

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E176 OF 2021**

**MICHAEL NJENGA KAMAU**  
.....**PETITIONER**

**VERSUS**

**THE DIRECTORATE OF CRIMINAL INVESTIGATIONS.....1<sup>ST</sup>**

**RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup>**

**RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup>**

**RESPONDENT**

**DANIEL GACHINGIRI MATU.....4<sup>TH</sup>**

**RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....5<sup>TH</sup>**

**RESPONDENT**

**JUDGMENT**

*Petitioner's case*

1. The petitioner filed this petition, amended on 21<sup>st</sup> September 2021, challenging the respondents' action to arrest and prosecute him. The petitioner stated that on 5<sup>th</sup> May 2021, two police officers summoned him to the Directorate of Criminal Investigations Offices at Kiambu. They informed the petitioner that the 4<sup>th</sup> respondent had filed a complaint of forgery relating to work done for Liason Valuers Limited.

2. The petitioner presented himself to the DCI officers and was directed to record a statement which he was forced to sign. Later on, the 4<sup>th</sup> respondent joined the meeting in the investigation room and then briefly left with one of the police officers.

3. After the two returned to the room, police officers confined the petitioner in the room and directed him to surrender his phone, a Samsung A21S model, together with the password which the petitioner did. The police officers then asked the petitioner to clear with the 4<sup>th</sup> respondent so that the complaint could be withdrawn. The petitioner met with the 4<sup>th</sup> respondent in the evening of the same day when the 4<sup>th</sup> respondent demanded Kshs. 100,000 to withdraw the complaint but the petitioner declined.
4. On 19<sup>th</sup> August 2021, the petitioner was arrested and booked at Muthaiga Police Station. He was presented before Kiambu Chief Magistrate Courts the following day and charged in Criminal Case No. 1497 of 2021 with forgery. The petitioner denied

the charges and was released on a cash bail of Kshs. 50,000.

5. The petitioner asserted that the charges were based on illegally obtained evidence by police officers in violation of articles 31 and 49 of the Constitution; he (petitioner) was not informed of his rights as an arrested person; there was no court order authorising the investigating officer to take away his phone and the conduct of the police officers violated his rights guaranteed under articles 31, 47 and 49 of the Constitution.

6. The petitioner relied on the decisions in *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR; *Kennedy v Ireland* [1987] IR 587 and *Philomena Mbeti Mwilu v*

*Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR.

7. The petitioner again cited article 47(1), (2) of the Constitution and the decisions in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR; *Dry Associates Limited v Capital Markets Authority and Another Interested Party Crown Berger (K) Ltd* [2012] eKLR and *Kenya Human Rights Commission & another v Non-Governmental Organizations Coordination Board & another* [2018] eKLR to contend that the 1<sup>st</sup> respondent's action was unfair, unreasonable, irrational and illegal.

8. The petitioner maintained that investigating officers violated his right to fair administrative action; privacy guaranteed under articles 31 and those of an arrested person guaranteed under article 49 of the Constitution. The petitioner relied on the decisions in *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of jurists Kenya Chapter (Amicus Curiae)* (supra) and *Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others* [2019] eKLR and *Joram Mwenda Guantai v The Chief Magistrate* [2007] eKLR.

9. The petitioner therefore sought the following relief:

*1. A declaration that the action of the 1<sup>st</sup> respondent's officers to confining the petitioner*

*inside the investigation room and not allowing him to leave unless he surrenders his phone together with its password was an act of arresting the petitioner.*

*2. A declaration that the action of the 1<sup>st</sup> respondent's officers to confiscate the phone of the petitioner and forcefully take its password infringed the rights of the petitioner under article 31 of the Constitution is illegal, unconstitutional and void.*

*3. A declaration that the action of the 1<sup>st</sup> respondent's officers to detain the petitioner in the investigation room until he gives out his phone and password without informing and according him of his constitutional rights under article 49, infringed his rights under article 49 is illegal, unconstitutional and void.*

4. *Writs of mandamus directed at the 1<sup>st</sup> respondent and anyone acting under him to give back the petitioner his mobile phone, Samsung A 21S model.*
5. *Writs of certiorari quashing the case in Kiambu Chief Magistrate's Criminal Case No. 1497 of 2021.*
6. *Writs of certiorari quashing the charge sheet dated 20<sup>th</sup> August 2021 in Kiambu Chief Magistrate's Criminal Case No. 1497 of 2021.*
7. *Writs of prohibition prohibiting the 1<sup>st</sup> and 5<sup>th</sup> respondents from charging and prosecuting the petitioner with forgery arising from the information obtained from his mobile phone, Samsung A21S model that was confiscated.*

