National Social Security Fund v Kiprono & 2 others (Civil Appeal 613 of 2019) [2026] KECA 376 (KLR) (27 February 2026) (Judgment)

Neutral citation: [2026] KECA 376 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 613 OF 2019

SG KAIRU, K M'INOTI & P NYAMWEYA, JJA

FEBRUARY 27, 2026

BETWEEN

THE NATIONAL SOCIAL SECURITY FUND ..... APPELLANT

AND

WILLIAM KIBET KIPRONO ..... 1ST RESPONDENT

KENYA WILDLIFE SERVICE ..... 2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT NAIROBI ..... 3RD RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (D. Chepkwony, J.) dated 29th March 2019inHC. Misc. JR. Application No. 467 of 2024)

JUDGMENT

1. The National Social Security Fund (NSSF), the appellant in this appeal, is challenging a judgment delivered by the High Court at Nairobi (Chepkwony, J.) on 29th March 2019. In that judgment, the High Court quashed, by an order of certiorari, criminal charges instituted by NSSF against William Kibet Kiprono (Kiprono) and Kenya Wildlife Service (KWS) the 1st and 2nd respondents respectively, for failure to pay monthly contributions to NSSF contrary to Section 36A of the repealed NSSF Act (repealed under Section 72 of the current National Social Security Fund Act which commenced on 10th January 2014).

2. On 3rd November 2014, NSSF charged Kiprono and KWS before the Chief Magistrate#s Court at Nairobi, being Criminal Case No. 289 of 2010, with 12 counts of the offence of failure to pay contributions contrary to Section 36A of the repealed NSSF Act. Under the separate counts, NSSF asserted that Kiprono and KWS had refused without any lawful excuse to pay the monthly contributions which they were legally required to pay. In relation to Kiprono, it was averred in the

charge sheet that he "was at all material times the Managing Director of KWS acting in control and management of its affairs."

3. To forestall the prosecution, Kiprono and KWS moved the Judicial Review Division of the High Court at Nairobi with an application dated 11th December 2014, being Miscellaneous Application No. 467 of 2014. They sought and obtained leave to apply for an order of certiorari to quash the said charges and an order of prohibition directed at NSSF or its officers prohibiting them from prosecuting or proceeding with their prosecution. They also sought was an order to prohibit the Chief Magistrate#s Court (the 3rd respondent) from hearing or entertaining the criminal charges.

4. The grounds on which Kiprono and KWS sought to quash the charges and to prohibit their prosecution as set out in the application, the statutory statement, and in the supporting affidavits sworn by Kiprono and by Valentain Kanani, KWS#s Human Resources Manager, were that: the charges related to offences allegedly committed between 16th May 1990 and 16th April 1991 well before Kiprono#s appointment as a director of KWS on 1st October 2012; that KWS established a staff superannuation scheme on 1st July 1991 to take care of the pensions of its employees; and that prior to 1st July 1991, all the permanent employees of KWS were still members of the Government Pension Scheme and were exempt from making any contributions to NSSF by dint of Section 1 of the Second Schedule to the NSSF Act.

5. They asserted further that with effect from 1st July 1991, KWS employees were declared to be in „public service# within the meaning of the *Pensions Act* and therefore non-contributors to NSSF; that the prosecution was brought maliciously and in bad faith with the aim of embarrassing Kiprono by dragging him through unnecessary criminal proceedings and with the aim of arm twisting KWS to pay the contributions; that in any case, NSSF had the option of commencing civil proceedings for the recovery of the contributions but elected to use criminal prosecution to force payment; and that in the circumstances NSSF was abusing its prosecution powers.

6. In opposition to the application, Hilary Mwaita, a Regional Manager of NSSF deponed in his replying affidavit that KWS was established in 1989 and commenced operations in January 1990; that KWS fell within the classification of a contributing employer under the provisions of the NSSF Act and the regulations thereunder and was required to register with the NSSF; the KWS did in fact apply for registration as an employer on 5th June 1990 and received notification of registration as a contributing employer on 5th July 1990; that by the time KWS made the application for registration it declared that it had employed 5,252 as regular workers and employed no casual workers; and that KWS then commenced remitting contributions and submitting monthly remittances to NSSF;

7. It was deponed that sometime in 2006, NSSF discovered that KWS was underpaying; that following an inspection, NSSF established that KWS had not been remitting contribution in respect of all its employees; that the inspection further revealed that KWS maintained two separate payrolls, one for contract/casual workers and the other for permanent and pensionable employees; that KWS was not making remittances with respect to the latter category; and that between April 1990 and July 2006, KWS had underpaid contributions in the amount of Kshs.100,052,720.00.

