



Onyango v Chief Magistrate’s Court at Milimani & 2 others (Miscellaneous Application E075 of 2024) [2026] KEHC 2019 (KLR) (Judicial Review) (19 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E075 OF 2024
JM CHIGITI, J
FEBRUARY 19, 2026**

BETWEEN

KELVIN OTIENO ONYANGO EX PARTE APPLICANT

AND

CHIEF MAGISTRATE’S COURT AT MILIMANI 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

JUDGMENT

1. The Application that forms the subject of this judgment is the one dated 9th July 2024 wherein the Exparte Applicant seeks for orders;
 1. That Exparte Applicant be granted a judicial review orders of Certiorari to move into this court for purposes of being quashed, the Charge Sheet dated 26th February, 2024 in criminal case number E196/2024 before the Chief Magistrate’s court, Milimani and a judicial review order by way of Prohibition prohibiting the Respondents from initiating any other criminal charges now and or in future against the accused person based on similar facts and similar evidence before any other courts of law.
 2. Such further or other orders as this Honorable Court may deem fit and just to grant.
 3. That the cost be in the cause.



The Applicant's Case;

2. It is the Applicant's case that the Respondent raided his premises without a search warrant. It is the Applicant's case that in the process the Respondent planted evidence on him and was forcing him to sign an inventory.
3. He argues that he was arrested on 22nd February 2025 and released on 26th February 2026 which means that he was detained beyond the Constitutionally allowed timelines under Article 49 of *The Constitution*.
4. The Applicant has moved the court seeking the intervention for the order sought in the Application.

Ex-Applicant's Written Submissions;

5. The Applicant submits that the decision to charge him was tainted by malice, based on unlawfully obtained evidence and aimed at punishing him extra judicially.
6. He placed reliance in the case of *Anyango v AG & Others* [2024] KEHC 254, where the court outlined four elements of malicious prosecution: Institution of criminal proceedings; Proceedings ended in the Applicant's favor; lack of reasonable cause; and malice on part of the prosecution.
7. He submits that his rights under Article 47 and Section 4 of the *Fair Administrative Action Act* were violated when the police exercised their discretion arbitrarily, and without lawful procedure or justification.
8. Article 23(3) (f) of *the Constitution* provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including an order of judicial review.
9. More recently in *Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 a 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) the court stated that: "ft is our considered opinion that the framers of *the Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority."
10. Article 49(1)(f)(i) of *the Constitution* of Kenya, 2010 provides that an arrested person shall be brought before a court as soon as reasonably possible but not later than 24 hours after being arrested.
11. Unjustified detention beyond 24 hours violates Article 49(1) (f) and should attract constitutional remedies including declarations of rights violations and compensation.
12. The Applicant was held for four days (4) in detention without being presented before a court in violation of *the Constitution* and applicable criminal procedure laws.
13. In *Otieno & 3 Others v IG of Police & 2 Others* [2025] KEHC 2754, the High Court held that detention beyond 24 hours without lawful justification or court extension is unconstitutional, and awarded damages for violation of Article 49. The court stated; "The 24-hour rule is inviolable unless compelling reasons are presented in court - and such reasons must be documented, transparent, and subject to judicial oversight." - Otieno (2025).
14. Article 28 protects the right to dignity, and Article 29(f) prohibits cruel, inhuman or degrading treatment.
15. The Applicant submits that the Respondent subjected the Applicant to humiliation before his staff when they raided his office to conduct the search and proceeded to arrest everyone in the premises, that



- the Applicant was treated with opprobrium when he was later detained unlawfully and let the other members free and never charged.
16. It is his case that the subsequent prosecution based on irregular investigations and tainted evidence amounts to denial of the Applicant's right to fair trial under Article 47.
 17. The Respondents forcefully entered the Applicant's private residence and conducted a search while they arrested him and others in the premises, without informing him why they were there, what they were searching for, who were the complainants, forcing him to sign foreign documents and eventually taking him to detention for Four (4) days and denying him bail/bond.
 18. The applicant submits that the Respondents violated the legal safeguards under Sections 118 and 122 of the Criminal Procedure Code (Cap 75) by unlawfully conducting a search without a valid warrant issued or letting the Applicant understand why they were in his premises.
 19. The Applicant's arrest, assault and prosecution was carried out maliciously, and without reasonable cause, amounting to an abuse of public power and malice.
 20. In *Buigut v EACC & Others* [2024] KEHC 4536, the court reiterated that a warrantless search is unconstitutional unless justified under limited exceptions, none of which applied in the Applicant's case.