8. *An order that the petitioner be compensated for violation of his constitutional rights by the respondents.*

9. *Any other further orders, directions, declarations and remedies as this Honourable court may deem fit and just in the circumstances.*

10. *An order on costs.*

*1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' case*

10. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents opposed the petition through grounds of opposition and a replying affidavit sworn by CI Geoffrey Ndatho.

*Grounds of opposition*

11. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended that the petition is premature and this court lacks jurisdiction on grounds that the petition addresses concerns relating to disciplinary offences committed by police officers which falls under police oversight enforcement agencies or investigative bodies.

*Replying affidavit*

12. In the replying affidavit, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents stated through CI Ndatho, that on 4<sup>th</sup> May 2021, the 4<sup>th</sup> respondent reported a complaint that a valuation report in respect of parcel of land Kajiado/Kisaju 6100 the 3<sup>rd</sup> respondent had done on instructions from Family Bank, Jomo Kenyatta International Airport Branch with a value of Kshs. 1million had been changed.

13. According to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, on 3<sup>rd</sup> May 2021, the 4<sup>th</sup> respondent received a call from Family Bank inquiring about the procedure he used to arrive at the amount of Kshs. 2.5 million indicated in the valuation report. The 4<sup>th</sup> respondent visited the Bank on 4<sup>th</sup> May 2021 and on getting a copy of the valuation report, he noticed that amount had been altered from the original valuation of Kshs. 1 million to Kshs. 2.5 million without his knowledge.

14. Following the complaint, police officers commenced investigations and summoned people of interest, including the petitioner to record statements. The petitioner voluntarily recorded a statement on 6<sup>th</sup> May 2021 and handed over his mobile phone for Digital Forensic Examination and

signed the Consent dated 6<sup>th</sup> May 2021 to Search Digital Media.

15. On 18<sup>th</sup> May 2021, the mobile phone was forwarded to the Cyber Lab through an exhibit Memo Form dated 18<sup>th</sup> May 2021. Upon examination, the Cybercrime Forensic Unit forwarded a report dated 3<sup>rd</sup> June 2021 with their findings.

16. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents stated that to aid further investigations, a copy of the valuation report from the bank; a copy of the valuation report from the 4<sup>th</sup> respondent; 4<sup>th</sup> respondent's specimen signature and the company seal were sent to the document Examiner through an Exhibit Memo Form dated 27<sup>th</sup> May 2021. The document Examiner established that the Bank valuation report presented

to Family Bank was forged and the amount changed from Kshs. 1 million to 2.5 million.

17. The investigations file was forwarded to the 5<sup>th</sup> respondent who recommended that petitioner be charged with the offence of Forgery contrary to section 393 as read with section 349 of Penal Code.

18. On 19<sup>th</sup> August 2021, the petitioner was arrested and appeared in court on 20<sup>th</sup> August 2021 to answer charges in Criminal Case No. 1497 of 2021. They asserted that they acted within their mandate.

19. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents maintained that they did not violate the petitioner's right to privacy since he voluntarily gave his phone to assist in investigation as evidenced by the consent to search digital media. They relied on the decision in *Samson*

*Mumo Mutinda v Inspector General National Police Service & 4 others* [2014] eKLR and *Abdulkadir Anod Dole & another v Republic* [2017] eKLR.

20. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents argued that the petitioner's allegation that he was compelled to surrender his phone is not true and relied on sections 107(1) and 109 of the Evidence Act on the burden of proof. They also relied on the decision in *Peter Ngari Kagume & 7 others v Attorney General* [2009] eKLR.

21. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents further relied on the decisions in *Kasina v Attorney General & another* [2024] KEHC 7573 (KLR) and *Faraj & 3 others v Police & 2 others* [2022] KEHC 287 (KLR). They cite the decision in *Republic v Mohammed & another*

[2019] KESC 48 (KLR) and *Mwaura v Republic* [2024] KEHC 6362 (KLR) to urge the court not to interfere with criminal proceedings before the trial court unless it is demonstrated that the proceedings are an abuse of the court process or were instituted in violation fundamental rights and freedoms.

22. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents again relied on the decision in *Abdiwahab Ibrahim Ali & another v Inspector General of the National Police Service & 3 others* [2017] eKLR and urged the court to dismiss the petition.

*4<sup>th</sup> respondent's case*

23. The 4<sup>th</sup> respondent opposed the petition through a replying affidavit. The 4<sup>th</sup> respondent stated that the

petitioner was an assistant valuer with Liason Valuers Ltd in the valuation department. On 3<sup>rd</sup> May 2021, the office received a complaint on a suspected overvaluation report from Family Bank. Upon reviewing the report, the 4<sup>th</sup> respondent noticed that the pages containing signatures had been altered, the company seal had been replaced and the submitted reports were drafts earlier done by the petitioner pending approval from directors, save for the values.

24. The 4<sup>th</sup> respondent undertook a preliminary review and established that there were disparities in that whereas the original market valuation was Kshs. 1 million, the altered report had Kshs. 2.5 million. The 4<sup>th</sup> respondent reported the matter to the 1<sup>st</sup> respondent and investigations commenced.

25. The 4<sup>th</sup> respondent stated that on establishing that there were other forged reports, the office conducted its own internal investigations. It liaised with First Community Bank, Nakuru Branch, Equity Bank, Nakuru, Gate House Branch and Kenya Commercial Bank, Nakuru Branch where further discrepancies were discovered. The petitioner was colluding with one Miriam Wambui Nderitu to undertake instructions that the office was not aware of, but which were done in the name of the office.

26. On 7<sup>th</sup> May 2021, the petitioner and another member of staff were suspended and notice to show cause issued. Miriam Wambui Nderitu admitted to gross misconduct but the petitioner denied the allegations.

27. The 4<sup>th</sup> respondent received a call from the petitioner requesting for a meeting. The petitioner attended the meeting with a Mr. Daniel Wanyama, a bank official also implicated in the criminal investigation. The two owned up to their mistakes and offered money as compensation, which the 4<sup>th</sup> respondent declined.

28. The 4<sup>th</sup> respondent relied on section 6 and 7 of the Independent Policing Oversight Authority Act, 2011 for the proposition that the petitioner's complaint should have been lodged with the IPOA before approaching this Court. The 4<sup>th</sup> respondent also relied on the decision in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR and urged the court to dismiss the petition.

*5<sup>th</sup> respondent's case*

29. The 5<sup>th</sup> respondent (the DPP) opposed the petition contending that the decision to charge the petitioner was based on the sufficiency of the evidence with a realistic prospect of conviction. The DPP denied that violating the Constitution, the law or any rights and fundamental freedoms in making the decision to prosecute. The DPP maintained that he made the decision in line with the National Prosecution policy.

30. The DPP asserted that the accuracy and correctness of evidence or facts gathered are best assessed and tested before the trial court where the petitioner's constitutional rights will also be safeguarded. The DPP maintained that he

discharged his mandate within the Constitution and the court should only interfere if it is shown that he acted *ultra vires* the Constitution or the law, which had not been demonstrated.

31. Regarding the alleged illegally obtained evidence, the DPP argued that the allegation is unfounded because the petitioner admitted to handing over his mobile phone and password to police officers. Moreover, criminal proceedings are based on evidence other than that obtained from the petitioner's phone and the complaints raised can be sufficiently addressed before the trial court. The DPP relied on the decision in *Saisi & 7 others v Director of Public Prosecutions & 2 others* [2023] KESC 6 (KLR).

32. The DPP again cited the decisions in *Hussein Khalid and 16 others v Attorney General & 2 others* [2020] KESC 30 (KLR); *Anarita Karimi Njeru v Republic* [1979] eKLR and *James Ondicho Gesami v Attorney General & 2 others* [2012] KEHC 3319 (KLR) and urged the court to dismiss the petition with costs.

### *Determination*

33. 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 Constitution, the law and or the petitioners' rights

and fundamental freedoms and should therefore be stopped.

34. The petitioners' case is that the investigations and his subsequent arrest and prosecution were conducted in violation of the Constitution; his right to privacy and the right of an arrested person guaranteed under articles 31 and 49 of the Constitution. According to the petitioner, investigating officers forced him to surrender his phone and the password to them in violation of his rights and therefore the decision to charge and prosecute him was in bad faith and in violation of article 157(11) of the Constitution and his rights and fundamental freedoms.

35. The respondents maintained that they acted in accordance with the Constitution and the law and that the petitioner voluntarily handed over the phone and password and signed a consent to that effect. They denied violating the Constitution the law or the petitioner's rights and fundamental freedoms.

36. Police officers under the command of the 2<sup>nd</sup> respondent undertake investigations pursuant to powers conferred on them by the National Police Service Act, to investigate any reported crimes. In that respect, police officers discharge statutory mandate in the performance of their functions when investigating complaints made over crime.

37. 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. Police officers 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 concluded that a crime has been committed, the investigation file is forwarded to the DPP to make a decision on whether the evidence gathered is sufficient to mount prosecution.

38. Where investigations conclude that an offence had been committed and the DPP agrees with that conclusion, the DPP makes a decision to prosecute 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. If, however, the DPP concludes that there is no sufficient evidence to prosecute, the file is closed and that is the end of the matter. Each side would have discharged its constitutional and or statutory mandate.

39. The DPP, in exercising his discretion, does not require consent from anybody or authority. Article 157(11), however, demands that when the DPP 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).

40. The law is settled that where police officers 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 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).

41. The constitutional text in article 157(10) is clear that the intention was to enable the DPP carry out 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 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).

42. An aggrieved 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 such 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. On the other hand, 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 rights enshrined in the Constitution are not only protected but are also enforced. (*Fose v Minister of safety and Security* (CCT 14/1996) [1997] ZACC 6.

43. 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 will invoke article 23(3) of the Constitution to grant an 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.*”

44. I have considered the petition, response and arguments by parties. The petitioner's grievance is that investigations against him violated his right to privacy and those of an accused person guaranteed under articles 31 and 49 of the constitution. With regard to article 31, the petitioner argued that the police forced him to surrender his cellphone and its password. He therefore maintained that the prosecution was initiated in bad faith in violation of article 157(11) of the Constitution.

45. The petitioner's argument, as I understand it, is that investigations violated his rights and the decision to prosecute him was in bad faith, 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.

46. Courts have consistently stated that a claim of 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, his rights and fundamental freedoms had been violated or threatened in contravention of the Constitution and or the law.

47. 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.*

48. In short, the Supreme Court was of the view, 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.

49. The petitioner's complaint is on both investigations and the decision to prosecute him. Police officers were exercising their mandate under the law and had an obligation to investigate any possible commission of crime in the discharge of that statutory mandate. The argument that police

investigations were conducted in violation of the Constitution or the law, has been denied, with respondents stating that the petitioner handed over his cellphone and password voluntarily.

50. The petitioner did not show how his right as an arrested person was violated apart from merely alleging that police officers directed him to settle the matter with the 4<sup>th</sup> respondent and that he was forced to surrender his phone.

51. The petitioner did not adduce evidence to contradict the respondents' claim that he voluntarily handed over his cellphone and the password and signed a consent to that effect given that the petition was based on affidavits and written submissions only without cross examination to ascertain the veracity of either side's claim. The

respondents maintained that investigations disclosed commission of crime and that was why they forwarded the file to the DPP for his decision.

52. On his part, the DPP made the decision to charge and the petitioner did not show that the DPP did anything in violation of the Constitution, the law or his rights and fundamental freedoms in making that decision. The petitioner's claim that the decision to prosecute him was made in bad faith was not explained.

53. The petitioner can raise the issue of how evidence was obtained and demonstrate such fact during trial since it would require calling of evidence to demonstrate violation of rights so that the trial court can make a determination on whether to admit such evidence or not it. 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 cases.

54. A petitioner cannot therefore 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 did 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.

55. A party claiming violation of rights and fundamental freedoms must therefore discharge the burden placed on him/her and demonstrate clear 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 acted contrary to constitutional provisions in the Bill of Rights that protect rights and fundamental freedoms, or that they failed to act as required by the Constitution or the law. The petitioner failed to do so in this petition.

56. Consequently, and for the above reasons, 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 signed at Nairobi this 4<sup>th</sup> Day of February 2026**

**E C MWITA  
JUDGE**

**Delivered and countersigned this 5<sup>th</sup> Day of February 2026**

**L N MUGAMBI  
JUDGE**

ORIGINAL