must fail. I therefore dismiss it with no order as to costs.
48. Those are the orders of the court.

Dated, signed and delivered at Kakamega this 31st day of October 2025.

A. C. BETT
JUDGE

In the presence of:

No appearance for the Parties

Court Assistant: Polycap

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