8. According to NSSF, what followed thereafter was baseless resistance by KWS to make remittances on claims that it was exempt on account of having been declared a „public service#; and claims that it had the Staff Superannuation and Staff Retirement Benefits Scheme. NSSF asserted that KWS#s application for exemption to the Minister for Labour on the basis that it had the Staff Superannuation Scheme was rejected by the Minister in November 2009. That KWS persisted in its non-compliance whereupon NSSF issued it with notice of intended prosecution for non-compliance with the NSSF Act.

9. NSSF stated that KWS thereafter requested for time to address the matter, sought an opinion from the Attorney General who advised that KWS was liable to make contributions despite which, and despite the indulgence granted to it, KWS persisted in default hence the charges preferred against it for failure to pay and for non-compliance with provisions of the NSSF Act with the knowledge, connivance and consent of Kiprono since his appointment as acting Director General and Chief Executive Officer of KWS.

10. Having heard the parties, the learned Judge of the High Court identified two main issues for determination. First, whether Kiprono and KWS were subject to the NSSF Act and whether the intended prosecution of Kiprono was irregular. Secondly, whether the charges against Kiprono and KWS for failure to pay contributions contrary to Section 36A of the NSSF Act were proper and whether they should be terminated.

11. As to whether the prosecution of Kiprono was irregular, the learned Judge referred to Section 23 of the Penal Code; noted that Kiprono was not a director of KWS in 1990 and 1991 when the alleged offence was committed and then concluded in paragraph 28 of the judgment as follows:

> " 28. In my view, the exceptions in Section 23 of the Penal Code favour the 1st ex-parte applicant's case. The 1st ex-parte applicant by virtue of him not having been a director of the 2nd ex-parte applicant at the material time was not responsible for any act or omission on his part. Further, the 1st ex-parte applicant could not have known that the offence was being committed or intended to be committed or had been committed. As a result, the 1st ex-parte applicant could not take any reasonable steps to prevent the commission of the offence. While the charges in question were preferred at a time when the 1st ex-parte applicant was a director of the 2nd ex-parte applicant, I do not find that the 1st ex-parte applicant could have been criminally liable for acts and/or omissions committed at a time when the 1st ex-parte applicant had no relationship with the 2nd ex-parte applicant."

12. As to whether the charges brought by NSSF against Kiprono and KWS are proper, the Judge stated that NSSF had not contested that KWS had in existence a Superannuation Scheme and that while NSSF "offers the basic social security" there is no reason why an employer should be compelled to make contributions to NSSF if the employer is contributing to an established Pension Scheme acknowledged under the *Pensions Act* or approved by the Minister.

13. The Judge found that KWS is "exempted from making contributions" to NSSF "by virtue of the Second Schedule to the NSSF Act" to which KWS#s "permanent and pensionable employees fall under the first category of persons exempt from making contributions". The Judge referred to Section 36 and 37 of the NSSF Act and held that Kiprono and KWS "did not commit the charges that were preferred against them in the first place" as Kiprono "wasn#t a Director with KWS and neither was the KWS a member of the National Security (sic) as at the time they are alleged to have been committed" and therefore the charges ought to be terminated. With that, the learned Judge granted the reliefs to which we have already referred.

14. NSSF has challenged the High Court judgment on 23 grounds set out in its memorandum of appeal. However in the appellant#s written submissions dated 25th April 2024, counsel consolidated the grounds into four issues, namely: whether the High Court had jurisdiction to determine the criminal liability of Kiprono and KWS; whether KWS was exempted from making contributions to the NSSF for its permanent and pensionable employees; whether the existence of staff superannuation Scheme

precluded the need for KWS to contribute to NSSF; and whether NSSF#s demands for outstanding contributions were time barred.

15. We heard the appeal on 28th July 2025. Learned counsel Mr. Dedan Wachira appeared for NSSF while learned counsel Mr.Lutta appeared for Kiprono and KWS. It was urged for NSSF, that the criminal charges against Kiprono and KWS were informed by their persistent failure to remit, contrary to Section 36(a) of the NSSF Act, statutory contributions for KWS#s permanent and pensionable employees despite having been given an opportunity to remedy the default; that the learned Judge did not have jurisdiction or authority to determine the criminal liability of Kiprono and KWS and wrongly delved into the merits of the case rather than restricting herself to the process that led to that decision.

16. It was urged, on the strength of the Supreme Court of Kenya decision in Dande & 3 Others vs. Inspector General, National Police Service & 5 Others [2023] KESC 40(KLR), that the application for judicial review presented by Kiprono and KWS before the High Court "constitute the traditional approach to judicial review under Order 53 of the Civil Procedure Rules" and it was therefore not open to the High Court to undertake a merit review.

