

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL AND JR DIVISION CONSTITUTIONAL
PETITION NO E003 OF 2024

LEON OTIENO ODONGO.....PETITIONER

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST
RESPONDENT

DIRECTOR OF CRIMINAL
INVESTIGATIONS.....2ND RESPONDENT

CHIEF MAGISTRATE COURT – MOMBASA..... 3RD RESPONDENT

JUDGMENT

1. The petitioner in this petition seeks to stop criminal proceedings against him in Mombasa Chief Magistrates’ Court Criminal Case No. E1770 of 2023 in which he has been charged with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code, cap. 63. To be precise, his prayers to this Honourable Court are as follows:

“a. A declaration be and is hereby issued that the 1st respondent’s initiation of criminal charges against the petitioner in Mombasa Criminal Case No E1770 of 2023, Republic v Leon Odongo is illegal, unlawful and unconstitutional and amounts to wanton abuse of the 1st and 2nd Respondents’ prosecutorial and investigative powers under Articles 243 and 157 respectively, of the Constitution of Kenya, 2010 and wanton abuse of the Court process.

b. An Order of Certiorari be and is hereby issued calling into this Honourable Court for purposes of being quashed and quashing the charges mounted against the petitioner before the 3rd respondent in Mombasa Criminal Case No E1770 of 2023, Republic v Leon Odongo in its entirety.

c. An Order of prohibition be and is hereby issued prohibiting the 1st and 2nd respondents from conducting any further investigations, harassment, intimidation, arrests and/or recommendation for prosecution against the petitioner with regard to the facts relating to and flowing from Mombasa Criminal Case No E1770 of 2023, Republic v Leon Odongo.”

The petitioner has also sought for costs of the petition.

2. I have not been able to find any affidavit sworn in support of the petition but there is one sworn by the petitioner in support of an application for conservatory orders. The application for conservatory orders has since been disposed of.
3. If peradventure, I may have missed the affidavit sworn in support of the petition I will proceed on the presumption that the depositions in the affidavit in support of the application for conservatory orders comprise the factual foundation of the petition.

4. According to this affidavit, on 27 December 2023, the petitioner was charged with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code, the particulars being that:

“LEON OTIENO ODONGO on the diverse dates between 30th October, 2023 and 10th December, 2023, within Mombasa County, jointly with others not before Court, with intent to defraud obtained cash Kshs. 790,000 from Jacqueline Walubwa Achwoka by falsely pretending that you were in position to secure for Jacqueline Walubwa Achwoka a vehicle make Toyota land cruiser V8 from Kenya Ports Authority, a fact you knew to be false.”

5. According to the petitioner, his prosecution is orchestrated to intimidate and to bring pressure to bear upon him following his decision to end his love affair with the complainant. It is his position that the money he is alleged to have obtained from the petitioner is just but some of the sums of money that he and the complainant would send each other in the course of their relationship.
6. The petitioner has sworn further that, since he was charged to the time of filing his petition, the 1st and 2nd respondents have failed to supply him with the prosecution witnesses’ statements and any documentary evidence they intend to rely upon in the prosecution of their case.

7. It is also alleged that the respondents have confiscated the petitioner's phone and, for this reason, he also seeks an order of this Honourable Court to have the phone released back to him.
8. Police constable Wycliffe Oguk swore a replying affidavit opposing the petition. He has sworn that on 16 December 2023, Jacqueline Walubwa Achwoka reported a case of obtaining money by false pretences contrary to Section 313 of the Penal Code. The complaint was against the petitioner and one Geoffrey Alemba. This report was recorded at the Directorate of Criminal Investigations office at Changanwe, in Mombasa and was entered in the occurrence book as OB 28/16/12/23.
9. According to the complainant, she had been defrauded of kshs 790,000/= paid on diverse dates to both the petitioner and the said Geoffrey Alemba. The two had held themselves out as being able to buy a Toyota Landcruiser for the complainant. In support of her complaint, the complainant presented certified M PESA statements and bank statements from the Kenya Commercial Bank detailing how the money had been sent and received by the petitioner and Alemba. The complainant only realized that she was being defrauded when the petitioner sent her a fake KRA e-slip on her Whatsapp account.
10. In the course of investigations of the complaint, constable Oguk recorded the complainant's statement and also collected the documents from the complainant in proof of the transactions allegedly received by the

petitioner and his accomplice. At the time the complaint was recorded, the complainant had paid a total sum of Kshs. 1,478,500/=.