“State officers are bound by Article 31; they must obtain lawful search warrants even in active investigations unless an exception is clearly present.” *Buigut* (2024).
 21. The Applicant also rely on the case of *Republic -vs.- Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 other* [2015] eKLR where the Court held;

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”
 22. He also submits that the documents recovered from the Applicant's office does not bear any of his signatures, has never been used and remain strange to the Applicant.

The 2nd, 3rd, 4th and 5th Respondent's case;

23. The Application is opposed by the 2nd, 3rd, 4th and 5th Respondents who argue that they received intelligence that the Applicant's premises on 6th floor Wu yi plaza was being used for purpose of a gold scam activity.
24. They entered the said premises and found licenses within the Applicant's premises, which were later on found to be forged. The argued that the Applicant signed the inventory voluntarily.
25. It is further their case that upon forwarding the file to the office of the director public prosecution the director invoked the decision to charge guidelines in correctly arriving at a decision that there was a prima case calling for the Applicant to be charged. He consequently directed that the Applicant be charged with the offences as set out in the charge sheet.



26. It is further their case that the Respondents' case that they acted within the law and that the Application should be dismissed.

The 2nd, 3rd And 4th Respondents' Submissions;

27. The main grounds for the orders sought is that the criminal charges preferred by the 2nd, 3rd and 4th vide Milimani Chief Magistrate's Court Criminal Case No.E196 of 2024 is based on illegally obtained evidence is documents and that the Respondents had violated his fundamental rights and freedoms during the arrest and after the arrest thus, the court should intervene and have the charges preferred against him quashed and the 2nd, 3rd and 4th Respondents herein prohibited from initiating any criminal charges based on the facts obtaining in the instance Application.
28. Article 47 of *the constitution* provides for the right to Fair administrative action. It states that every person has a right to Fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Any person likely to be adversely affected by administrative action, he/she has the right to be given written reasons for the action.
29. *Fair administrative action Act*, 2015. The Act amplifies Article 47 of *the constitution*. Under section 4 of the said Act, the rights of a person to whom a decision to be made relates to, are exhaustively provided for, which includes; the person to be heard and be allowed to make presentation be given prior notice and be offered reasons for the decision made.
30. Reliance is placed in the case of Public Procurement Administrative Review Board & Another Exparte Intertek Testing Services (EA) PTY Ltd. & Authentix Inc & 2 Others Justice A.K. Ndungu quoting the case of Pastoli -Versus- Kabale District Local Government Council & Others (2008)2 EA 300 where the court had held as follows;
- “In order to succeed in an Application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards..... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observation of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision”.
31. In the case of Municipal Council of Mombasa -Versus- Umoja Consultants Ltd (2002) eKLR where the Court of Appeal where the Court of Appeal had held as follows;

“Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issue as to whether the decision makers had the



jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

32. Reliance is also placed in the case of Republic -Versus- County Government of Kiambu Exparte Robert Gakuru & Another (2016) eKLR where Justice G.V. Odunga quoted the Halsbury’s Laws of England 4th Edn.Vol.1(1) para 12-page 270 which state;

“The remedies of quashing orders (formerly known as orders of certiorari), prohibition orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus) ...are all discretionary. The court has a wide discretion whether to grant relief at all and if so what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief.....”

33. The Supreme Court of Kenya’s decision of Dande & 3 Others -Versus- Inspector General of Police & 5 Others (Petition 6(E007),4(E005) & 8(E010) OF 2022(Consolidated) [2023] KESC 40(KLR) (16 June 2023) (Judgment) the court held that judicial review is no longer a strict administrative law remedy but also a constitutional fundamental rights enshrined in *the constitution* hence the court ought to conduct a merit review of the questions before it.
34. From the foregoing, it’s clear that besides the court considering the procedural propriety of the decision, legality, rationality and proportionality of the decision, it has to review the entire material placed before it to consider its merits much as the court the court has wide discretion on the grant of the orders sought herein, the said orders are not granted as a matter of right to the Applicants.
35. The 2nd, 3rd and 4th Respondents wish to submit that they have not infringed any of the Petitioner’s fundamental rights and freedoms, particularly, article 25, 27, 47, 48 and 50 of *the Constitution* as claimed.
36. The Investigation Officer indicated that they had received intelligence that there was an office within WU-YI PLAZA in Kilimani area where unsuspecting members of the public were being duped into gold scam business and upon raiding the place, they recovered several documents as indicated at paragraph 6 of the said affidavit, which documents upon authentication by the relevant authority i.e. the Ministry of Mining were found to be fake.
37. The 3rd Respondent, who upon perusal of the same concurred with the 2nd and 4th Respondent that an offence had been disclosed from the evidence presented.
38. Under Section 24 read with Section 35 of the *National Police Service Act*,2011 the 2nd and 4th Respondents are mandated among other duties to prevent and detect crime, collect criminal intelligence, investigate crime and apprehend offenders.
39. Further, Section 29 of the Criminal Procedure Code Cap 75 Laws of Kenya as read with Section 58 of the *National Police Service Act*,2011 provides for the circumstances and situations under which the officers of the 2nd and 4th Respondents may arrest suspects without a warrant of arrest such situation includes where the police suspect upon reasonable grounds that one has committed or is about to commit a felony. They submit that it was therefore, in the exercise of their Constitutional and statutory mandate to investigate and arrest the Applicant herein.



40. It was also in exercise of the 3rd Respondent's mandate as enshrined under Article 157 of *the constitution* as read with the ODPP Act, 2013 to peruse the evidence availed by the 2nd and 4th Respondent to satisfy itself that the same meets the threshold before the charges before court against the Applicant were preferred against him.
41. They submit that in the reception of the intelligence report and subsequent arrest of the Applicant and arraignment in court, the 2nd, 3rd and 4th Respondents herein acted within the law as they exercised their respective mandates lawfully.
42. They submit that the decision to have the Applicant herein charged in court had been arrived at impartially, properly and professionally.

Analysis and determination:

The court has to determine the issues;

1. Whether the Applicant is entitled to the prayers sought.
 2. Who shall bear the costs.
43. In order to determine whether or not the Applicant has made out a case he must demonstrate and prove that the prosecution and those charged with the responsibility of making the decisions to charge acted in an illegal or an unreasonable manner.
44. In the case of *Republic vs Commissioner of Police and Another Ex parte Michael Monari & Another* (2012) eKLR it was held:

“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. 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”.

45. In the Ugandan case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA 300, that:

“In order to succeed in an Application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.



Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

46. The entry into the Applicant’s premises without a search warrant, no doubt, offended Article 31 *the constitution* which guarantees Applicant to the right privacy.
47. Article 47 of *the Constitution*, which provides for the right to fair administrative action which must be safe guarded whenever an investigation or an arrest of a suspect is being executed.
48. Section 7 of the *Fair Administrative Action Act* provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. Any violation of Article 31 of *the Constitution* amounts to and or goes hand-in-hand with the abuse or infraction of the right fair administrative action as guaranteed under Article 47.
49. Anything that is done in breach of Articles 31 and 47 of *the Constitution* amounts to an illegality. It is tainted with procedural improprieties. Everybody is entitled to the liberty and at 49 of *the constitution*. Nobody should be detained beyond 24 hours in the event in the case of an offense like the one the Applicant is said to have committed.
50. The court has looked at the charge sheet and noted that the Applicant was arrested on 22 February 20 2025 and released on 26 February 2025.
51. The Applicant was over detained without any justification in violation of Article 49 of *the Constitution*. Any decision to charge an accused person who has been taken through such a process amounts to an illegality which this court cannot countenance.
52. The upshot of the forgoing is that the impugned criminal proceedings that are pending in the criminal court cannot culminate into a legally sound conviction.
53. If an Applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this Court will not hesitate in putting a halt to such proceedings, as that falls squarely within its mandate as a judicial review Court.
54. The Applicant has also sought orders of prohibition.
55. In Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [2022] eKLR, the Court rendered itself thus:

“The Order of "Prohibition" issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi’s Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction.”

“Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful



decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself."

56. It is my finding and I so hold that the issuance of prohibition order as sought will offer protection to the Applicant from illegal proceedings and I so hold.

Determination:

57. The Application has merit.

Costs;

58. Costs will follow the event. This court finds that the applicant is entitled to cost.

Order:

The Notice of Motion dated 9th July 2024 is allowed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY 2026.

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J. CHIGITI (SC)

JUDGE