17. In further support of the argument that the Judge erred in delving into the merits of the case and in going beyond examination of fairness, reasonableness or lawfulness of NSSF#s decision making, counsel cited decisions in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR; Director of Public Prosecutions & Another vs. Crossley Holdings Limited & Another [2016] KECA 645(KLR).

18. Regarding the question whether KWS was under an obligation to remit contributions for its employees, it was submitted that KWS made every effort to avoid its legal obligation to do so, first, by claiming that it#s members belonged to the disciplined forces and hence exempt under paragraph 4 of the Second Schedule to the NSSF Act. It then claimed that having been declared to be a "public service" it was exempt under a paragraph 1 of the Second Schedule to NSSF Act; and when all that failed it claimed that it had in existence its own superannuation scheme. It was submitted that despite seeking and obtaining a legal opinion from the Attorney General which re-affirmed that KWS was legally obligated to remit contributions, it persisted in its disregard for the law.

19. As to whether the charges were instituted out of time, it was submitted that criminal proceedings were initiated upon establishment of criminal culpability on the part of Kiprono and KWS and that the failure to remit contributions was a continuing wrong; that Section 37 of NSSF Act provides for initiation of proceedings within three months from the date the Minister is satisfied there is sufficient evidence to justify prosecution, or within 12 months from the date the offence is alleged to have been committed.

20. In opposing the appeal, learned counsel Mr. Lutta in highlighting Kiprono#s and KWS#s written submissions dated 27th April 2025 began by urging that it is not in public interest for the criminal proceedings against Kiprono and KWS to be pursued and neither is it in anyone#s interest to continue the proposed criminal proceedings before the Chief Magistrate#s Court; that Kiprono was appointed a director of KWS after the alleged offences were committed, served his tenure and is no longer in office; that the contributions the subject of intended prosecution were never collected and cannot be paid and neither is there a budget or reserve for them; and that under the new NSSF Act, all employers are statutorily required to register and deduct their employees# contributions, and KWS has complied and is compliant since the new law came into force.

21. On whether there are sufficient grounds for this Court to interfere with the decision of the learned Judge, it was submitted that the prosecution was initiated with the aim of collecting contributions

using "strong arm tactics"; that that in lieu of the criminal charges NSSF should have invoked Section 38 of the NSSF Act and commenced civil proceedings by way of a plaint to recover the amount claimed.

22. Counsel stressed that Kiprono was appointed into office on 5th October 2012 and was not in office during the period 16th May 1990 and April 1991 when the amount claimed ought, allegedly, to have been deducted and remitted and Kiprono could therefore not be said to have been in control of affairs of KWS when he was not a director at the material time.

23. It was submitted further that KWS being a "public service" under the *Pensions Act* was exempt from making contributions under the Second Schedule to the NSSF Act; and that KWS was conferred with that status of a "public service" by the Permanent Secretary by a letter dated 6th November 1991; that in any event the staff members in question were contract staff; that KWS had in place a Staff Superannuation Scheme which is superior to NSSF. Moreover, it was urged, the opinion given by the Attorney General to the effect that KWS was liable to make contributions was not conclusive or binding.

24. On the jurisdiction of the High Court to have undertaken a merit review, it was submitted on the strength of the decision of the Supreme Court in case of Dande & 3 Others vs. Inspector General, National Police Service & 5 Others, that whether the High Court should undertake a merit review depends on the approach parties take; that in this case, it is the parties before the High Court who invited the Judge to go into merit issues and the Judge had no alternative but to delve into the same; and that NSSF is therefore estopped from raising the issue; review.

25. Counsel concluded by submitting that the criminal proceedings against Kiprono and KWS were commenced outside the time limited under Section 37 of the NSSF and were time barred and NSSF did not provide any evidence of the opinion of the Minister having been granted before the prosecution to establish that the prosecution was within time.

26. We have considered the appeal and the submissions. In our view, the overarching issue for determination is whether Kiprono and KWS, established, to the required standard, a basis for the grant of the orders of certiorari and prohibition. In other words, did they establish that their prosecution by NSSF amounted to an abuse of the process of the court? Within that is the question whether in the circumstances of this case, the learned Judge usurped the mandate of the criminal court in exonerating Kiprono and KWS from criminal liability.

27. Section 36(a) of the repealed NSSF Act provided that:

> " Any person who—
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> a. fails without lawful excuse to pay to the Fund within the period prescribed by this Act any contribution which he is liable as a contributing employer to pay under this Act...
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> ...
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> ...
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> shall be guilty of an offence and liable to a fine not exceeding fifteen thousand shillings."

28. Section 39 of the same statute provided that:

> " All criminal and civil proceedings under this Act may, without prejudice to any other power in that behalf, be instituted by any enforcement officer or other officer of the Fund

and, where the proceedings are instituted or brought in a magistrate's court, any such enforcement officer or other officer may prosecute or conduct the proceedings."