11. The petitioner was eventually arrested on 23 December 2023 at the Junction mall in Nairobi by police officers from the Directorate of Criminal Investigations at Dagoreti. He was subsequently escorted and booked at Directorate of Criminal Investigations offices at Changamwe for processing. A phone, make iphone 14 promax was recovered from him and retained for investigation purposes. On 27 December 2023, the petitioner was arraigned for the offence of obtaining money by false pretence contrary to section 313 of the Penal Code.

12. In the course of the investigations, constable Oduk sought court orders in Mombasa Miscellaneous Application No. number E001 of 2024 to obtain certified subscriber registration detail for mobile number 0729599244, 0784599244 and 0774599244 which are alleged to belong to the petitioner and mobile number 0722353626 alleged to belong to Geoffrey. This was to enable the investigation officers confirm whether they had been in communication with the complainant through her mobile number 0727580749 and 0786526662 and whether they had indeed received monies from the complainant.

13. The petitioner's application to be released on bond was allowed on 2 January 2024 but the bond terms were to be given after a pre-bail report had been obtained from the probation office.

14. On 31 January 2024, the criminal case came up for pre-trial. On that date constable Oguk confirmed to the court that he was in possession of the petitioner's phone and that it was to be subjected to forensic analysis by cyber-crime unit to retrieve the WhatsApp texts and image of KRA E-slip that the petitioner had sent to the complainant. The court granted the investigation officers 30 days to avail evidence for forensic analysis. The case was to be mentioned again on 4 March 2023.
15. According to constable Oguk, the prosecution has overwhelming evidence against the petitioner and his prosecution is not a witch hunt and, in any event, the trial court is capable of determining whether the applicant is guilty or not.
16. Both parties filed written submissions which I have had the opportunity to consider.
17. The non-contentious facts that form the background of the petition are rather straightforward: a complainant made a report to the police that she had been swindled of her money by the petitioner and one other person; the police launched investigations into the complaint; in the course of investigations, they recorded a statement from the complainant and also gathered material which, in their view, comprise proof of the allegations against the petitioner; and, finally, they charged the petitioner with the offence of obtaining by false pretences.

18. The petitioner does not appear to dispute the fact that he received some money from the complainant; however, contrary to the complainant's claim, the money was received, not in furtherance of any particular transaction, but because the two had a relationship and that it was characteristic for them to send each other money in the course of their affair. According to the petitioner, his prosecution is a consequence of the petitioner's decision to end of his affair with the complainant. The latter is alleged to have employed the state machinery, in particular, the police, to intimidate him and to bring pressure to bear upon him as a result of the petitioner's decision.

19. The Directorate of Criminal Investigations is established under section 28 of the National Police Service Act. Although the office is headed by the Director of Criminal Investigations, it is "*under the direction, command and control of the Inspector-General*". (see section 28 of the Act).

20. The functions of the directorate have been outlined in section 35 of the Act. This provision of the law reads as follows:

35. Functions of the Directorate

The Directorate shall—

(a) collect and provide criminal intelligence;

(b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money

laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;

(c) maintain law and order;

(d) detect and prevent crime;

(e) apprehend offenders;

(f) maintain criminal records;

(g) conduct forensic analysis;

(h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157(4) of the Constitution;

(i) coordinate country Interpol Affairs;

(j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and

(k) perform any other function conferred on it by any other written law

21. It is thus, clear from the National Police Service Act, that amongst the functions the Director of Criminal Investigations is enjoined to undertake, are the tasks of detecting and preventing crime and also apprehending offenders. Further, **Section 24 (e)** of the **National Police Service Act** provides for functions of the Kenya Police Service to include investigation of crimes.

22.It follows that the Director of Criminal Investigations was quite in order and, more importantly acted within the law, when he launched investigations into the complainant’s complaint to establish whether an offence had been committed. Needless to say, it would have been impossible for the Director of Criminal Investigations to satisfy himself of the veracity of the complainant’s complaint and come to any conclusion whether indeed any offence known in law had been committed without undertaking investigations.

23.I am satisfied that there is nothing unconstitutional about the Director of Criminal Investigations conducting investigations into the complaint lodged against the petitioner. The Director’s actions are in tandem with section 35 (d) of the National Police Service Act and this Honourable Court cannot stand in the way of the Director’s execution of his statutory mandate.

24.This Honourable Court addressed this point *Muhiato v Director of Criminal Investigations & 2 others (Constitutional Petition E026 of 2023) [2024] KEHC 2093 (KLR) (29 February 2024) (Ruling)*, where it held as follows:

“22. There is no gainsaying that it is the duty of the police to investigate the commission of crimes. Accordingly, unless it is demonstrated that there is clear abuse of process for ulterior motives, the Court ought to be reluctant to intervene in the

exercise of lawful duty imposed not only by dint of Articles 244 and 245 of the Constitution but also by Sections 24(e) and 35 of the National Police Service Act.

23. Indeed, in Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another (2012) eKLR (supra), it was emphasized that: -

“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 case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

25.If, based on the complaint’s complaint, the police reasonably suspected the petitioner to have committed a crime they had the constitutional and statutory mandate, in fact, the obligation, to investigate the complaint. As to what “*reasonable suspicion*” entails, it has been defined by the Privy Council in *Privy Council Appeal No. 29 of 1968; Inspector Shaaban bin Hussein and othersChong Fook Kam and Another* as follows:

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; “I suspect but I cannot prove”. Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.”

26. As far as the prosecution of the petitioner is concerned, the Director of Public Prosecutions made his decision based on the evidence that had been gathered. In reaching this decision, the Director of Public Prosecutions exercised his discretion under article 157 (6) (a) of the Constitution, according to which he has the discretion to institute and undertake criminal proceedings against any person. This provision of the Constitution reads as follows:

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

27. The Director of Public Prosecutions does not exercise his powers under this provision at whim because under article 157(11), he is enjoined to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process, in

exercising the powers conferred upon him. In this scheme of things, this Honourable Court's task is to maintain the balance between protection of the rights of the individual against misuse of the Director of Public Prosecution powers and the need to maintain law and order, and in particular, the need to prosecute where circumstances are such that the prosecution is necessary.

28. Speaking of this balance, Lord Salmon expressed himself in **D.P.P versus Humphrey's (1976) 2 ALL ER 497 at 527-8** as hereunder:

“A judge has not and should not appear to have any responsibility for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to interfere. Fortunately, such prosecutions are hardly brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved”. (Emphasis added)

29. Although this statement was made in a case that was decided many years before the promulgation of the Constitution of Kenya, 2010, it is, in a way, a sum total of articles 157(6) (a) and 157(11) of the Constitution

and, to a greater degree, it captures the intention of the people of Kenya as expressed in those provisions of the Constitution.

30.If I may repeat, this Court's noble and constitutional duty is to ensure that the balance between the Director of Public Prosecution's exercise of his powers under article 157(6)(a) and the individual's enjoyment of his constitutional rights is maintained. No doubt, in navigating the question whether that balance holds in any particular case and, in particular whether the Director of Public Prosecution has abused his power, the court will have regard to article 157(11) and, among other things the court is enjoined to take into account under this provision, consider whether the larger public interest is served.

31.With this background in mind, it is not up to this court to interrogate what would otherwise be the petitioner's defence, in the event the trial court finds he has a case to answer, that he had an affair with the complainant and that any money given to him by the complainant was consequent upon their affair. That's the task of the trial court and not a constitutional issue.

32.In the ultimate, I am not persuaded that, as far as the prosecution of the petitioner is concerned, the Director of Public Prosecutions has abused his discretion or has exercised it for an improper purpose. There is no evidence that he has breached his duty to act fairly or that he has acted unreasonably. He has not acted, and it has not been demonstrated, to my

satisfaction, that he has acted *ultra vires* the Constitution or any other written law that prescribes the exercise of his powers. In short, I do not find any merit in the petitioner's petition. It is hereby dismissed.

Signed, dated and delivered on 7 November 2025

Ngaah Jairus
JUDGE