29. The power of NSSF to prosecute for failure to remit contributions was therefore anchored in statute. In that regard, what this Court stated in the case of Commissioner of Police & Director of Criminal Investigations Department & Another vs. Kenya Commercial Bank Limited & 4 Others [2013] eKLR in relation to the powers of investigation and prosecution applies equally to those of NSSF. In that case, the Court stated:

> "...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 abuse of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.
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> It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR 69."

30. Earlier in the case of Meme vs. Republic & Another [2004] eKLR, the Court had, in the same vein, stated that an abuse of the court#s process would in general arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes. In effect, misuse of court process.

31. The Supreme Court of Kenya in the case of Jirongo vs. Soy Developers Limited & 9 Others (Petition 38 of 2019) [2021] KESC 32 (KLR) pronounced that the mandate to prosecute crimes ought always to be exercised judiciously and not in perpetuation of an unfair and malicious complaint. The Supreme Court pronounced that criminal proceedings should not be "mounted to aid proof of matters before a civil court" or to force a compromise "by the sword of criminal proceedings."

32. It was therefore not open to NSSF to unreasonably exercise its powers of prosecution or to do so in bad faith or to achieve ulterior motive.

33. Regarding the principles when a court may review prosecutorial powers, the Supreme Court of Kenya in Jirongo vs. Soy Developers Limited & 9 Others endorsed guidelines propounded by the Supreme Court of India in the case of R P Kapur vs. State of Punjab AIR 1960 SC 866 thus:

> "(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or
>
> II. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or

II. Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or

II. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge."

34. With the foregoing in mind, the burden lay with Kiprono and KWS to prove, by evidence, that their prosecution was tantamount to an abuse of the court process or that there was any ulterior motive or collateral purpose on the part of NSSF in making the decision to charge them. Did Kiprono and KWS discharge their burden in that regard? As already noted above, their case in a nutshell was: that Kiprono was not a director of KWS at the material time; that KWS was, for various reasons, exempt from remitting contributions to NSSF; that the prosecution was time barred under Section 37 of the NSSF Act absent any evidence of the opinion of the Minister having been obtained prior to the prosecution; and that the course that was open to NSSF was to file a civil action for recovery of the debt.

35. Regarding the question whether the prosecution was time barred, Section 37(1) of the repealed NSSF Act provided as follows:

"37. (1) Proceedings for an offence under this Act may, notwithstanding anything in any law to the contrary, be commenced at any time within the period of three months from the date on which evidence, sufficient in the opinion of the Minister to justify a prosecution for the offence, comes to his knowledge, or within the period of twelve months after the commission of the offence, whichever period last expires."

36. In our view, whereas some of the matters raised by Kiprono and KWS in their bid to quash the criminal proceedings, are matters that probably lay in the province of the criminal court to interrogate, the question whether the prosecution was instituted within the period of time provided in Section 37 of the Act is a matter that the learned Judge of the High Court properly took on board in the context of determining whether the prosecution was tantamount to an abuse of the court process.In that regard, the learned Judge of the High Court correctly stated that Section 37(1) presupposes that the Minister must have reasons for charging for the offences to stand, and that after stating the offence, the facts ought to provide the reasons the Minister relied on to justify his actions. Whereas as a general proposition there is generally no limitation of time for institution of criminal charges, Section 37(1) made specific provision in respect of offences under the Act. For the prosecution of Kiprono and KWS to have survived scrutiny by the learned Judge, it was incumbent upon NSSF to demonstrate that it was instituted within the time stipulated under Section 37(1). Having failed to do so, we are unable to fault the learned Judge for having terminated the prosecution. The offences in question having allegedly been committed in 1990-1991, the institution of the charges approximately 23 years later is not in our view consistent with the requirements of Section 37(1).

37. We are, in reaching that decision cognizant of the principle that the power to quash criminal proceedings must be exercised sparingly as stated by the Court in the case of Lalchand Fulchand Shah vs. Investments & Mortgages Bank Limited & 5 Others [2018] eKLR .The Court in that case, speaking to the limitation of the powers to quash criminal proceedings endorsed pronouncements by

the Supreme Court of India in State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007, that:

> " The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled-for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings."
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> We respectfully agree.

38. As for the complaint that the High Court to delved into the merits of case to the extent that the court was interrogating the reasonableness or otherwise of the action by NSSF to institute the prosecution, it was justified in undertaking a measure of merit review. See the Supreme Court of Kenya decision in Saisi & 7 others vs. Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR).

39. Enough said, the appeal has no merit. It is accordingly dismissed with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb.

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR